



**Transnational Computer Technology (Kenya) Ltd v Principal Secretary,
the National Treasury & Planning & 2 others (Civil Suit E321 of 2022)
[2024] KEHC 2472 (KLR) (Commercial and Tax) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E321 OF 2022
FG MUGAMBI, J
MARCH 8, 2024**

BETWEEN

TRANSNATIONAL COMPUTER TECHNOLOGY (KENYA) LTD ... PLAINTIFF

AND

**THE PRINCIPAL SECRETARY, THE NATIONAL TREASURY &
PLANNING 1ST DEFENDANT**

THE NATIONAL TREASURY & PLANNING 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. The plaintiff instituted the present suit against the defendants vide a plaint dated 1st August 2022, seeking damages for breach of contract. The suit was defended vide a statement of defense dated 29th September 2022. The dispute revolves around the intricacies of contractual relationships, including extensions of agreements and the delivery of services in the absence of a written contract.
2. The uncontroverted facts are that on or about February 2019, the 2nd defendant advertised Tender No. TNT/023/2018-2019 for provision of onsite support and improvement of IFMIS application, oracle e-business suite, financial, purchasing, budgeting and business intelligence. (the tender) and invited bids for the same. After a competitive tendering process, the tender was awarded to ISON Technologies Kenya Limited (ISON) in consortium with Transnational Computer Technology Limited (TCT) (together, the consortium).



3. In the meantime, the consortium between ISON and TCT had been established through a Joint Venture Partner Agreement (the Agreement) dated 5th June 2019. ISON was designated as the lead of the consortium while TCT was to coordinate the consortium in all project aspects and play a managerial and implementation role.
4. Following the award of the tender, on or about 22nd March 2019, the 2nd defendant entered into a contract for a period of one (1) year with the consortium for provision of the tender at a contract price of Kshs.122,363,644.58. This principal contract which ran from 1st April 2019 up to 31st March 2020 lapsed on 31st March 2020 and the 1st and 2nd defendants issued a first addendum to the contract.
5. The contract was dated 24th April 2020, renewing the principal contract for a further period of three and a half (3½) months running from 1st April 2020 to 15th July 2020, at a contract price of Kshs.18,140,305.63. There is no dispute over the payment of this and the principal contract.
6. Upon expiry of the first addendum the 1st and 2nd defendants issued a second addendum seeking to extend the principal contract for a further period of two (2) months from 16th July 2020 to 15th September 2020, at a proposed contract price of Kshs.10,365,889/=.The plaintiff declined to sign the extension on the basis of the contract price and instead proposed the contract price offered in the 2nd addendum.
7. Meanwhile, after declining the proposed contract price, the consortium's partnership was dissolved, and ISON departed the project site on 15th July 2020. The 1st and 2nd defendants allegedly sought to continue utilizing the consortium's services to mitigate security threats until a new tender could be awarded.
8. In December 2020, the 2nd defendant, pursuant to section 103(2)(d) of the [*Public Procurement and Asset Disposal Act*](#), directly procured services from the consortium. The said tender no TNT/029/2020-2021 was issued on 3rd December 2020 for the period covering 16th July 2020 to 31st December 2020.
9. Subsequently a dispute arose when the plaintiff, as part of a consortium with ADK Technologies Ltd and ISON, submitted their bid for the tender, which was declared non-responsive because ADK Technologies Ltd was not part of the original bid. This led to disagreements over payments for services rendered and the legality of the plaintiff's presence and work at the project site after the second addendum and the joint venture's termination.
10. Although the plaintiff argues that they did not get any communication from the defendants rejecting their bid, the defendants' case is that the unsuccessful outcome of the tender was communicated to TDK in consortium with ISON and TCT on 15th February 2021. ISON and TCT were asked to leave the site following their decline to sign the 2nd addendum and after submitting the non-responsive bid. The plaintiff's case is that they remained on site at the 1st and 2nd defendants request and continued receiving work orders and providing services until April 2021.
11. It is further averred that on or about 11th March 2021, the 1st defendant wrote to the plaintiff purporting to terminate its engagement with the 2nd defendant. Despite the purported termination, the plaintiff continued receiving work orders throughout the month of March 2021, which it executed.
12. The plaintiff indicates that they left the site at the end of April 2021 and submitted all the hand over reports to the 1st and 2nd defendants, which were received and signed by Treasury officials in the IFMIS department. As a result, the plaintiff claims the amount of Kshs.664,158,26.02 due from the defendants for the period between January 2021 to April 2021 as well as 16th July 2020 to April 2021.



13. The defendants on the contrary argue that the suit should be dismissed as there was no written contract between the 2nd defendants with ISON in consortium with TCT for the period between 16th July 2020 and 15th February 2021. Also, because ISON had indicated that the consortium's contract had ended on 15th July 2020 when the contract was not extended, the 2nd amendment was not signed and as such there was no claim.
14. The parties have identified the following issues for determination:
 - i. Whether there was a contract between the parties;
 - ii. Whether the plaintiff performed any work after the 1st addendum expired;
 - iii. Whether there was a breach of contract on the part of the 1st and 2nd defendants;
 - iv. Whether the plaintiff is entitled to remedy for the breach;

Whether there was a Contract Between the Parties; the Second Addendum:

15. The basics of a contract are well known and are as stated in *William Muthbe Muthami v Bank of Baroda*, (2014) eKLR. The Court of Appeal observed that:

“...In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”
16. The offer made by the defendants in the second addendum is not controverted. The evidence further shows that the consortium declined the terms of the second addendum vide a letter dated 3rd August 2020 signed by the General Manager ISON. In part the letter stated that:

“... we wish to bring to your attention that we are NOT able to sign the 2nd extension unless the contracted sum agreed between us is correctly computed as per the original contract and other irregularities we noted as we provided you with services are resolved amicably.....the letter further states that we are therefore constrained NOT to accept the offer as it is currently but still committed to an amicable, negotiable position. ..”
17. No further communication was exchanged by the consortium regarding the offer. It is upon the strength of this communication that ISON formally communicated the end of the contract and the lapse of the JV Agreement to the plaintiff and the 1st and 2nd defendants. All these facts are not controverted. Strictly speaking, parties remained at cross roads about the contract price payable and as such cannot be said to have been at a meeting of minds.
18. *In the matter of Nairobi Homes Ltd v Major Bastur Kalyan*, CA No. 30 of 1985, the Honourable Court addressed the scenario wherein the contract price is not definitively established, or where a counter-offer fails to secure mutual assent from the involved parties. It was noted by the Court that:

“Where the agreement is uncertain on the fundamental term on the payment of purchase price, in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment, it makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or to be entitled to any damages from the abortive agreement.”



19. In the instant case, the absurdity of the situation is that the consideration to the agreement remained unclear all through as the initial offer by the defendants was met by a counter offer and thereafter silence. The subsequent communication from ISON, indicating the termination of the joint venture, as well as their exit from the site served as a definitive indication that the consortium was not inclined towards renegotiating the contractual terms.
20. The JV Agreement expressly stipulated that the parties were precluded from competing against one another in the relevant project. Consequently, ISON's withdrawal unequivocally signified that TCT lacked the requisite capability to fulfill the contract's obligations independently as a sole consultant.
21. Furthermore, it is not contested by the plaintiff that there was no formalized written agreement for the second addendum, a departure from the procedure followed for the initial addendum. Nevertheless, the plaintiff maintains the stance that there was an implied contractual relationship between the parties, which could be inferred from the conduct of the parties and the documents filed in court. This is particularly asserted on the grounds that the plaintiff was asked to perform works with the full awareness and acquiescence of the defendants.
22. An implied contract is distinguished from an express contract by its formation, which is through the behavior and interactions of the involved parties rather than explicit written agreements. An implied-in-fact contract is inferred from the situation, conduct, activities, or established relationship between the parties, demonstrating a collective intent to form a contract. Conversely, implied-in-law contracts, or quasi-contracts, are not genuine contracts per se but are duties enforced by law to rectify instances of unjust enrichment.
23. The *Halsbury's Laws of England* Vol 9(1) at pg 23 defines a contract implied by law as: an obligation imposed by law independently of an actual agreement between the parties and may be imposed notwithstanding an expressed intention by one of the parties to the contrary.
24. In other words, if the plaintiff performed work under the reasonable belief that they were acting within the scope of a contract, and the defendants benefited from this work without an intention to compensate, the principles of reliance and unjust enrichment could support the existence of an implied contract. This was echoed in *Lamb v Evans*, (1893) 1 Ch 218 where the Court stated that:

“... What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”
25. The plaintiffs relied on the case of *Steadman v Steadman*, (1976) AC 536, 540 cited with approval by the Court of Appeal in its Judgement delivered in the case of *Ali Abdi Mohamed v Kenya Shell & Company Ltd*, (2017) eKLR where he stated that:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.”
26. For a contract to be implied in fact, the following conditions typically need to be met:
 - i. Offer and acceptance: Actions of the parties must show that an offer was made by one party and accepted by the other.
 - ii. Consideration: There must be a benefit to the promisor or a detriment to the promisee, which was bargained for.



- iii. Intention to create legal relations: The parties must intend their actions to result in a legal obligation.
 - iv. Certainty: The key terms of the contract must be sufficiently certain.
27. From the facts and the evidence before the Court, a critical issue is the plaintiff's lack of capacity to enter into a contract independently of the consortium. The plaintiff was well aware that they were acting outside of the scope of their contract. Clause 13.4 of the JV Agreement stated as follows:
- “The provisions of this agreement shall not restrict the right of any party to carry out its own business for its own benefit save for activities falling within the scope of the Project in which each of the parties undertakes not to compete with the project. This clause shall survive the termination of this agreement...”
28. In *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna* Nairobi, HCCC No. 1601 of 1999, it was held that:
- “If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”
29. ISON confirmed that there was no authority for the plaintiff to work under the same contract beyond or after expiry of the contractual period. This is corroborated in the letter of 11th March 2021 from ISON to the 2nd defendant and copied to TCT, to which there was no response from TCT. ISON's correspondence affirms the factual end of the contractual relationship upon the non-renewal of the second addendum. ISON informed TCT to wind up at the site as per the contractual terms, which it promised to do.
30. In totality, there is no repudiation from the plaintiff regarding their actions, which contravened the JV Agreement. The actions by the plaintiff were undertaken with full knowledge of said provisions, thereby deliberately incurring a foreseeable loss. Furthermore, to substantiate the presence of an implied contract, it is imperative to demonstrate that both entities had a mutual intention to establish a legal relationship that extends beyond the confines of the original consortium agreement, a determination that must be extrapolated from their collective conduct.
31. The plaintiff produced project reports executed subsequent to the cessation of the JV Agreement, which bear the signatures of the defendant's representatives, as a testament to this mutual intention. Nonetheless, such documentation in isolation does not conclusively affirm the existence of a contractual agreement.
32. Moreover, the plaintiff's allegation of having received directives to proceed with work from the defendant is not corroborated by tangible evidence, such as Purchase Orders or specific work orders emanating from an individual duly authorized to act on the defendant's behalf. This represents a departure from previously established procedural norms. Additionally, communications from March 2021 involving Sylvia W. Waruinge does not constitute sufficient evidence of the defendants issuing formal work orders to the plaintiff.
33. Consequently, given the context of the second addendum, the argument advocating for the existence of an implied contract is found to be without merit. The quest for recompense for any resultant loss is also unfounded.



The Direct Procurement:

34. The cause of action asserted by the plaintiff further emanates from the direct procurement which was advertised on or about December 2020 by the 1st and 2nd defendants and to which the plaintiffs duly submitted their bid. It is contended by the plaintiff that the absence of a formal response from the defendants to the plaintiff's proposed contractual sum of KES.247,482,487/= constitutes, in law, an implied acceptance of the plaintiff's tender and the financial terms contained therein.
35. This position is opposed by the defendants. It was the defendant's case that the said tender was submitted not by the consortium but by M/s ADK Technologies Limited (lead bidder) in consortium with M/s ISION Technologies Kenya Limited and M/s Transnational Computer Technology Limited in utter disregard of the law as M/s ADK Technologies Limited was not a member of the consortium in the original contract. The contract was hence declared non-responsive.
36. The defendants further rely on section 87 of the Public Procurement & Asset Disposal Act No. 33 of 2015. It is their submission that a procurement contract, such as the present case must in addition to the elements of a contract be aligned to the provisions of statute for validity.
37. Section 103(2)(d) of the Public Procurement and Asset Disposal Act allows provides for direct procurement as a mode of procurement. The justification for Direct Procurement, according to the Act is that:

“The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;
38. From this provision it is clear that the entities participating in the procurement process are a fundamental aspect of a direct procurement. The plaintiff does not deny that there was a new party introduced into the bid, distinct from ISON, in breach of Clause 4.2.4 of the JV Agreement. This clause prohibited the plaintiff from contracting or creating liability in the name of ISION without prior approval of the lead bidder. It is clear that no such approval had been sought and therefore this contract with ADK was a breach of the terms between ISON and TCT.
39. In any case, it is my view this contract was void ab initio owing to the absence of a valid JV Agreement which could be used as a vehicle for parties to contract. Clause 11 of the Agreement was clear that the agreement would continue in full force for the duration of the project. Consequently, the plaintiff's endeavor to incorporate a new entity into the consortium represents an act of bad faith, undermining the established contractual dynamics and violating the express terms of the agreement.
40. Furthermore, the plaintiff failed to satisfy the prerequisites for direct procurement, resulting in the absence of an award due to the tender being deemed unresponsive. From my perspective, the termination notice issued on 15th February 2021 was of no legal effect, as there existed no contractual agreement to terminate following the unsuccessful attempt to extend the second addendum.



Whether the Plaintiff is Entitled to the Orders Sought?

41. It is the plaintiff's case that the 1st and 2nd defendants are liable to pay the plaintiff for the services rendered outside the principal contract from 16th July 2020 to 30th April 2021 and compensate the plaintiff for the loss as a result of the breach of contract.
42. This Court finds otherwise. The plaintiff has not proved the breach of contract neither have they substantiated how the claimed figures arose, devoid of any corroborating contract or formal request. Rather, my conclusion is that the plaintiff has, through its actions, willfully assumed a risk and consequent loss for which the defendants cannot be held accountable.

Determination

43. For all the reasons that I have set out, the plaintiff's suit is dismissed with costs to the 1st and 2nd defendants.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

