



**Kensetsu Kaihatsu Kenya Limited v Kenya Airports Authority (Civil Suit 530 of 2024)
[2025] KEHC 842 (KLR) (Commercial and Tax) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 530 OF 2024
A MABEYA, J
FEBRUARY 3, 2025**

BETWEEN

KENSETSU KAIHATSU KENYA LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

JUDGMENT

1. Through a plaint dated 24/11/2011, the Plaintiff sought judgment against the defendant for a declaration that the contract is terminated and for Kshs. 87,379,514/- together with interest and costs of the suit.
2. The plaintiff's case is that in 2010, it offered consultancy services for the defendant's technical, engineering design and construction for the restoration of original aircraft pavements and associated facilities at Isiolo Airport ("Isiolo Airport Project"). It developed and submitted the engineering design and drawings used to compute the bill of quantities while compiling the tender documents. It also prepared the final detailed engineering design and drawings for implementation and construction and submitted to the same to the defendant on 17/3/2011.
3. The defendant's authorised agent started work by adopting the plaintiff's design before there was any supervision or contract administration in place and when the plaintiff demanded payment on invoices raised and submitted on 21/3/2011, the defendant refused to pay.
4. The defendant's authorised Contractor began to frustrate the plaintiff's efforts to carry out its consultancy duties and although the defendant had not in any way remunerated the plaintiff, it went ahead to illegally utilise the plaintiff's designs in the construction of the Isiolo Airport Project.



5. Despite illegally utilising the plaintiff's designs, the defendant failed to put in place corrective measures to streamline the administration of the contract between it, its agent and the plaintiff.
6. The defendant opposed the suit vide a Statement of Defence dated 5/12/2012 in which it denied the plaintiff's claim. Its case was that it only engaged Kundan Singh Construction Limited ("Kundan Singh") as the contractor to undertake the Isiolo Airport Project and that in the absence of a direct contract between it and the plaintiff, it was under no obligation to respond to the material forwarded to it.
7. At the trial, the plaintiff called three witnesses, Dr. John Ngaya Mukabi (Pw1), Joram Okado (Pw2) and Fred Sirmoi Wekesa (Pw3).
8. Pw1 adopted his witness statement dated 31/10/2012, which mirrored the plaint, as his evidence. He also produced Volumes 1-4 of the plaintiff's lists of documents, all dated 31/10/2012, together with the supplementary list dated 3/12/2018 as PExh1 – 5, respectively.
9. He testified that the plaintiff was engaged by the defendant because of its expertise in innovative and unique technologies, moisture suction, geo textile, optimum mechanical and chemical stabilization, that would save up to between 30-60% construction costs. That that the project was fast run because the late former President Mwai Kibaki had given a directive that he wanted the works for the Isiolo Airport Project to be in place by 2012.
10. In cross-examination, he denied that the plaintiff was engaged by Kundan Singh. He maintained that the plaintiff was engaged by the defendant directly. He admitted that there had been no advertisement for the engineering and design consultancy services; that the plaintiff did not submit a bid and that there was no written contract signed by the parties as the contract submitted was not signed by the defendant.
11. He also admitted that he corresponded with Eng. David Kamau through his personal email address. That the services were rendered before the project implementation details were finalized on 28/9/2010 and the Tender advertisement of 18/11/2010.
12. In re-examination, he told the Court that the defendant's letter to the Permanent Secretary indicating that the details for implementing the Isiolo project were finalized on 28/9/2010, was not on its official letter head.
13. Pw2 adopted his witness statement dated 31/10/2012 as his evidence. He stated that he was part of the plaintiff's team that attended site visits to conduct field tests for sampling at the Isiolo Airport after they were granted access by the defendant's officer, Mr. Kariuki. He attended three site visits.
14. During the 2nd site visit, the conditions of the runway were evaluated. Upon finding that it mainly had black cotton soil, there was need to survey the surrounding areas for suitable sources of material. While he was taking images at one of the sites, 78 Tank Battalion, a military station in Isiolo, he was arrested by military personnel.
15. In cross-examination, Pw2 admitted that he did not witness the signing of an agreement between the plaintiff and the defendant. He further admitted that he did not receive instructions to conduct the site surveys from the defendant directly. He confirmed that the samples were obtained from Kundan Singh.
16. Pw3, the design engineer, adopted his witness statement dated 31/10/2012 as his evidence. He testified that he attended five site visits and that the basic design study was done from 15/10/2010 and submitted to the defendant on 26/10/2010. He explained that the plaintiff's role in the project was to



undertake studies, generate the designs and prepare the tender documents while the role of Kundan Singh, the Project's Contractor, was to implement and construct the Isiolo Airport Project.

17. On cross-examination, he told the Court that he was not aware whether the consultancy services offered were advertised or tendered for. That the plaintiff signed its part of the contract but he was not aware whether the defendant executed its part. He was firm that in engineering, there are no site minutes since physical activities are undertaken.
18. He also stated that there were reports showing the outcomes of the visits, mentioning the Basic Design Report submitted on 26/10/2010 through email and the Detailed Engineering Report submitted on 17/3/2011. That the plaintiff did not respond to the tender for construction because its role was design.
19. When referred to the letter dated 28/9/2010 indicating that the details for implementing the restoration of original aircraft pavements at Isiolo Airport, he could not confirm whether all the details for implementation were ready as at the date of that letter, including the designs. He acknowledged that Geogrids reinforcement technology system was neither developed by the plaintiff nor registered as an industrial design or utility model for its exclusive use.
20. The Defendant called one witness, its employee, James Waweru Mucuha (Dw1), a trained Civil Engineering Technician. He adopted his witness statement dated 11/3/2021 as his evidence. He also produced the defendant's list supplementary list of documents dated 5/12/2012 and 27/5/2013 as DExh1 and 2, respectively.
21. Dw1 testified that he was engaged in the Isiolo Airport Project as a clerk of works, based on a site full time basis. That the plaintiff's claim was unfounded because all projects by the defendant are usually advertised then tendered for after which bids are accepted, evaluated and based on the evaluated parties, the job is awarded. He further testified that the defendant did not tender for the design services. The designs utilised in the Project were done by the defendant's Engineering Department.
22. In cross examination, Dw1 confirmed that Eng. David Kamau was his supervisor. That he did not avail any evidence to show that the defendant's engineers came up with the drawings. He had not joined the defendant in 2005 when the design studies were allegedly done.
23. I have considered the pleadings and the evidence together with the submissions on record. The plaintiff's primary and supplementary written submissions were dated 19/8/2024 and 30/9/2024, respectively while those of the defendant were dated 6/9/2024. The issue for determination is whether the Plaintiff has proved its claim to the required standard and whether it is entitled to the reliefs sought.
24. The standard of proof in a civil claim is on a balance of probabilities. The claimant must convince the Court that its claim is more probable.
25. Sections 107 to 110 of the [Evidence Act](#) provide as follows:

“ 107

- (1) Whoever 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.
 - 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- 108) The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



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 that fact shall lie on any particular person.”

26. The plaintiff’s claim is founded on breach of contract. The plaintiff claimed that it was engaged directly by the defendant to provide engineering consultancy and design services and that its designs were to inform the tender for the construction of the project.
27. The plaintiff produced a contract signed by Dr. Mukabi (Pw1) and witnessed by Mr. Wekesa (Pw3) on the plaintiff’s part. However, the contract was not signed on the defendant’s part. The contract bore the defendant’s Projects and Engineering Services General Manager’s stamp dated 21/3/2011. This is proof that the contract was delivered to the defendant on 21/3/2011. Yet, this does not prove that defendant explicitly engaged the plaintiff.
28. The plaintiff’s witnesses admitted that the defendant did not sign the contract but and argued that there was an implied contract. The plaintiff relied on email correspondences between it and the defendant’s employee, Engineer David Kamau to show that it carried out the engineering and design services by making site visits to the Isiolo project site, collecting samples, conducting lab tests and submitting various design reports utilized in the tender document before advertisement of the tender in November 2011.
29. In an email dated 18/10/2010, Pw1 wrote to kamaudavid dndungik@gmail.com informing him that the first team that undertook laboratory scoping was back; that they would undertake some basic laboratory testing and analysis to facilitate a basic design and that a sending team will have to go for the detailed design after determining the technical, geo-scientific and geotechnical requirements from the results of the basic test.
30. In another email dated 26/10/2010, Pw1 again wrote to kamaudavid dndungik@gmail.com regarding the results for the laboratory test and an analysis of the basic physical properties of the BSC subgrade geo-materials. He mentioned that the reviewed and revised basic design drawings had been attached.
31. On the other hand, the defendant argued that there was no implied contract because the plaintiff did not demonstrate that the applicable procurement laws and regulations were complied with. It contended under section 27(4) of the Public Procurement and Disposal Act, 2005 (“PPDA”), the defendant could only enter into a written contract, signed by the Managing Director.
32. The defendant contended that the plaintiff’s allegation that it was engaged by Eng. Kamau to carry out the consultancy services was not supported by evidence that the said Eng. Kamau had the power and authority to act on behalf of the Managing Director and/or the defendant, and whether such power could in any event be delegated to him.
33. The defendant produced a letter issued by its Managing Director to the Permanent Secretary, Ministry of Transport indicating that the details for implementing the Isiolo Airport project were finalized on 28/9/2010 and the Tender advertisement for the Isiolo Airport project displayed in the Daily Nation Newspaper dated 18/11/2010. All this occurred before the alleged site visits by the plaintiff.
34. The defendant also produced a letter dated 28/6/2011 from the Project Contractor, Kundan Singh to the plaintiff. In the said letter, the contractor indicated that the Company had engaged the plaintiff to undertake some urgent review for it to submit an alternative design during the tendering stage but the whole idea was shelved due to the plaintiff’s inability to meet the agreed timelines.



35. The Court has carefully considered the evidence and looked at the exhibits produced. The contract produced by the plaintiff was not signed by the defendant. The plaintiff relied on email correspondence, the site visits conducted and reports submitted to prove that there was an implied contract.
36. However, since the services were meant to be offered to the defendant, which is a state corporation established under the [Kenya Airports Authority Act](#), the applicable law at the time was the Public Procurement and Disposal Act, 2005 (PPDA, 2005), repealed by the [Public Procurement and Asset Disposal Act](#) (2015).
37. Section 27(4) of the PPAD 2005 required all contractors, suppliers and consultants to comply with all the provisions of the Act and the regulations.
38. The plaintiff claimed that the engineering and design services were procured directly. Section 75 of the PPDA, 2005, set out the procedure applicable to direct procurement, as follows: -

“75. The following shall apply with respect to direct procurement—

- a. the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;
- b. the procuring entity shall not use direct procurement in a discriminatory manner; and
- c. the resulting contract must be in writing and signed by both parties.”

39. There was no proof of negotiations for the supply of the services sued for. There was also no proof of any written contract signed by both parties. In *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* (Civil Suit No. 352 of 2014) [2019] eKLR, the Court observed that: -

“It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.

The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being



overlooked. Non-compliance could easily be seen. For this reason this Court is unwilling to hold that RMS should be excused from the flawed process.”

40. In addition, in *Suken International Limited v Ministry of Health & another* (Civil Suit 006 of 2021) [2023] KEHC 19556 (KLR) (Commercial and Tax) (30 June 2023) (Judgment), the court cautioned that: -

“Parties must be cautious when tempted to enter into contracts with public entities, and ensure that any procurement is in conformity with the law, lest they suffer the consequences of being lured to act outside the law.”

41. Further, in *Grana Limited v National Social Security Fund (Civil Appeal E028 of 2020)* [2022] KEHC 61 (KLR) (Commercial and Tax) (31 January 2022) (Judgment), the Court noted that: -

“The Plaintiff relied on the cases of Hydro Water Well Case (Supra) and Kabuito Contractors (Supra) to state that the Respondent cannot escape liability for the subsequent works undertaken. These cases can be easily distinguished on the ground that the decision in this case is based on statutory provisions and on the facts where there was admittedly no contract in writing signed by the parties. In the Hydro Water Well Case, there was a valid written contract for the projects undertaken by the plaintiff therein and that part payment was made for those services. In the Kabuito Contractors Case, the contract therein was executed in 1997/1998, before the enactment of the repealed Public Procurement and Disposal Act, 2005 that required procurement contracts to be in writing and the court rightly held that the same could not be applied retrospectively. Finally, the common law principle encapsulated in the rule in *Turquand’s Case* cannot supplant or override clear statutory provisions.

I am not unsympathetic to the Appellant’s plea that it provided services but was not paid however, *the Constitution* and its values must prevail over any personal loss or benefit. Article 227 of *the Constitution* which provides, inter alia, that procurement must be done in a system that is fair, equitable, transparent, competitive and cost-effective gives procurement a constitutional significance given that Kenya spends huge public resources in procuring goods and services. The Act, which is based on the constitutional imperatives must be given effect as the authorities cited have shown. Of course, non-compliance with the provisions of the Act may result in criminal sanction for the officer involved and the said officer may be held personally liable for the loss but this is not the issue here.”

42. In view of the foregoing, the Court finds that the plaintiff has not proved its claim to the required standard and dismisses the suit. Since there was evidence however that the defendant may have utilized the plaintiff’s services albeit, unsolicited, each party shall bear own costs.

It is so decreed.

SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

