



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 64 OF 2013

KENCALL EPZ LIMITED.....PLAINTIFF

- VERSUS -

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The plaintiff, **KENCALL EPZ LIMITED** has sued the **ATTORNEY GENERAL** in his capacity as the Principal Legal Advisor to the Government of Kenya, and in respect of a claim which the plaintiff has against the **MINISTRY of INFORMATION AND COMMUNICATIONS**.
2. It is the plaintiff's case that it provided **CALL CENTRE SERVICES**, which received both SMS and Voice Reports on famine-stricken areas of Kenya. The messages were received from the residents of the famine-stricken areas, and were then relayed to the National Disaster Operations Committee, which was the government agency responsible for coordinating relief efforts during disasters.
3. According to the plaintiff, there was a confirmation by the Ministry of Information and Communications that it would provide funding for the programme. It was on the strength of that alleged confirmation that the plaintiff proceeded to set up the **CALL CENTRE HELPLINE**.
4. After providing services, the plaintiff asked for payment from the Permanent Secretary of the Ministry of Information and Communications.
5. The plaintiff's case, as stated in paragraph 5 of the Amended plaint, is that the Permanent Secretary promised to pay the plaintiff.
6. The plaintiff said that it relied upon the promises from the Permanent Secretary, and therefore continued to offer the required services.
7. However, throughout the four (4) months period when the plaintiff offered services, it was never paid. And the plaintiff's case is that it closed down the call centre Helpline because of non-payment.
8. The plaintiff's claim is for the sum of USD 118,000.00, on account of the expenses it had incurred. The plaintiff said that the expenses included;

a) Expenses incurred by the plaintiff	USD 70,800.00
b) Sums paid to Safaricom	USD 40,000.00.

9. In answer to the claim, the defendant denied the existence of any contract between the two parties.
10. The defendant also said that there was no legally binding agreement between him and the plaintiff.
11. In the alternative, if there was either a contract or a legally binding agreement, the defendant asserted that the plaintiff offered services voluntarily, without any pecuniary consideration being expected from the defendant.
12. In the further alternative, the defendant said that if the plaintiff were entitled to any pecuniary consideration, the said consideration was not payable by the government.
13. The defendant denied the contention that the Permanent Secretary of the Ministry of Information and Communications had given promises to the plaintiff, that the sums claimed would be paid by the government.
14. In conclusion, the defendant asked the court to dismiss the plaintiff's suit.
15. The parties agreed that the following were the issues arising from the pleadings;

a) Whether or not the parties entered into a contract for the provision of services, by the plaintiff, of a Call Centre Helpline.

b) Whether or not the plaintiff suffered loss in the sum of USD 118,000.00, as a result of the defendant's breach of the contract.

c) Whether or not the plaintiff was entitled to the reliefs sought.

16. At the trial, each of the parties called one witness. The plaintiff's witness was **NESBITT NICHOLAS**, the Chief Executive Officer of the plaintiff, whilst the defendant's witness was **HENRY MUNG'ASIA**, the Director of Administration in the Ministry of Information, Communication and Technology.

17. PW1 testified that in or about January 2009 there was a Declaration of a State of Emergency in Kenya. The said declaration was made by the President of the Republic of Kenya because the prevailing famine in the country had become a National Disaster.

18. It is common ground that the Permanent Secretary in the Ministry of Information and Communications called for a meeting which was intended to help alleviate the impact of the famine.

19. PW1 testified that the meeting agreed that the plaintiff would provide Call Centre Services, through which residents in the famine-stricken areas would report daily, to the government agency responsible for coordinating reliefs.

20. In his Witness Statement, **PW1** said;

“6. In that meeting also, the PS stated that the Ministry of Information and Communication together with the ICT Board were to work with donors to provide funds for the Call Centre Service Helpline, known as “2009 Famine Relief ‘109’ Hotline system setup and running”.

21. It is the plaintiff's case that it relied on the “*agreement*”, and more specifically the fact that “the Ministry of Information and Communications was to provide funding for the Call Centre, and therefore the plaintiff proceeded to set up the said Call Centre Helpline.

22. After providing the services, the plaintiff raised an invoice, which it delivered to the Ministry. However, notwithstanding, promises from the Permanent Secretary, that the plaintiff would be paid, no such payment was received by the plaintiff.

23. It is then that the plaintiff instituted this suit.

24. During cross-examination, **PW1** drew the court's attention to the minutes of the meeting held by the Famine Relief Committee, which was held on 21st January 2009.

25. He testified as follows, concerning that first meeting of the committee;

“The agenda for the meeting was to bring together, in a public forum, multiple players who could help the Government respond quickly to the famine. It brought together leaders of the business community”.

26. Ms. Kilei, the learned state counsel appearing for the defendant, suggested to Mr. Nesbitt that the minutes of the meeting show that the government was calling out for assistance.

27. **PW1** responded to that suggestion thus;

“The minutes at page 10 reflect a call from Government for assistance, but it is not correct that we were only providing help”.

28. That answer led to the plaintiff's witness being asked to show the contract between the parties.

29. **PW1** said that he could not show any such contract.

30. **PW1** also confirmed that there was no evidence that the plaintiff ever wrote to the Government to request it to enter into a contract with the plaintiff.

31. When he was asked if the Ministry issued any Local Purchase Order (**LPO**) to the plaintiff, **PW1** answered in the negative.

32. But he emphasized that although the government had called for assistance, the government did not say that it would not pay for such assistance.

33. If anything, the Permanent Secretary did inform the meeting that the government had already received Kshs. 5 million from well wishers.

34. Secondly, as **PW1** pointed out, the minutes show that the government would help in fund-raising in respect to alleviating famine, as well as for the setting-up and the running of the Call Centre.

35. **PW1** conceded that there was no evidence to show that the plaintiff was asked to proceed to set up and to run the Call Centre, even without a contract.

36. As regards the funding, **PW1** said that money was to be raised from **ROCKERFELLER FOUNDATION** and other donors. He added that, the Government was to work with the donors.

37. Finally, the witness concluded thus;

“There is no contract between us and the Government or any Local Purchase Orders”.

38. Even during re-examination, **PW1** reiterated that there was no “*written contract*”. He said that the plaintiff had worked very hard to get a contract. He then added that notwithstanding the plaintiff's said efforts to get the contract;

“...We never agreed on the terms. But we performed services”.

39. The reason for doing so, said **PW1**;

“We performed without a contract in writing as I trusted Dr. Ndemo and Rockefeller; that they would pay. I had worked with Dr. Ndemo for over 2 years”.

40. After **PW1** testified, the plaintiff closed its case.

41. When giving evidence, **DW1** said that because of the severe famine experienced in 2009, there was need to put in place measures to ensure that relief efforts were well-coordinated and effectively executed.

42. He explained that the government and non-governmental actors did come together to manage the relief efforts.

43. However, he denied the plaintiff’s contention that the Ministry of Information and Communications made a representation to the plaintiff that money would be paid to the plaintiff for use in establishing the Call Centre Helpline.

44. As far as **DW1** was concerned, the absence of any contract between the parties, was a reflection of the fact that the Government never undertook to pay the plaintiff.

45. During cross-examination, **DW1** conceded that the plaintiff developed the Call Centre Helpline. However, he insisted that the Ministry of Information and Communications did not tell the plaintiff that it would be paid for that service.

46. As far as **DW1** was concerned, the responsibility of the Ministry was to do fund-raising, to run the Call Centre. **DW1** admitted that the Call Centre was not to be free.

47. But he added that it is donor funds which were to be used to pay for the services provided.

48. After **DW1** testified, the defence closed its case.

49. Thereafter, the parties filed their respective written submissions.

50. I have given due consideration to the pleadings; the evidence tendered, (*orally, in written Witness Statements and by documents*); and also to the written submissions.

51. First, I find that the minutes of the meeting held on 21st January 2009 are admissible in evidence.

52. Secondly, I find no reason to doubt the credibility of the said minutes, because both parties have taken up their respective cases, on what appears to me, to be an acknowledgment that the minutes properly captured the happenings at the meeting in issue.

53. A reading of minutes reveals that the plaintiff was assigned the role of providing Call Centre Services. According to the minutes, the said **ICT** based solution was to be;

“...facilitated by the Ministry of Information and Communication, Kenya ICT Board, KBP OCC Society (the Services of Kencall) and supported by Rockefeller Foundation”.

54. Clearly, therefore, the meeting noted that one of the “*persons?* who would facilitate the Call Centre Services, was the defendant.

55. I do not find anything within that minute, which suggests that the use of the term facilitation meant that the defendant was under an obligation to pay the plaintiff for its services.

56. Indeed, if by “*facilitation*” it was meant that those upon whom the obligation fell would pay for the services, I find no reason that would justify the decision by the plaintiff to go after the Ministry alone.

57. But more significantly is the fact that the role of the Ministry was later clarified in the same minutes,

as follows;

“The Ministry of Information and Communication and Kenya ICT Board will work with donors to fundraise for the call center system setup and running”.

58. The Ministry was thus not assigned the role of making payment for the Call Centre Services. Its role was to work with donors to raise funds for those services.

59. The minutes appear to give an insight about the “*persons?* from whom money was to be obtained. This is what the minutes indicated;

“Rockefeller has already pledged support for the system. The RF funding for the system will be disbursed through Kenya ICT Board, principally to meet cost of the Call Center setup and expansion on a need-for expansion basis?.

60. The funding for setting up the Call Centre Services was provided by Rockefeller Foundation; that is what the minutes indicate.

61. The minutes further indicated that;

“Disbursement will be based on approved cost estimates and will be disbursed in accordance with Rockefeller guidelines?.

62. The minutes did not assign to the Ministry of Information and Communications, the role of paying the plaintiff for the services it provided.

63. I further find that the minutes of the meeting, which brought together persons from both the Private and the Public sector cannot have given rise to a contract between the plaintiff and the government.

64. The plaintiff, in its evidence confirmed that there was no written contract between it and the Ministry.

65. I also find that the meeting in issue did not constitute the Ministry into a procuring entity, pursuant to the provisions of the Public Procurement and Disposal Act, 2005 (*now repealed*).

66. In any event, as was conceded by the plaintiff;

“It is correct that Section 75 of the 2005 Act provides that the contract resulting from direct procurement must be in writing?.

67. Therefore, even if there had been direct procurement, the contract would have had to be put in writing. And the plaintiff has admitted that there is no written contract.

68. In the absence of a valid contract, the defendant cannot have been in breach of the contract allegedly executed by the defendant.

69The plaintiff submitted that where an oral contract is deemed unenforceable, the defendant should be compelled to pay the plaintiff a reasonable value for the services which the plaintiff had rendered.

70. As submitted by the defendant, a contract, be it oral or written is only deemed valid if the following essential elements exist;

a) An offer;

b) An Acceptance;

c) Consideration;

d) An Intention to create legally binding relations; and

e) Capacity to contract.

71. In this case, the plaintiff has not demonstrated, through evidence, that it is either the plaintiff or the defendant who made an offer.

72. “*Chitty on Contracts – General Principles?*, 27th Edition Defines Acceptance as follows;

“An acceptance is a final and unqualified expression of assent to the terms of an offer?.

73. It therefore follows that for a party to be deemed to have accepted an offer to enter into a contract, the Terms of the offer must be specified.

74. In this case, it has not been demonstrated that the defendant accepted some specified terms which had been incorporated into an offer made by the plaintiff. Similarly, the plaintiff has not shown that it accepted an offer whose terms were contained in an offer made by the defendant.

75. It has also not been shown that the services which the plaintiff rendered, were rendered for the benefit of the defendant.

76. As appears from the minutes of the meeting dated 21st January 2009, the Terms of Reference for the **FAMINE RELIEF COMMITTEE** were two-fold as follows;

“1.To plan and direct PR around the famine

situation as a ‘National

Disaster’ as pronounced by the President.

2. To drive a ‘call to action’ comparing to;

i) Report incidences of hunger and relief food corruption using code 102 free toll No. by SMS and Voice.

ii) Fundraise for relief supplies including in cash.

iii) Provide famine incidences information/Data to NDOC and Red Cross, to support distribution?.

77. First, the meeting was not one between the plaintiff and the Ministry of Information and Communications. The meeting was of the Famine Relief Committee.

78. It is that Committee which set up its own agenda, and thereafter the persons present proceeded with the meeting.

79. There is nothing in the minutes of the meeting or in any subsequent communications which indicates that there was an intention to give rise to legally binding relations between the plaintiff and the Ministry of Information and Communications.

80. In the circumstances, even if the plaintiff had proved that it suffered a loss of **USD 118,000.00**, there is no basis, in law, for holding that the defendant was liable to compensate the plaintiff for that or for any other sum.

81. The plaintiff provided a letter from Safaricom Limited dated 23rd June 2009, showing that Safaricom

was demanding Kshs. 2,718,962.38, in respect to **TOLL FREE LINE** and **E1 LINKS**.

82. There is no proof that the plaintiff paid that amount to Safaricom. However, even if the plaintiff had paid that amount, there is no basis, in law, for holding the defendant liable to settle that amount.

83. Incidentally, the claim by the plaintiff is that it paid to Safaricom, the sum of **\$ 40,000.00**. There was no evidence produced to support that claim.

84. As regards the plaintiff's claim for **USD 79,800.00**, the plaintiff did not provide the court with documentary or other evidence, to demonstrate how that figure was derived.

85. The plaintiff also failed to demonstrate why it was claiming compensation denominated in United States Dollars, instead of Kenya Shillings.

86. In conclusion, the answers to all the 3 Issues raised by the parties, are in the negative.

87. Accordingly, the plaintiff's suit is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of October 2017.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Ms. Wanjiru Ngige for the Plaintiff

Leteipan for Ms. Kilei for the Defendant

Collins Odhiambo – Court clerk.