LINO STATIONERS LIMITED…………....................................………… PLAINTIFF

- VERSUS –

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION ………………...............................……………..….. DEFENDANT

JUDGMENT

1. This is a claim for remedies for breach of contract. The plaintiff claims Kshs 21,344,000 being the contract price for supply of scanning software to the defendant under a tender issued by the defendant in September 2005. The plaintiff claims a further Kshs 3,841,000 as the cost of upgrading the software to meet the defendant's additional specifications. The plaintiff also claims general damages for breach of contract, costs and interest. The defendant denies the entire claim.

2. The plaintiff's case is that in September 2005, the predecessor of the defendant, the Electoral Commission of Kenya, issued a tender for supply of OCR/ICR/OMR scanning software and scanning equipment. The plaintiff's bid at Kshs 21,344,000 for scanning software was accepted and a local purchase order issued. The plaintiff developed the software as per the specifications in the bid documents and delivered them to the defendant on 9th December 2005. The plaintiff also imported and delivered scanners to the defendant. The plaintiffs' witness Zilad Janmohamed testified that on 20th January 2006, the defendant informed the plaintiff that the software delivered was unacceptable for want of stand alone licences.

3. On 10th February 2006, the defendant elaborated on its dissatisfaction with the equipment and software as follows: the software should be able to process structured, semi-structured and unstructured forms; it should be scalable from 100s to million per day; and the server based system was to be accompanied by a quotation for stand alone versions. The plaintiff's position was that it tendered for structured forms based on samples provided by the defendant. Although the plaintiff's system could process 400,000 forms per year, it could still handle a million forms per year. There would also be cost implications in changing from the specified tender's central server system to a stand alone version. The plaintiff accused the defendant of trying to introduce new terms to the contract. For example, in November 2006, the defendant was now demanding a system that could process more than 5000 forms per day. The plaintiff's evidence is that the defendant breached the contract by advertising for a new tender on 3rd March 2007 for supply of the same software. The plaintiff thus claims damages. The defendant has not paid the contract sums. The plaintiff at some point hired an Israeli company to beef up its technical team. It was incurring costs to service interests on loans.

4. The plaintiff relied further on the witness statement of Zilad Janmohamed filed in court on 10th February 2012, bundles of documents dated 18th October 2007 and two supplementary bundles. They were admitted into evidence by consent. The parties also consented to admit the defendant's bundle of documents dated 18th November 2007. In particular, the parties agreed to admit the documents numbered 2,3 and 4 in the defendants list of documents dated 29th November 2007 without calling a defence witness. Besides that, the defendant closed its case without calling a witness.

5. I have considered the evidence and the written submissions of the parties. The following issues are pertinent:

a) Whether the plaintiff's bid for supply and delivery of OMR/ICR/OCR scanning software was accepted by the defendant.

b) Did it meet the specifications of the tender?

c) Whether the plaintiff breached the terms of the contract.

d) Whether the defendant breached the terms of the contract.

e) Whether the contract was subject to the "basic assumptions" by the plaintiff.

f) Whether the defendant was entitled to terminate and readvertise the contract.

g) Whether the parties are entitled to the reliefs sought in the plaint and defence.

6. By a chamber summons dated 6th April 2010, the plaintiff was granted leave to substitute the name of the defendant from the Electoral Commission of Kenya to the Interim Independent Electoral Commission. Further leave was granted on 5th December 2011 to amend the defendant's name to "Independent Electoral and Boundaries Commission". The Electoral Commission of Kenya, the predecessor to the defendant, had in September 2005 advertised a tender number ECK/1/2005 for supply of OCR/ICR/OMR scanners equipment and software "as and when required" upto 30th June 2006. There were to be 12 small scale scanners Bell+Howell model truper 3,200 as per specifications at a cost of Kshs 9,462,398.40; 20 medium scale scanners at Kshs 50,161,880 and 2 heavy duty scanners for Kshs 8,950,989.20. Relevant to the present suit was supply of 1 pack "Data capture and image manipulation software for OCR/ICR/OMR" for Kshs 21,344,000. The supply was to be made in 3 to 6 weeks and to conform to specifications. A local purchase order was given to the plaintiff dated 15th October 2005 (page 101 of plaintiff's bundle). I am satisfied it was for the same tender for 1 pack data capture and manipulation software at the consideration of Kshs 21,344,000. Earlier, and on 12th September 2005 the defendant had written to the plaintiff (letter at page 100 of bundle) informing it that its bid had been accepted. The plaintiff was "required to ensure that the items supplied conform to specifications in all respects". Supplies were to be made against a local purchase order. The plaintiff did not invoice the defendant until 16th June 2006 (document at page 97 of plaintiff's bundle).

7. A key question is whether the plaintiff's software met the requirements of the tender. The defendant's case is that it did not. The reasons are threefold: the software was supposed to process structured, semi-structured and unstructured forms; the software was meant to be scalable from 50 forms to 1 million forms per day; and the plaintiff had only quoted for a server based software. The defendant's core mandate is to register voters and carry out presidential, national assembly and local authority elections in Kenya. The material software was being sourced for aspects of voter registration in Kenya, data capture and content delivery solutions. Any, doubt is removed by the final terms of agreement between the plaintiff and the Electoral Commission of Kenya dated 3rd January 2006 (page 1 of bundle). The specifications and special conditions were outlined in the tender document. To that extent the technical and financial evaluation report (defendant's document no 2 pages 3 to 201) is material. I find that the plaintiff admits that the forms specified were fixed (structured) forms, semi-structured forms and non-structured forms. It is expressly so stated at page 57 of the bundle. The plaintiff had stated there that:

"The E-flow software can handle a variety of forms that are structured, semi-structured and unstructured. These can also be automatically detected and captured according to the specifications for each document class".

8. The truth however is that the software supplied was primarily for structured (fixed) forms. The plaintiff blames the defendant for forwarding to it structured forms samples only on 2nd November 2005. And that

was after a number of requests on 27th October 2005 and 1st November 2005. I have looked at the letter dated 2nd November 2005 (page 8 of plaintiff's bundle). It forwarded three OMR forms for: application to transfer registration as a voter; application to be registered as a voter (S/No 1365799784); and the presidential, national assembly and local authority elections nomination information form. In my view, the samples provided were not meant to alter the specifications in the tender document. It cannot be answered by the project basic assumptions on what the needs of the defendant were. The delivery of a local purchase order No 4800 did not waive the contractual duties of the plaintiff under the tender. I have seen the letter dated 10th February 2006 at page 13 of the plaintiff's bundle. It was re-affirming the defendant's requirement that the software should be capable of processing structured, semi-structured and unstructured forms. The defendant was asking for a confirmation that the plaintiff's software met that requirement. In default, it would cancel the local purchase order. In my mind, that did not amount to changing goal posts as stated by the plaintiff's witness.

9. To be fair to the plaintiff, the plaintiff contended that the software could handle structured, semi-structured and unstructured forms. But as detailed in its letter of 13th February 2006 (page 14 of plaintiff's bundle) each module would have different cost implications. The tender by the defendant was for a specified sum. The plaintiff stated as follows;

"The Software as mentioned in the tender and as per the specifications provided has the capacity to handle Structured, Semi-Structured and Un-Structured forms. However, we had tendered for structured and had specified the same as well. Reason being that all the forms provided by yourselves are structured and the cost implication for each one of the modules (Semi and Unstructured) would be as good as implementing this software. Please note that unlike other softwares the TIS platform can at any point allow the integration of the other modules into the same platform and can be done at any stage or point in time. However each module has a different cost structure and each one would vary with the number of documents being processed".

10. I have also seen the remarks by the technical committee at page 201 of the report that "based on the above observations, it is our considered opinion that e Flow software has the kind of capacity that the Electoral Commission of Kenya is looking for ………" In my mind that evaluation team's conclusions can not mean that the defendant was waiving the contract requirements or that the plaintiff had met the full specifications of the tender. I have reached the conclusion on that matter that the software provided by the plaintiff was unable to process structured, semi-structured and unstructured forms without additional costs on some of the modules. It was erroneously based on the structured forms samples and was thus primarily geared towards scanning structured forms only. To that extent, I find the plaintiff in breach of the contract.

11. The next key question is whether the software was scalable from 50 to 1 million forms. I have stated that the defendant's requirements were specific. It was mandated to carry out presidential, national assembly and local authority elections. The specification under that head in the tender was that forms must be scalable from hundreds of forms per day to millions. The plaintiff's offer was:

"E-flow software is scalable for processing from 50 to over a million forms per day".

The defendant's position was that the plaintiff's software could process only 400,000 forms per day. The plaintiff conceded in the letter I referred to of 13th February 2006 that for the software to achieve a million forms, it was dependent on the processing speed of the operators. It stated:

"The software is capable of handling a million forms a year but that ofcourse is dependent on the processing speed of the operators at the final completion stage. However, before getting to the completion stage all the automated processes can handle a capacity of a million forms a year".

12. I think the letter was misleading. The specifications were for a million forms a day. But that may as well be a slip. The problem is that the plaintiff made some "basic assumptions" found at page 27 of the defendant's bundle. It lists those assumptions as follows:

"Volumes: Approximately 400,000 forms a *year. Form Type: Structured with mostly OMR based with a few OCR/ICR Fields.*

4 types of forms.

1 Central Processing Center.

Scanning, processing and completion based on 8 hour working shifts".

The plaintiff further stated that in order to process the data above, the defendant required hardware (the scanners with colour background drop out capability and software (TIS e FLOW) including the integra plug-in application for the processing of the voting structured forms. Those basic assumptions were not accepted by the defendant. The document containing those basic assumptions is on the plaintiff's note paper. True, it appears in the defendant's bundle as stated. But I note that the defendant has specifically denied accepting those assumptions at paragraphs 5 d) and e) of its statement of defence.

13. I thus find no hesitation in finding that the "basic assumptions" did not constitute the contract between the parties. Furthermore, those basic assumptions informed the quotation by the plaintiff of Kshs 18,400,000 plus VAT all totalling the contract price of Kshs 21,344,000. From the analysis above, it is clear that the software provided could only produce 400,000 forms per year falling far short of the specifications in the tender documents. The system could produce 1,000,000 forms a year but conditional upon processing speeds of the operators at the final completion stage and different cost considerations. I thus find that the plaintiff was in further breach of the contract on that score. It is a cardinal precept of the law of evidence and as stated in section 109 of the Evidence Act that he who alleges must prove it. The burden to prove that the basic assumptions were part of the contract fell upon the plaintiff. It would be to turn logic on its head to assert that the defendant should have called a witness to be cross-examined on that fact or to prove the denials in the statement of defence. I am alive to the notion that pleadings, such as that statement of defence are not evidence. I will revisit that legal point shortly. It should have in the circumstances been quite easy for the plaintiff's witness Zilad Janmohamed to lead evidence to show that the defendant accepted those basic assumptions. I have not seen such evidence or that the software had scalability from hundreds of forms per day up to millions depending on capability of the scanner. As late as 24th May 2006, the plaintiff was offering to modify the software at the tender price. In the defendant's letter dated 3rd August 2006 at page 56 of the plaintiff's bundle, the defendant was emphatic that it "cannot sign and stamp the system design proposal" suggested by the plaintiff until all changes proposed were addressed by the software developer TIS/Lino.

14. Pleadings are not evidence. See *CMC Aviation Ltd Vs Crusair Ltd* (No 1) [1978] KLR 103, *John Didi Omulo Vs Small Enterprise Finance Company Ltd and another* [2005] e KLR. But it is not lost on me that the plaintiff consented to the production of the defendant's bundle of documents without calling their maker. The plaintiff was bound in contract to supply to the plaintiff the software specified in the bid document. Without doing so, consideration by way of payment could not flow. Those contract terms are express and speak for themselves. See *Musundi and others Vs Small Enterprises Finance Company Ltd* [2007] 1 E.A 219 at 227. Parties are bound by commercial agreements that they enter into freely. See *Morris & company Vs Kenya Commercial Bank* [2003] 2 E.A 605.

15. From the bid documents, the plaintiff was to quote for both server based and stand alone software. At page 63 of the defendant's bundle, the plaintiff stated:

"The software is licence based in such a way that you can have a central large installation with distributed scanning and verification workstations or several stand alone installations with all modules within the stand alone".

The technical evaluation team of the defendant seemed impressed. At page 200 they stated:

"Very advanced software that allows the user maximum benefits. Has more than eight voting engines and at one time a minimum of three engines are used. Comes as a complete suite ……"

Their report was made on 17th August 2005. The local purchase order was issued on 15th October 2005. That is why the plaintiff takes up cudgels on the defendant's conduct. It says the defendant was shifting goal posts. But I find that is not entirely true. I say so by going to the plaintiff's letter of 13th February 2006 that I referred to earlier. By that date, the defendant's gripe was that the plaintiff did not quote for both server based and stand alone software which it had confirmed would be supported by the eflow software. The defendant was asking for prices for stand alone version. The response by the plaintiff in the letter I mentioned was as follows:

"As specified earlier, administration for stand alones is very expensive unless you have trained professional personnel at each site. There is also the hidden time cost of tracing what documents have been processed and what stages they are placed at. However should you require the same speeds as we are supplying on the central server based system the cost factor per site would be the same. For a lower speed and capacity of the number of forms a smaller engine can be developed but we would require assumptive quantities of the number of forms being processed. For the same cost as quoted on the central server system we can provide 5 stand alones with the following specifications.

1 eFlow platform

1 Scan Gate

1 Recognition

1 Form ID

1 Manual ID

1 Export

1 Basic OCR/OMR Engine Pack (25 cps)……."

16. Clearly, the plaintiff had failed to quote for both server based and stand alone software as versions per the tender document. I find it was again in breach of the contract. I am thus not surprised that on 17th May 2006 (page 17 of plaintiff's bundle) the defendant decided to rescind the contract and readvertise the tender. The defendant recalled the Local Purchase Order No 4800. The defendant, in my view, was entitled to rescind the contract for the three breaches by the plaintiff. Like I stated, the parties tried to resolve the dispute as evidenced by the plaintiff's letter of 19th May 2006, the letter from TIS, (Top Image Systems) of 16th May 2006, a visit by their system designer in July 2006 and the letter I referred to from the defendant dated 3rd August 2006. There were meetings, correspondence and agreements to revise or change the software and pricing (pages 53 to 96 of plaintiff's bundle). As late as 21st December 2006, the plaintiff was insisting that it could assist with implementation phases of the project. It all came to nought. The plaintiff was complaining of "severe financial strain" due to the delay and position adopted by the defendant. Like I stated earlier, the plaintiff was the author of its misfortune. It should have followed the specifications of the contract and the defendant's acceptance letter dated 12th September 2005 (page 100 of plaintiff's bundle). That letter required simply that "the items supplied conform to specifications in all respects".

17. My answers to issues numbered a) to f) are then as follows: There was a valid contract between the parties for supply and delivery of OMR/ICR/OCR data capture and manipulation or scanning software; The offer was accepted by the defendant; the plaintiff breached the terms of the contract by failing to meet key and express specifications of the tender; and, the defendant did not commit a breach and was thus entitled to terminate or rescind the contract. It follows that the plaintiff's claim for the contract price of Kshs 21,344,000 is without merit and is dismissed.

18. The plaintiffs claim for Kshs 3,841,000 for the cost of modifying the software fails for want of proof. In his testimony in court, Mr. Zilad Janmohamed stated in cross-examination:

“I do not have evidence of that expense of Kshs 3,841,000”

No credible evidence such as invoices, local purchase orders or receipts were produced. Even in his witness statement filed on 10th February 2012, there was no such reference save to state at paragraph 22 that “it had expended a lot of resources and time in this project”. Being a claim for special damages, it required to be specifically pleaded and strictly proved. The evidence was not forthcoming. See *Virani t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Company Limited* [2004] 2 KLR 269, *Ratcliffe Vs Evans* [1892] 2 QB 524.

19. There is then the prayer for general damages for breach of contract. I have no doubt the plaintiff expended resources and time in the delivery of the impugned software. At some point in July 2006, it brought into the country a system designer from TIS who was to be around for 2 days. The plaintiff’s witness did not produce evidence of such expenses or costs. In its letter of 11th December 2006 (page 96 of plaintiff’s bundle) the plaintiff stated it had “invested heavily in terms of time and finance” and needed to close the matter. That is repeated at paragraph 22 of the plaintiff’s witness statement filed on 10th February 2012. No concrete or cogent evidence of financial or other loss was presented in the oral testimony of the witness. The written submissions of the plaintiff dated 2nd April 2012 at paragraph 20 state only that the plaintiff “expended a lot of resources and man-hours” and should be compensated. Where is the evidence? It is missing. There is thus no basis upon which I can assess general damages. It is also not lost on me that as a general proposition, general damages are unavailable for breach of contract. A guiding principle for the court in such matters is *restitutio in intergrum*. See *Dharamshi Vs Karsan* [1974] E.A 41, *Joseph Ungandi Kedera Vs Ebby Kangisah Kavai* Court of Appeal, Civil Appeal 239 of 1997 (unreported). The claim for general damages is thus dismissed. My answer to issue number g) is that the plaintiff is not entitled to the reliefs sought in the plaint. The plaintiff has failed to prove its case on a balance of probabilities. The suit is dismissed.

20. Costs ordinarily follow the event. They are also at the discretion of the court. The defendant did not call a witness. It relied on its pleadings and the bundle of documents admitted into evidence by consent. I have said I infer that the plaintiff expended unspecified monies and resources to design and deliver the software. Its claim failed for want of strict proof and for its own breaches of the contract. The defendant strung the plaintiff along. There were considerable delays between the award of the tender and termination or rescission of the contract. Even after expressly terminating the contract on 17th May 2006, it kept on negotiating with the plaintiff to change, redesign or improve the software until about 21st November 2006 when the tender was finally cancelled. In short, the defendant, whose technical team had praised the E-flow software at some point and awarded the tender to the plaintiff, is not entirely without blemish. I think in the interests

of justice the defendant is not entitled to costs. In the end, the plaintiff’s suit is dismissed with no order as to costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th day of October 2012.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. Koech for the Plaintiff.
Mr. Mogere for the Defendant.