Jamarat Apartments Limited v Mandera County Government (Civil Case E003 of 2020) [2025] KEHC 2415 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2415 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL CASE E003 OF 2020

JN ONYIEGO, J

MARCH 6, 2025

BETWEEN

JAMARAT APARTMENTS LIMITED ..... PLAINTIFF

AND

MANDERA COUNTY GOVERNMENT ..... DEFENDANT

JUDGMENT

1. The plaintiff via a plaint dated 21.10.2020 sought for orders against the defendants as follows;
   i. Declaration that the defendant is in breach of contract dated 03.07.2017.
   ii. Special damages of Kes. 46,915,000/-.
   iii. Interest on (a) above at court rates from the date of demand till payment in full.
   iv. General damages for breach of contract.
   v. Costs of the suit.
2. The background of the suit is that via an agreement dated 03.07.2017, the plaintiff entered into an agreement with the defendant for the supply of relief food for the financial year 2017/2018. It was averred that the agreement was express that the plaintiff would commence its work/obligations within one month of the execution of the contract. That it was further an express term of the contract and the obligation of the defendant to issue an LPO, inspect the goods to confirm that the same were of good quality and fit for human consumption. Additionally, that the defendant was to issue an inspection and acceptance certificate to the plaintiff. That in breach of its obligations to the plaintiff, the defendant failed, refused and/or neglected to requisition, inspect and take delivery of goods procured by the plaintiff in fulfilment of the agreement entered on 03.07.2017.

3. That as a consequence of the said breach by the respondent, the plaintiff suffered substantial loss amounting to kes 46,915,000/= including costs of procuring the goods, their transportation and storage. A break-down of the contracted goods to be supplied was given as follows;

    1) purchase of 3000 bags of beans valued at kes 18,300,000/=

    2) purchase of 40,000 litres of cooking oil at kes 6,800,000/=

    3) purchase of 1,1350 bags of Basmati rice (50kg) for Kes 5,332,500/=

    4) purchase of 28,000 litres of cooking oil for Kes 4,760,000/=

    5) 9,000 litres of cooking oil for kes 1,372,500/=

    6) purchase of 1500 bags of rice for kes 6,450,000/=

    7) purchase of 1000 bags of rice for kes 3,900,000/=

4. Despite service of summons and a copy of the plaint to enter appearance and file defence, the defendant failed to do so. Via an application dated 18,12.2020, the plaintiff sought for judgment in default of appearance. The court through its ruling delivered on 10.06.2021, entered a default judgment against the defendant. Consequently, a decree was drawn for a sum of kes 46,915,000, interest at court rate from the date of demand till full payment, general damages and costs of the suit. Subsequently, the plaintiff filed judicial review application number E001 of 2022 Republic vs Mandera County Government and 2 others seeking mandamus orders to compel the respondent to honour the decree then standing at kes 58,069,920/=.

5. The defendant woke from its slumber and filed an application dated 05.04.2022 under certificate of urgency seeking orders for; stay of execution of the decree; leave to file defence out of time; that the contemplated defence was raising triable issues and stay of JR number E001 of 2022 pending hearing and determination of the application. The application was anchored on grounds that there was no proper service and that the defendants had a good defence given that no goods were ever supplied as claimed by the plaintiff.

6. The court via a ruling dated 04.12.2023 allowed the application with a caveat as follows:

    i. That the interlocutory judgment entered herein be set aside on condition that the defendant/ applicant within 30 days of delivery of this ruling deposits Kes. 15,000,000/- in an interest earning account jointly held by the parties' advocates.

    ii. That the defendant/applicant shall pay throw away costs of Kes. 100,000/- to the plaintiff within 30 days from the date of this ruling.

    iii. That costs of this application is awarded to the plaintiff.

    iv. That the applicant's undated draft statement of defence filed on 21.06.2023 is hereby considered as duly filed upon fulfilling the conditions set herein above.

    v. The matter be set down for hearing on a priority basis.

7. The defendant/applicant further filed an application dated 19.02.2024 seeking for inter alia; an order to enlarge and/or extend the time within which it could comply with the order issued on 04.12.2023 directing it to deposit the sum of Kes. 15,000,000/- in a joint interest earning account in the names of the advocates on record within 30 days of delivery of the ruling.

8. The above notwithstanding, the defendant later deposited the money as directed by the court and as such, the matter was set down for hearing with parties directed to comply with order 11 of the Civil Procedure Rules.

9. The defendant in his defence dated 10.06.2024 denied the claim and urged that the plaintiff was undeserving of the prayers sought. It was urged that as required by the Public Procurement and Assets Disposal Act, the defendant invited all eligible suppliers to apply for pre-qualification. That the pre-qualification of a supplier under a framework contract did not entitle a supplier to a contract for the supply of the relevant goods and/or services but only granted them an opportunity to supply where a requisition is made in line with the provisions of the Public Procurement and Assets Disposal Act. It was thus urged that the suit herein be dismissed with costs as the same was devoid of merit.

10. During the hearing, PW1, Ali Hassan Abei testified that he was the manager of the plaintiff co. and further adopted his statement dated 24.06.2024. He also produced a bundle of documents dated 24.06.2024 as exhibits No. 1 – 8 and urged the court to allow his prayers as listed in the plaint. He urged that he tendered for the contract and won but the defendant rejected to pay him as agreed. That he bought food and other food stuffs but the defendant failed to collect the same thus breaching the said agreement.

11. On cross examination, he stated that this was not the first tender as he had previously dealt with the defendant and was paid. It was his case that in as much as he did not know how to read, he was responsible for bidding for the tender in question. He stated that he understood what an open tender and a framework contract entails. He conceded that the bid that he won was an open tender but further stated that he did not understand clearly the difference between an open tender and framework agreement. He acknowledged appending his signature on the agreement but further contended that the defendant visited his store and inspected the stored food and thereafter recommended that the same be destroyed as they were not fit for human consumption.

12. It was his evidence that the agreement was breached by the defendant for the simple reason that in as much as he bought the required food, the defendant failed and /or neglected to pick the same thus occasioning him immense loss. He however, admitted on cross examination that he did not supply the goods as the defendant did not go for them. That he purchased the required supplies awaiting collection from the county government(respondents).

13. On the other hand, DW1, Ali Noor Chute, the director of assets management and acting director of procurement testified that he was conversant with the case at hand. He adopted his statement dated 11.10.2024 and further produced list of documents dated 10.06.2024. The documents were marked as Dex 1 – 4. He basically stated that there was a frame work agreement between the plaintiff and defendants for the supply of the stated goods but on request or a need basis.

14. That pre-qualification does not amount to entry of contract to automatically supply without being requested to. That in this case, no request was made nor local purchase order issued. That there was no physical supply of any of the alleged goods hence payment cannot accrue from the defendants.

15. On cross examination, he reiterated that the contractor was to supply the scheduled goods as and when required by the defendant. It was his case that three companies were contracted to supply food during the relevant period but only, Al Imran supplied the food needed. He averred that the L.P.O. was not issued to the plaintiff and therefore, a contract could not have arisen out of the signed agreement. He stated that the plaintiff was not entitled to the prayers sought as he did not supply any food to the defendant.

16. Parties were directed to file their respective submissions. The plaintiff filed its submissions dated 04.11.2024 citing two issues for determination:

    i. Whether the defendant was in breach of contract dated 03.07.2017.

    ii. Whether the plaintiff has proven a case for damages.

17. Regarding the first issue, the plaintiff argued that the defendant breached the agreement in question by failing to issue local purchase order which would have provided the amount of goods to be supplied pursuant to the framework agreement. That the refusal to issue the local purchase order frustrated compliance with clause 5 of the contract. It was contended that the defendant was to blame for inspecting goods intended for supply but declined to issue the plaintiff with an inspection certificate for the goods as required under clause 10 of the agreement. It was further urged that, the failure to requisition and take delivery of the goods, amounted to breach of contract hence the damages sought.

18. In respect to the second issue, it was urged that the plaintiff had sufficiently proved its case on special damages via receipts pleaded and produced before the court. It was stated that the special damages were not controverted in terms of accuracy and authenticity and the same was buttressed by the fact that the defendant inspected the said foods in the plaintiff's warehouse.

19. The plaintiff further submitted that ordinarily, courts don't issue general damages in cases where there is a breach of contract although there are exceptions such as when the conduct of the defendant is shown to be oppressive, high handed, outrageous, insolent and vindictive. To that end, reliance was placed on the case of Marine Management Association & Another vs National Maritime Authority (201) 18 NWLR 504.

20. That it is common ground that the framework agreement executed between the plaintiff and the defendant mandated the defendant to make a minimum order of the contracted goods. That during the oral testimony of the defendant, it was admitted that despite the nature of the framework agreement, the plaintiff did not receive any requisition from the defendant. That it was the plaintiff's uncontested testimony during cross examination that the defendant inspected the food, undertook to make requisition of the food, failed to make such requisition and subsequently confiscated and disposed off the food on grounds that the same was not fit for human consumption. That these set of facts constitute a conduct by the defendant that is to be oppressive, high handed, outrageous, insolent or vindictive. In the end, the plaintiff urged this court to grant the prayers sought in the plaint.

21. The defendant also filed submissions dated 22.11.2024 citing three issues for determination as hereunder:

    i. What was the nature of the agreement dated 03.07.2017 executed by the plaintiff and the defendant?

    ii. Whether there was a breach of the framework agreement dated 03.07.2017?

    iii. Whether the plaintiff supplied any relief food to the defendant?

    iv. Whether the plaintiff is entitled to the reliefs sought?

22. On the first issue, it was urged that a framework agreement procedure is often used to procure goods and/or services that will be required on an emergency basis or at an unidentifiable time in the future, but the procuring entity does not know the exact quantities, nature or timing of its requirements.

23. That in line with the provisions of Regulation 102 of the PP & AD regulations, the plaintiff was awarded and executed an agreement in respect of Tender No. MGC/T/33/2016 – 2017 on 03-07-2017

for the supply and delivery of relief food. That while the description, unit prices and the unit of measure were definite and set out in the agreement; the volume of orders, timing of orders and delivery of the locations were left open at the first stage and were to be set when the orders were made. To that end, it was contended that the framework agreement is not a procurement contract and only sets out the terms and conditions of future purchases. That the obligation to purchase and deliver relief food was to be triggered by a requisition and issuance of a local purchase order which was not done in this case.

24. On the second issue, it was submitted that a framework agreement does not obligate a contracting authority to purchase goods, services or works. But it simply sets out the terms and basis upon which contracts will be awarded in the future. That in order to purchase goods, services or works under a framework agreement, a contracting authority must issue a local purchase order. It was contended that the defendant would only pay upon invoicing the defendant for the goods supplied, supplying the local purchase order in triplicate, providing copies of duly signed delivery notes and providing a certificate of inspection and acceptance of goods. That none of the foregoing documents had been tendered by the plaintiff in his evidence.

25. On the third issue, it was the defendant's contention that the plaintiff admitted that he did not supply any relief food to the defendant. That in view of this admission, the claim for payment of goods allegedly purchased ought to be dismissed. Similarly, clause 10 of the agreement clearly provided that the defendant would only settle invoices for goods inspected and accepted.

26. On the last issue regarding grant of the prayers sought, counsel contended that the same does not apply as there was no proof of breach of contract. To that end, reliance was placed on the Court of Appeal case of Delilah Kerubo Otiso vs Ramesh Chandra Ndingra [2018] eKLR where the court held that '... the measure of damages is such as may be fairly and reasonably considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.'

27. In conclusion, it was urged that the plaintiff's claim be dismissed with costs for the same was destitute of any merit. Additionally, that the Kes. 15,000,000/- held in account number 9177610018 in the name of Issa and Company Advocates and Mugor and Murgor be released to the defendant advocates unconditionally.

28. I have carefully considered the pleadings herein, response thereto, oral testimony by witnesses and rival submissions by both parties. Issues that germinate for determination are;

    i. What was the nature of contract entered between the parties herein?

    ii. Whether there was breach of contract by the defendants?

    iii. What are the possible remedies applicable?

29. From the onset, parties did not controvert the fact that the agreement dated 03.07.2017 the subject of these proceedings was a framework agreement. In the same breadth, the plaintiff does not claim having supplied goods but rather it is advancing a claim for special damages for breach of a contractual obligation by the defendant. On the other hand, the defendant in opposing the plaintiff's claim urged that there could be no breach of contract for the reason that the agreement signed between the parties was simply a framework agreement which did not automatically entitle the plaintiff to supply without requisition through an LPO.

30. Section 2 of the *Public Procurement and Asset Disposal Act* provides that:

> "framework agreement" means a pact between a procuring entity and a selected supplier (or suppliers) or contractor (or contractors) identified for a definite term to supply goods works or service whose quantities and delivery schedules are not definable or determinable at the beginning;

31. From the above definition, it follows that a framework agreement is therefore a pact between a procuring entity and a selected contractor or contractors identified to inter alia supply services for a certain period of time, whose quantities and delivery schedules are not determinable at the onset.

32. Notably, a framework agreement is identified under section 92 of the Act as one of the methods of procurement that may be utilized by a procuring entity to procure services in procurement proceedings.

33. Additionally, Section 114 provides the following in respect to a Framework agreement:

(1) A procuring entity may enter into a framework agreement open tender if—

(a) the procurement value is within the thresholds prescribed under Regulations to this Act;

(b) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and

(c) a minimum of seven alternative vendors are included for each category.

(2) The maximum term for the framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment undertaken annually to determine whether the terms designated in the framework agreement remain competitive.

(3) When implementing a framework agreement, a procuring entity may—

(a) procure through call-offs order when necessary; or

(b) invite mini-competition among persons that have entered into the framework agreement in the respective category.

(4) For the purposes of subsection (3)(a), "call-offs order" means an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of works, goods, consultancy covering terms and conditions including price that users require to meet the immediate requirements.

34. From the above, a procuring entity may enter into a framework agreement through an open tender for a maximum period of three (3) years if: (i) the procurement value is within the thresholds prescribed under Regulations in the Act, (ii) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement;

35. Having considered the foregoing, a cursory look at the agreement herein shows various clauses and terms upon which the agreement was hinged on. It is not contested that the plaintiff vide Tender No. MGC/T/33/2016 – 2017 successfully bid and was awarded a contract for the supply and delivery of relief food. But of importance to note is the fact that the said agreement especially at paragraph 'C', the said supply of food was captured as 'As and when Need arises Basis'.

36. Having established that the agreement between the parties was a framework agreement, the question that I now need to deal with is whether the signed agreement brought about a valid contract between the parties herein?

37. Thus a tendering process as envisaged in a framework agreement is established with multiple suppliers for a specific period and when a specific requirement arises, the buyer can then request quotes or proposals from the pre-approved suppliers within the framework. At that point, acceptance as an element of a contract is thus sealed.

38. From the facts of this case, the plaintiff confirmed that it waited for the defendant to pick the foods/ goods in vain. The defendant on the other hand stated that the agreement dated 03.07.2017 was predicated on a specific condition or happening before a contract could be created and the condition being, 'when a need arises'. To that end, it did not ask the plaintiff to supply the foods instead, it sought to buy from another supplier by the name of Imran.

39. I clearly note that the plaintiff in championing its case urged that under clause 19 on General Terms and Conditions of the agreement, work or supply of goods was to commence within one (month) of signing of the agreement failure to which the award could terminate. The question is whether there was any ambiguity in the terms of the contract.

40. In the case of Arnold vs Britton [2015] UKSC 36, Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

41. In the same breadth, Mativo J. (as he was then) in the case of Euromec International Limited vs Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) quoted Professor A Burrows QC in the case of Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 where he summarized the modern approach to contract interpretation in the following terms: -

> " The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."

42. From the above, it is my humble understanding that courts have established that in order to determine the relevant context of a contract, the wider context is admissible. Further, in the case of Tillman vs Egon Zehnder Ltd [2019] UKSC 32], the court held that courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain.

43. It therefore follows that in interpreting the agreement signed between the plaintiff and the defendant, the tenor of what a framework agreement in a procurement proceeding is must take precedence. Having said so, in a further attempt to convince this court otherwise, the plaintiff urged from my understanding that the actions of the defendant by inspecting the goods amounted to breach of contract and they should thus be estopped from claiming otherwise.

44. Section 120 of the *Evidence Act* provides as follows: When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

45. It is true that in the English Common Law, equitable or promissory estoppel does not, generally, found a cause of action. This limitation goes back to the founding (or rediscovery) of the doctrine in the contract jurisprudence by Lord Denning. For example, in Combe vs Combe [1951] 2 K.B. 215, 219, Lord Denning remarked that equitable estoppel: does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be un- just to allow him to enforce them.

    [Also see the sentiments of Lord Denning in the case of Central London Property Trust Ltd. vs High Trees House Ltd. [1947] K-B. 130 (1946)].

46. From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel. The same are as follows:

    i. Representation: There must be a representation by the representor in words or by acts or conduct;

    ii. Reasonableness: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;

    iii. Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;

    iv. Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and

    v. Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

47. Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with its former representation.

48. Thus the critical question to ask in this regard is whether the agreement dated 03.07.2017 coupled with the conduct of the defendant of inspecting the foods amounted to a representation capable of being reasonably relied on by the plaintiff?

49. As already noted elsewhere in this judgment, the agreement between the parties was simply a framework agreement thus due to its nature, it could not possibly create an impression that by the defendant inspecting the foods, an illusion of contract would ensue. This is so because, the plaintiff did not demonstrate that by signing the frame work agreement, a valid contract would be construed. This was notable when at the point of cross examination, the plaintiff stated that he knew what a framework agreement is.

50. Having already elaborated what a framework agreement is, it cannot authoritatively be said that the plaintiff was not aware of what it entered into and the consequences therein. It is therefore clear that the defendant did not order for the goods pre-qualified for supply by the plaintiff when required.

51. The mere act of inspection which was not followed by a local purchase order did not imply automatic supply. The term in the contract for supply within one month may as well mean supply not later than one month upon request. The bottom line is that; the plaintiffs were prep-qualified to supply when need a rose. In other words, they were on standby awaiting necessary requests to supply

52. From the above, it is my humble view that the plaintiff is simply inviting this court to either re-write a binding contract or to assist it to evade consequences of a legally binding agreement it voluntarily executed. See National Bank of Kenya Limited v pipe plastic Samkolit(K)Ltd (2002)2 EA 503 (2011) e KLR where the court held that;

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved" see also Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited 92017) e KLR".

53. As such, there was no breach of contract as alleged by the plaintiff as the alleged agreement did not mature to meet the essentials necessary for a valid contract to attach.

54. Indeed, the plaintiff did not supply any goods hence tax payers' money cannot be paid against air or unsupplied goods. It would be a bad precedent if the court were to allow all pre-qualified suppliers to lay claim over unsupplied goods on the basis of pre-qualified agreement otherwise known as frame work agreement. In view of the above holding, it is my finding that the defendants were not in breach of contract hence cannot be held liable. For those reasons, the claim herein is unfounded.

55. As to whether the reliefs sought can issue, the answer is a straight no. Having held that the claim cannot stand, the prayers sought for breach of contract cannot issue. Regarding costs, the same ordinarily does follow the event. However, the same is within the discretion of the court depending on the circumstances of the case. See Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Supreme court petition No. 4 of 2012 (2014) eKLR where the apex court held that costs follow the event and that the same is within the inherent powers of the court.

56. Given the circumstances of this case and the misinterpretation of the contractual terms leading to the plaintiff purchasing huge quantities of goods for supply but which were eventually destroyed by the respondent's department of public health for being unfit for human consumption, it would amount to double jeopardy to subject it to paying costs. For those reasons, I am inclined to order that each party bears own costs

57. Consequently, the orders that are commendable to me are as follows:

    i. The suit herein is dismissed for want of merit.

    ii. Parties to bear their own costs.

    iii. The amount deposited herein as security be released to the depositor.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE