



J&K Investment Kenya Limited v Kensetsu Kaihatsu Consulting Engineers Limited (Commercial Case E016 of 2024) [2025] KEHC 6302 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E016 OF 2024**

RC RUTTO, J

MAY 16, 2025

BETWEEN

J&K INVESTMENT KENYA LIMITED PLAINTIFF

AND

KENSETSU KAIHATSU CONSULTING ENGINEERS LIMITED .. DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 18th January 2024 against the Defendant seeking, inter alia:
 - a. A declaration that the Defendant is in breach of the Consultancy Agreement dated 18th January 2021 and Addendum No. 2 dated 5th April 2022;
 - b. A declaration that the Defendant's demands for payments against the Plaintiff are premature, given that the arbitral award is yet to be settled;
 - c. An injunction restraining the Defendant, whether by itself, its agents, employees, servants, nominees, or otherwise, from constantly and continuously demanding payment of consultancy fees while being fully aware that the arbitral award remains unsettled;
 - d. General damages for breach of contract;
 - e. Costs and interest of the suit.
2. The gist of the Plaintiff's case, as pleaded, is that on 18th March 2020, it entered into a contract with the National Water Harvesting and Storage Authority for the construction of the Turkana Peace Dam at the Naku'etum Site in Turkana County. Pursuant to the contract, the plaintiff entered into a Consultancy Agreement dated 18th January 2021, with the Defendant, where the defendant was engaged to develop a contractual claims proposal, manage the process, represent the Plaintiff, and



expedite and settle any claims against the Plaintiff by the Authority. The Plaintiff's obligation under the agreement was to pay the Defendant the consideration set out therein.

3. The Plaintiff avers that the Authority failed to fulfill its obligations under the main contract, leading to a dispute that was referred to arbitration. An arbitral award was subsequently issued in favour of the Plaintiff in the sum of Kshs.397,440,203.03/=. The Plaintiff further avers that, under the Consultancy Agreement and Addendum No. 2, the consultancy fees intended to cover all services rendered by the Defendant, including fees for specialist or expatriate personnel hired by the Defendant and were only payable once the National Water Harvesting and Storage Authority had fully settled the arbitral award. Notwithstanding the foregoing, the Defendant has been consistently and persistently demanding payment from the Plaintiff, despite being fully aware that the arbitral award is yet to be settled due to ongoing court proceedings. The Plaintiff also states that the Defendant has instituted various legal proceedings, including one in which a court ruling directed the Plaintiff to pay legal fees to a firm of advocates outsourced by the Defendant allegedly for services rendered in contravention of the agreements between the parties.
4. On its part, the Defendant filed a Statement of Defence and Counterclaim denying the key averments in the Plaintiff. In its defence it asserted that it entered into a Consultancy Agreement with the Plaintiff, and that the necessity to execute an Addendum Agreement arose due to the lack of commitment by the National Water Harvesting and Storage Authority (NWHSA) to settle the Plaintiff's claim. This necessitated the invocation of arbitral proceedings, the costs and consultancy fees of which had not been anticipated under the initial Consultancy Agreement.
5. The Defendant averred that Addendum No. 2 was executed on the understanding that the Plaintiff would compensate the Defendant for the investments made towards the continued engagement of expatriate professionals, costs incurred during the arbitration process, and the seamless provision of critical consultancy services rendered to ensure a successful conclusion of the arbitral process. The Defendant further contended that, following the issuance of a favourable arbitral award in favour of the Plaintiff, it facilitated an application for an additional award to increase the sum from Kshs.397,440,203.93/= to Kshs.517,000,000/=: on the basis of computational and clerical errors in the initial award. The said additional award is, according to the Defendant, still pending collection from the sole arbitrator. The Defendant further averred that, following the issuance of the favourable award, the Plaintiff's directors ceased communication with it and unilaterally appointed new advocates to represent the Plaintiff in the recognition of award proceedings. The Defendant contends that the Plaintiff's conduct effectively terminated the Consultancy Agreement, thereby crystallising the amounts due and owing to the Defendant.
6. Consequently, it made a Counterclaim against the Plaintiff, seeking the following reliefs:
 - a. An order that the Plaintiff's suit dated 20th December 2023 be dismissed;
 - b. A declaration that the Defendant is entitled to its consultancy fees as covenanted under the Consultancy Agreement dated 18th January 2021 and Addendum No. 2 dated 5th April 2022;
 - c. Judgment in its favour in the sum of Kshs.89,424,045.88/= (exclusive of taxes), being 22.5% of the award issued in favour of the Plaintiff in the sum of Kshs.397,440,203.93/=: and reimbursable expenses of Kshs.19,189,168.61/=:
 - d. Interest on the aforementioned sums at the rate of 12% per annum from 25th August 2022 until payment in full;
 - e. Judgment in its favour for 22.5% of any additional award issued over and above the initial award of Kshs.397,440,203.93/=: and



- f. Interest on the foregoing sums at the rate of 12% per annum from the date of publication of the additional award until payment in full.
7. In support of its Counterclaim, the Defendant averred that after entering into the Consultancy Agreement with the Plaintiff, it further entered into an Addenda to the contract dated 17th September 2017 and 5th April 2022. The Defendant stated that it performed its contractual obligations by providing technical and documentary support for the Plaintiff's case, including testamentary and documentary evidence before the Arbitral Tribunal, which led to the issuance of a favourable award. However, the Defendant contended that the Plaintiff violated Sub-clause 2.1 of the Agreement dated 18th January 2021 by unilaterally changing advocates in the course of defending an application to set aside the arbitral award, excluding the Defendant from court proceedings relating to the recognition of the award and/or settlement of the claim against the National Water Harvesting and Storage Authority. The Defendant further averred that the Plaintiff spitefully renounced an affidavit sworn by Eng. Simoi Wekesa who had consistently sworn affidavits on behalf of the Plaintiff as the contractor's representative and instead filed another affidavit that was, in many respects, a word for word replica of that initially sworn by Eng. Simoi. The Defendant claimed it was generally sidelined in all matters relating to the settlement of the Plaintiff's claims and the associated court cases. It further averred that the Plaintiff failed to pay its consultancy fees for services rendered and to compensate the Defendant for reimbursable expenses already incurred prior to its exclusion, thereby breaching the contract between the parties.
8. The Plaintiff filed a Reply to the Defendant's Defence and Counterclaim dated 29th June 2024. It reiterated the contents of its Complaint while denying the averments in the Counterclaim. The Plaintiff admitted to the execution of the agreements but asserted that the additional 15% provided for under Addendum No. 2 was specifically chargeable to the claims settlement under Financial Claim No. 2, which claim was not allowed by the arbitrator in the final award. The Plaintiff further stated that the engagement of the firm of Gazemba Wekesa & Co. Advocates was limited strictly to the arbitration proceedings, and upon the successful conclusion of those proceedings, it was at liberty to engage a different firm of advocates. It contended that the actions of its director in this regard did not constitute a breach of the Consultancy Agreement between the parties.
9. In relation to the affidavit sworn by Eng. Simoi Wekesa, the Plaintiff averred that it distanced itself from the said affidavit on grounds that it had not instructed either the former advocates or the deponent, Eng. Simoi Wekesa, to prepare or swear the affidavit in the manner they did. In conclusion, the Plaintiff contended that the amounts claimed by the Defendant have been prematurely demanded, as the arbitral award is yet to be settled. Further, it asserted that the Defendant is only entitled to 7.5% of the claim's settlement, not 22.5% as alleged.
10. During the trial, Li Shankang testified on behalf of the Plaintiff and identified himself as the Managing Director of the Plaintiff company. Having adopted his witness statement dated 11th January 2024 as his evidence-in-chief, he produced the bundle of documents listed in the Plaintiff's List of Documents dated 11th January 2024, which were marked as Plaintiff's Exhibits 1 to 7. On cross-examination, he confirmed that he is not the sole director of the company, noting that the other directors are Kenyan nationals while he is Chinese. He stated that his role is limited to managing the company and that no board resolution was filed authorizing him to testify in these proceedings. He acknowledged that the agreements in question were duly executed by the Plaintiff's representatives.
11. He testified that the Plaintiff was to reimburse expenses amounting to Kshs.5,579,900/=, which it did, although proof of payment was not included among the documents filed by the Plaintiff. When referred to the third agreement, he confirmed that it was voluntarily signed and that the Defendant



- was to be paid an additional 15% for Financial Claim No. 2, as provided under Clause 3 of the said agreement. He further testified that upon issuance of the favourable award of Kshs.397,440,203.93/=, it was the Defendant's responsibility to pay the advocates, as the Defendant had appointed them. He admitted to signing the letter dated 9th December 2021 appointing the advocates but asserted that there was no agreement assigning the responsibility of appointing advocates to the Defendant. He referenced Clause 6.2(b), stating that the consultancy contract was to terminate upon full payment. He also clarified that the site engineer only changed after the work was completed and that following the arbitral award, the Plaintiff only changed its advocate and did not sideline the Defendant.
12. Upon re-examination, he reiterated that the additional 15% consultancy fee was contingent on a successful award for Financial Claim No. 2 alone. He explained that the consultant was to facilitate the engagement of the advocate, and that reimbursable expenses were to be settled upon the presentation of invoices, provided they were reasonable. Regarding the letter dated 9th December 2021, he stated that he signed it on behalf of the Defendant for legal purposes.
 13. The Defendant called one witness, Dr. John Nyaga Mukabi who testified and identified himself as a Professor and Engineer. He adopted his witness statement dated 8th April 2024 as his evidence in chief and produced the Defendant's List and Bundle of Documents dated 12th April 2024.
 14. During cross-examination, he stated that the Defendant was responsible for facilitating legal representation and introduced the legal consultants to the Plaintiff. He stated that the variation of the contract occurred after the issuance of the arbitral award. When referred to the letter dated 9th December 2021, he maintained that the instructions to the legal consultants were confined to the arbitration process, including up to the adoption of the award, and thus the Plaintiff was not permitted to appoint another advocate.
 15. He stated that communication between the parties was cordial until the Plaintiff commenced the process of recognizing the arbitral award, during which the Defendant was sidelined. However, he admitted that he had no documentary evidence of the alleged sidelining, save for the demand letter. He testified that Addendum No. 2 outlined the Defendant's obligations, the only unmet obligation being the provision of technical advice to the newly engaged advocate. He further stated that he was unaware of whether the claim between the Plaintiff and the National Water Harvesting and Storage Authority had been settled and clarified that the Defendant's claim was to be settled upon the pronouncement of the arbitral award. Regarding the 15% fee, he explained that it represented a financial investment by the Defendant and was not limited to Financial Claim No. 2. He added that the fee was eventually compounded to 7.5%. He confirmed that Kshs. 5,579,900/= was to be paid immediately to facilitate the arbitral process and that the Defendant had received partial payments amounting to approximately Kshs.2.5 million, which was about 50% of the amount due. Upon re-examination, he clarified that the Defendant's role during both the arbitration and litigation phases was to provide financial support and technical guidance, particularly in interpreting provisions of the Terms of Reference in the contract. He affirmed that he had testified as a witness in the arbitration proceedings. He further stated that he had reached out to the Plaintiff via a letter dated 5th May 2023, but received no response.
 16. At the close of the trial, both parties filed their respective submissions. The Plaintiff's submissions were dated 25th October 2024, while the Defendant's submissions were dated 4th November 2024.

Plaintiff's submissions

17. The Plaintiff, in its written submissions, provided a comprehensive background of both its case and that of the Defendant. It identified the following three issues for determination: (a) Whether the



- Defendant breached the Consultancy Agreement; (b) Whether the Defendant is entitled to the claims sought in the Counterclaim; and (c) Whether the Plaintiff is entitled to the prayers sought in the Plaintiff.
18. On the first issue, the Plaintiff submitted that the Defendant had breached the Consultancy Agreement by persistently demanding payment despite being fully aware that the arbitral award had not yet been settled due to pending court proceedings. It was the Plaintiff's position that the Defendant failed in its responsibility to cater for the legal costs of the outsourced firm of advocates, and instead sought reimbursement of sums higher than those contractually agreed upon.
 19. The Plaintiff referred to Clause 2.5 of the Consultancy Agreement, which stipulates that consultancy fees payable to the Defendant are 5% of the total amount of the claim's settlement, and Clause 2.6, which states that such consultancy fees shall be payable within seven days of the settlement to an account designated by the Consultant. Based on these provisions, the Plaintiff argued that the Defendant's entitlement to payment is contingent upon the actual settlement of the claims, which has not occurred since the dispute with the National Water Harvesting and Storage Authority (NWHSA) escalated to the High Court. The Plaintiff noted that NWHSA had filed an application seeking to set aside the arbitral award, and therefore, no settlement had been realized. Consequently, the Plaintiff argued that the Defendant's demand for fees at this stage contravenes the express terms of the contract. In support of its submissions, the Plaintiff relied on the case of *Hydro Water Well (K) Ltd v. Nelson Henry Sechere & Others, Civil Suit No. E212 of 2019*, to emphasize that the Defendant's primary obligations were clearly outlined in the Consultancy Agreement. It submitted that the Defendant had performed its obligations only up to the point when the Plaintiff engaged a different law firm to represent it in the High Court proceedings seeking to set aside the arbitral award.
 20. The Plaintiff submitted that the instructions to the firm of Gizemba & Company Advocates were limited solely to the arbitration proceedings. It contended that had the intention been for the said firm to represent the Plaintiff in subsequent proceedings, such instructions would have been expressly provided. With reference to Clause 1 of Addendum 2 to the Consultancy Agreement, the Plaintiff argued that the Defendant was under an obligation to outsource services and experts to ensure the seamless continuation of services as required by the Plaintiff. In return, the total fees for such services were capped at 7.5%, payable to the Defendant.
 21. On the second issue, the Plaintiff relied on Clause 2.5 of the Consultancy Agreement and Clause 2 of Addendum 1 to assert that the Defendant was only entitled to a compounded consultancy fee of 7.5% of the total claim amount. It acknowledged that this was the amount due and payable to the Defendant, but reiterated that the same was only to be paid within seven days of the settlement of claims, in line with the agreement. As for the Defendant's claim to an additional 15% fee pursuant to Addendum No. 2, the Plaintiff submitted that this was expressly tied to Financial Claim 2, which was submitted before the arbitrator but ultimately failed. Therefore, the Plaintiff argued, the Defendant could not be entitled to fees based on a claim that did not succeed. Regarding the Defendant's monetary claim of Kshs.19,189,168.61/=, the Plaintiff submitted that the same had not been proven to the requisite standard for special damages. In support, it relied on Civil Appeal No. 42 of 1983 (185) KLR 716 Hagn v. Singh, which underscores the requirement for special damages to be specifically pleaded and strictly proved.
 22. The Plaintiff further submitted that it did not sideline the Defendant, as alleged, by changing the firm of advocates. Rather, it asserted that any litigant has the right to change legal representation at any stage of the proceedings. It contended that the Defendant was only aggrieved by the fact that the newly appointed advocates had not been outsourced through it. In conclusion, the Plaintiff urged the Court to dismiss the claims raised in the Counterclaim.



23. On the third issue for determination, the Plaintiff submitted that it is entitled to an order of permanent injunction restraining the Defendant from making any further demands for payment, which it argued are premature. In support, the Plaintiff relied on Civil Case No. 97 of 2020 INN v. NK, to assert that injunctive relief is warranted under such circumstances. Regarding the claim for general damages, the Plaintiff cited Minister of Safety and Security v. Van Dulvenboden 2022 (6) SA 431 (SCA) 449, submitting that while there is no dispute as to the existence of the contract between the parties, it is the Defendant who has breached the terms of the said contract. As a consequence of this breach, the Plaintiff contended that it suffered loss, including being sued for legal fees by the firm of Gizemba & Company Advocates. Specifically, the firm filed Miscellaneous Application No. E377 of 2023: Gazemba Wekesa & Co. Advocates v. J & K Investment Kenya Limited, seeking payment of Kshs.35,000,000/=. The Plaintiff submitted that the matter was heard and determined in favour of the firm of advocates, resulting in the Plaintiff's tools of trade being auctioned.
24. In conclusion, the Plaintiff submitted that it is entitled to the prayers sought in the Plaint, including the permanent injunction and general damages, and urged the Court to dismiss the Defendant's Counterclaim in its entirety.

Defendant's Submissions

25. The Defendant also gave an introduction outlining the facts of the case. In its introduction, the Defendant acknowledged that there is no dispute regarding the existence and validity of the Consultancy Agreement dated 18th January 2021, Addendum No. 1 to the Consultancy Agreement dated 17th September 2021, and Addendum No. 2 to the Consultancy Agreement dated 5th April 2022. Additionally, the Defendant submitted that it is uncontested that the consultancy fees stipulated under Sub-Clause 2.5 of the Consultancy Agreement dated 18th January 2021 and Addendum No. 1 dated 17th September 2021 are valid and enforceable.
26. The Defendant outlined three key issues for determination: Whether the Defendant is entitled to the 15% consultancy fee under Addendum No. 2 to the Consultancy Agreement dated 5th April 2022; Who is in breach of the Consultancy Agreement and Addenda No. 1 and 2 to the Consultancy Agreement; and Whether the Defendant is entitled to the prayers sought in its Statement of Defence and Counterclaim dated 11th March 2024.
27. Regarding the first issue, the Defendant submitted that the Plaintiff's claim that the payment of the consultancy fees is contingent upon the award by the Arbitrator concerning financial claim No. 2, as published on 25th August 2022, is unsubstantiated and lacks evidentiary support. The Defendant argued that there is no established nexus between Addendum No. 2 to the Consultancy Agreement dated 5th April 2022 and the arbitrator's award of 25th August 2022. The Defendant further asserted that the primary purpose of entering into Addendum No. 2 was to recognize the Defendant's significant contributions, including financial investments and other resources, and to ensure the Defendant was properly remunerated for its investment. While placing reliance on the case of Quest Resources Limited versus Japana Port Consultants Limited [2015] eKLR, the Defendant submitted that the Plaintiff does not dispute the actual performance of the Defendant's obligations but merely challenges whether the 15% consultancy fee should be paid based on the arbitrator's award. The Defendant maintained that it had not been paid for services rendered under the Consultancy Agreement and was solely operating under the expectation of benefiting from its investment in the settlement of claims by the Authority. The Defendant emphasized that its interest in this investment was specifically addressed and protected under Addendum No. 2 to the Consultancy Agreement dated 5th April 2022.



28. On the second issue, the Defendant submitted that it is undisputed that the Plaintiff independently appointed a new firm of advocates without the Defendant's involvement, contrary to the agreement under Clause 7, titled "Executive Authority," which explicitly stated that neither party had the authority to bind or make any commitment on behalf of the other unless such authority was expressed in writing jointly. The Defendant also argued that it was not informed of ongoing developments in the High Court matters, including the Plaintiff's application for the recognition of the arbitral award. In reliance on the case of *Basco Products Kenya Limited versus Machakos County Government* [2018] eKLR and *Kenya Breweries Limited & Tembo Cooperative Savings & Credit Society Limited versus Washington O. Okeyo* [2002] KECA 284 (KLR), the Defendant submitted that the court should not permit the Plaintiff to evade its obligations by using the contract as a shield, especially given that the Plaintiff had violated it in the first place. The Defendant maintained that the agreement was breached as a result of the Plaintiff's conduct.
29. Regarding the third issue, the Defendant submitted that under the various agreements, specifically the Consultancy Agreement dated 18th January 2021, it is entitled to 5% consultancy fees of the total claim's settlement, exclusive of tax. For Addendum No. 1 to the Consultancy Agreement dated 17th September 2021, the Defendant is entitled to a fee of 2.5% of the total claim's settlement, also tax-exclusive. As for Addendum No. 2 dated 5th April 2022, the Defendant is entitled to 15% of the total claims' settlement, tax-exclusive. In total, this amounts to 22.5% of the total claim, which is Kshs.397,440,203.93/=, translating to Kshs.89,424,045.88/=.
30. The Defendant further submitted that the existence of an additional award for Kshs.517,403,001.30/= has not been disputed, though the said award is yet to be collected due to non-payment of the arbitrator's fees. The Defendant submitted that given that it has discharged its obligations under the agreement, it is entitled to be compensated. On reimbursement of expenses, the Defendant clarified that these are costs incurred in the discharge of its duties under the consultancy agreement. Through Invoice No. 2 and Invoice No. 3, the Defendant provided a breakdown of the costs incurred during the arbitration process. Regarding interest on the consultancy fees and reimbursable expenses, the Defendant submitted that since the breach of the contracts occurred after the publication of the award on 25th August 2022, the court should grant interest on the consultancy fees and reimbursable expenses. The Defendant referred to the case of *Ruth Njeri Kuria, suing through Samuel Kungu by virtue of the power of attorney registered as IP/A57190/Iv Njeru Cucu* [2017] eKLR.
31. The Defendant concluded its submissions by urging the court to dismiss the Plaintiff's case and allow the counterclaim with costs.

Analysis and determination

32. The Court has considered the pleadings, record, the evidence as well as the submissions by parties. The questions arising for determination are:-
 - a. Whether the Defendant breached the Consultancy Agreement and Addendum Agreements
 - b. Whether the Plaintiff breached the Consultancy Agreement by unilaterally appointing new legal representation and sidelining the Defendant.
 - c. Whether the Defendant is entitled to the consultancy fees and reimbursable expenses claimed in the Counterclaim.
 - d. Whether the Plaintiff is entitled to a permanent injunction and general damages for breach.



Whether the Defendant breached the Consultancy Agreement and Addendum Agreements

33. The Plaintiff alleges that the Defendant breached the Consultancy Agreement dated 18th January 2021 and Addendum No. 2 dated 5th April 2022 by persistently demanding consultancy fees despite the arbitral award remaining unsettled. The Plaintiff's case is anchored on Clauses 2.5 and 2.6 of the Agreement, which state that fees are to be paid only upon actual settlement of the claims by the National Water Harvesting and Storage Authority (NWHSA).
34. On the other hand, the Defendant argues that the Addendum No. 2 was not conditional upon actual settlement, but rather represented a return on its investment in ensuring the success of Financial Claim No. 2, and that the consultancy fees had crystallized upon the publication of the award.
35. In order to determine this issue, it is necessary to examine the relevant contractual provisions of the parties.
36. Clause 2.5 of the Consultancy Agreement dated 18th January 2021 provides that;
- “The Client shall pay, as consultancy fees, 5% of the total amount of the claims’ settlement. This consultancy fees shall be exclusive of taxes.
37. Clause 2 of the Addendum No.1 to the consultancy agreement dated 17th September 2021 provides that;
- “As a consequence of the foregoing, the client shall pay, as consultancy fees, an additional 2.5% to a compound consultancy fee of 7.5% of the total amount of the claims’ settlement less financial and other interim claims on the additional 2.5%. This consultancy fees shall be exclusive of taxes.”
38. Clause 3 of the Addendum No. 2 to the Consultancy Agreement dated 5th April 2022 provides that;
- “Now, therefore, and as per the proposal by the client to pay an additional 15% for financial claim No. 2 during the Board of Directors Meeting held on 5th April 2022, the client shall pay, as consultancy fees and compensation for investment, a total of 15% of the total amount of the claims’ settlement for Financial Claim No. 2 after receive the payment less any advances payments made by the client for expenses. This amount shall be exclusive of taxes.”
39. I have also looked at Clause 6.2 of the Consultancy Agreement dated 18th January 2021. It provides that: -
- “Unless otherwise terminated earlier, the contract agreement shall be in force until’
- a. The claims are settled accordingly.
 - b. The client has remunerated the consultant as per Clause 2 of this contract agreement
 - c. Either party communicates by way of giving a 7 days (seven days) terminate notice, and the same being accepted in writing by other party.
40. Clause 3 of Addendum No. 2 explicitly conditions the 15% fee on “receiving the payment” for Financial Claim No. 2. It does not merely refer to the issuance of an arbitral award; rather, it ties



compensation to actual payment realization, a condition that is yet to be fulfilled, as the arbitral award is yet to be satisfied due to pending High Court proceedings. Furthermore, the cumulative 7.5% consultancy fee (5% under the Consultancy Agreement and 2.5% under Addendum No. 1) under Clauses 2.5 and 2, respectively, is also expressed as being calculated from the “total amount of the claims’ settlement.” The term “settlement,” when read in context and alongside Clause 6.2, which stipulates that the Agreement remains in force until claims are settled and the consultant is paid, clearly signifies that settlement refers to the actual receipt of funds rather than the mere issuance of an arbitral award.

41. By continually making such demands in breach of the agreed payment triggers, and even initiating legal proceedings for the same, the Defendant acted contrary to the clear terms of the contract. This position is further supported by Clause 2.6 of the Agreement, which provides that consultancy fees shall be payable within seven days of settlement, not upon issuance of the award or completion of services.
42. Therefore, until such time as the arbitral award is settled, any demand for consultancy fees under the Consultancy Agreement and its Addendum is premature.

Whether the Plaintiff breached the Consultancy Agreement by unilaterally appointing new legal representation and sidelining the Defendant.

43. The Defendant asserts that it was excluded from ongoing litigation involving recognition of the arbitral award and claims that this exclusion breached Clause 8 of the Consultancy Agreement, which required joint decision making. The Plaintiff rebuts this, arguing that it had the right to engage legal representation independently, especially once arbitration concluded. It further argues that the engagement of Gazemba & Co. Advocates was limited to arbitration proceedings, and the Plaintiff had no continuing obligation to retain them after the arbitration and publishing of the award.
44. To begin with, I have keenly looked at Addendum 2 to the contract agreement dated 5th April 2022 specifically Clause 4 which provides that;

“Pursuant to Sub-Clause 2.1 and 2.2 as well as Clause 6 of the Consultancy Agreement, the consultant shall continue to provide the following services, amongst others, without prejudice to any former agreements.-Professional management and coordination of the entire claims, arbitration and litigation process.-Correspondence with the arbitral tribunal and Respondent-Representation during the arbitral and litigation processes.-Formulation and preparation of all necessary documentation including Reply to Response and Counterclaim, Supplementary submissions and strategic counter-responses, among others.-Preparation of the appropriate “Applications” on other pending disputes including interim awards for payment IPC Nos. 7 and 9.- Preparation of a strategic framework for the evaluation of the client’s supporting evidence.-Development of other construction contract claims.-Development of a comprehensive counter-defence;-Development of a comprehensive elucidation and validation construction contract claims report.-Preparation of updated monthly interim notices.-Preparation of any further interim claim notices and reports.

Representation of the client to any relevant party throughout the entire process including during the arbitration process until the award of the claims.

Expediting and guiding the process to the amicable settlement of the claims.

Negotiating appropriately and to the advantage of both parties (the client and the consultant), a legally and contractually fair quantum of compensation.



45. From the above, it is clear from Clause 4 of Addendum No. 2 dated 5th April 2022 expressly outlines the Consultant's continued role to include "professional management and coordination of the entire claims, arbitration and litigation process," and mandates the Consultant to represent the Plaintiff "during the arbitral and litigation processes," as well as to guide the process to its logical conclusion. .
46. Clause 8 of the Consultancy Agreement on Executive Authority in the main Consultancy Agreement clearly provides that: "Neither the Consultant nor the Client shall have authority to bind or to make any commitment on behalf of the other unless such authority is expressed in writing jointly."
47. Clause 8 establishes a requirement for joint decision-making, particularly in matters concerning the legal representation of either party within the framework of their shared contractual objective. Additionally, Clause 6.2 of the Consultancy Agreement explicitly states that the Agreement remains in effect until the claims are settled and the Consultant has been remunerated, unless terminated through mutual written notice.
48. In cross-examination, DW1, Dr. Mukabi, admitted that the legal team's instructions were strictly limited to the arbitration process, up to the adoption of the award, and that the Plaintiff was not permitted to appoint any other advocate. Conversely, PW1, Li Shankang, acknowledged that a new law firm was engaged post-award but maintained that the Consultant's role had effectively ended with the conclusion of the arbitration. The Plaintiff, however, contended that it retained the right to independently choose its legal representation.
49. The Plaintiff's stance, however, is directly contradicted by Clause 4 of Addendum No. 2, which explicitly extended the Consultant's role to include litigation and post-award representation. Furthermore, Clause 8 of the Executive Authority prohibits either party from making unilateral decisions that bind the other without express written joint authorization.
50. The Plaintiff produced no evidence of such joint written authority permitting it to independently engage a new firm of advocates or exclude the Consultant from the litigation phase. Moreover, the Plaintiff did not issue any termination notice as required under Clause 6.2(c). This omission underscores that the Agreement remained in force, and that the Consultant retained a continuing role in the litigation and settlement process.
51. I therefore find that the Plaintiff breached the Consultancy Agreement and Addendum No. 2 by unilaterally appointing new legal counsel in the post-arbitral litigation phase; doing so without written joint authority, was contrary to Clause 8 of the Executive Authority; as it excluded the Consultant from further participation in the ongoing litigation and settlement process, despite the clear mandate under Clause 4 of Addendum No. 2.

Whether the Defendant is entitled to the consultancy fees and reimbursable expenses claimed in the Counterclaim.

52. Regarding the consultancy fees, the Defendant claims 22.5% of the awarded amount that comprises of 5% under the Agreement, 2.5% under Addendum 1, and 15% under Addendum 2, translating to Kshs. 89,424,045.88/=. The Plaintiff concedes that 7.5% (Consultancy Agreement and Addendum 1) is payable, but only upon settlement. The Plaintiff contests the 15%, arguing it was contingent on the success of Financial Claim No. 2, which failed.
53. Clause 2.5 of the Consultancy Agreement dated 18th January 2021 provides that the Defendant is entitled to 5% of the total amount of the claims' settlement, exclusive of taxes. Clause 2 of Addendum No. 1 dated 17th September 2021 increases the consultancy fee by an additional 2.5%, bringing the total to 7.5%, but makes the 2.5% conditional, stating it applies "less financial and other interim claims."



Importantly, both fees are clearly stated as payable from the settlement of the claims not merely the issuance of an arbitral award. Clause 3 of Addendum No. 2 dated 5th April 2022) introduces a further 15% consultancy fee, explicitly tied to Financial Claim No. 2, and states that the Defendant “shall be paid... after receiving the payment” for that claim. This clause links payment directly to actual receipt of funds by the Plaintiff.

54. The foregoing aligns with what the Defendant is seeking which is cumulatively 22.5% of the settlement amount.
55. Regarding the reimbursable expenses, the Defendants; claim of Kshs.19,189,168.61 the law on special damages is settled. Special damages must not only be pleaded but strictly proved. The Defendant relied on invoices that is, Invoice No. 2 and No. 3, but did not present corresponding receipts, bank records, or other reliable proof showing actual disbursement of those sums. Notably, the Plaintiff acknowledged partial payment of approximately Kshs. 2.5 million, which the Defendant also conceded during cross-examination. However, no breakdown was provided for the remaining balance. Without such evidence, the Court is unable to verify the reasonableness, accuracy, or necessity of the entire sum claimed.
56. Accordingly, the claim for reimbursement of Kshs.19,189,168.61/= fails for want of strict proof. I must add that any Interest and other monetary claims tied to uncrystallized obligations are premature and not awardable at this stage. Based on the above, I find that the Defendant is not entitled to the consultancy fees or reimbursable expenses claimed in the Counterclaim at this time, and its monetary claims must therefore fail.

Whether the Plaintiff is entitled to a permanent injunction and general damages for breach.

57. The Plaintiff seeks a permanent injunction restraining the Defendant from persistently demanding payment of consultancy fees, which it contends are premature in light of the fact that the arbitral award has not yet been settled. It also seeks general damages for breach of contract.
58. Having already found that the Consultancy Agreement and its Addenda clearly conditioned the payment of consultancy fees upon the actual settlement of the arbitral award, and that the Defendant’s demands for payment were therefore premature and contrary to the express terms of the contract, this Court finds that the Plaintiff has established a basis for injunctive relief.
59. Further, Clause 2.6 of the Consultancy Agreement supports the Plaintiff’s position, as it provides that fees are payable only within seven days of settlement of the claim.
60. As to the claim for general damages, although the Court is satisfied that the Defendant acted contrary to the Agreement by prematurely demanding fees, the Plaintiff has not adduced sufficient evidence quantifying or proving the specific loss allegedly suffered. The reference to being sued for legal fees in a separate proceeding, *Gazemba Wekesa & Co. Advocates v. J&K Investment Kenya Limited*, is not enough, in the absence of a demonstrable link between the Defendant’s conduct and the damages claimed.
61. Accordingly, while the Plaintiff is entitled to an injunction, it is not entitled to general damages.
62. Based on the above, this court makes the following orders: -
 - a. A declaration is hereby issued that the Defendant’s demands for consultancy fees are premature, the arbitral award having not been settled.
 - b. The Defendant is found to be in breach of the Consultancy Agreement and Addendum by prematurely demanding payment of consultancy fees.



- c. The Plaintiff is found to have breached the Consultancy Agreement by unilaterally appointing new legal firm and sidelining the Defendant, contrary to Clause 4 of Addendum No. 2 and Clause 8 of the Executive Authority.
- d. The Defendant's Counterclaim for consultancy fees and reimbursement of expenses is dismissed for being premature and not proven.
- e. The Plaintiff is granted a permanent injunction restraining the Defendant, its agents, employees, or representatives from making further demands for payment of consultancy fees until such time as the arbitral award is settled.
- f. The Plaintiff's claim for general damages fails.
- g. Each party shall bear its own costs of the suit and counterclaim.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Plaintiff

.....for Defendant

Sam Court Assistant

