



**Brisma Africa Limited v Hubei Hongyuan Power Engineering Limited; Kenya Power and Lighting (Interested Party) (Civil Case 16 of 2018) [2023] KEHC 18857 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 16 OF 2018  
HK CHEMITEI, J  
JUNE 15, 2023**

**BETWEEN**

**BRISMA AFRICA LIMITED ..... PLAINTIFF**

**AND**

**HUBEI HONGYUAN POWER ENGINEERING LIMITED ..... DEFENDANT**

**AND**

**KENYA POWER AND LIGHTING ..... INTERESTED PARTY**

**JUDGMENT**

1. In its Amended plaint dated 23<sup>rd</sup> August 2018 the plaintiff prayed for the following reliefs against the defendant;
  - (a) A declaration that the defendants intended termination and repudiation of the MOU made on 25<sup>th</sup> April 2017 between the plaintiff and the defendant is unlawful, null and void ab initio.
  - (b) Spent
  - (c) Exemplary or aggravated damages for unlawful termination of the memorandum of understanding.
  - (d) Costs of the suit including attorney's fees.
  - (e) Any other relief that the court may deem fit to grant.
2. The defendant did file its defence dated 3<sup>rd</sup> October 2018 in which it denied the plaintiffs claim and prayed that the suit be dismissed.
3. The matter proceeded to full hearing where each of the parties called a single witness but majorly relied on the bundles of exhibits which were essentially common to them.



4. PW1 Moses Mburu Gitau, the plaintiff's director testified that the plaintiff entered into a Memorandum of Understanding (hereinafter referred to as MOU) with the defendant who had won a bid to construct power lines transmission on behalf of Kenya Power and Lighting company. In the said contract the plaintiff and two others were subcontractors since the main contract was between the defendant and the interested party.
5. It was his case that the plaintiff's role was to do with labour and transport segment and would have been apportioned a 30% profit. The said MOU was made on 25<sup>th</sup> April 2017. It is noted that the other two parties to the MOU have since withdrawn the case against the defendant after entering into a consent.
6. The plaintiff went on to state that the defendant in a last minute decision gave the plaintiff a two days' ultimatum to agree on the terms of the MOU which was not possible thus rendering the defendant to enter into other agreements with other subcontractors.
7. It was therefore the plaintiff's case that it was the defendant who breached the contract or the MOU after letting it incur serious costs before, during and even after the MOU was signed. He said that the legitimate expectations were that the plaintiff was going to get its 30% share of the profit which in this case was computed at kshs 24 million.
8. In the premises, the plaintiff prayed that based on the said understanding the defendant ought to be compelled to compensate it and further be punished for the losses it led the plaintiff incur.
9. One Tau Liu testified on behalf of the defendant and told the court that there was no binding MOU and what was there was purely for purposes of getting an extension of Bid Bond from Family bank and which was set to expire on 21<sup>st</sup> September 2018 a fact the plaintiff was aware.
10. The defendant went on to state that already vide the consent on record and which led the other plaintiffs withdraw the suit against the defendant, the plaintiffs had been paid cumulatively kshs11 million. The plaintiff was therefore estopped from making any further demands against the defendant.
11. The court after the close of the case directed the parties to file their written submissions which they have done.

#### **Plaintiffs written submissions.**

12. The plaintiff submitted on the question among others of whether the MOU was binding. It said that the same was binding as it was signed by all the four parties including the defendant. That on the contrary it was not only meant for securing an extension of the bid bond by Family bank as claimed by the defendant.
13. It went on to state that the endorsement by pen that it was "for the family bank for bid bond" was only done by the defendant and if it was legitimate then all the parties would have done so or at least a further MOU would've been done. In any case the tender had already been won.
14. On the issue of withdrawal of the suit by the other two plaintiffs namely Tarita Electric Company Limited and Umeme Services Limited, the plaintiff submitted that the same does not affect it in any way as it was not part of the consent agreement. In any case its 30% share was not affected in any way.
15. It was therefore its submission that the defendant breached the terms of the MOU by failing to award it the subcontracted work of labour and transport component and specifically apportionment of pure costs as per clause 3 of the MOU.



16. The plaintiff submitted that based on the said breach it was entitled to an award of exemplary and aggravated damages. It relied among others on the case of Raindrops Limited V. County Government of Kilifi (2021) eKLR.
17. It concluded that this court does award it a sum of kshs 24 million being its profit from the agreed kshs.80million.

#### **Defendants submissions.**

18. On its part the defendant submitted that the MOU was not binding at all and reiterated that the same was basically to secure an extension of the Bid Bond from Family bank and that is why there was an endorsement by the defendant by hand.
19. That had it been the intention for the MOU to be a binding document, then the same would have been a joint venture which would have been contrary to the terms of the tender documents. It went on to state that the issue of labour and transport costs had in any case not been agreed upon by the time the MOU was signed as they were subject to further discussions and every subcontractor was to enter a different and separate agreement with the plaintiff.
20. The defendant further submitted that the suit was compromise by the consent signed by the four parties withdrawing the suit upon the payments of ksh.11 million by the defendant. The said consent was according to the defendant valid as it was signed by the plaintiffs' counsel then on record.
21. On the prayers made by the plaintiff the defendant submitted that the same were untenable as they were vague and not specifically pleaded. It cited several authorities including Barclays Bank Of Kenya Limited V. Mema (Civil Appeal NoE011 OF 2021) KEHC (KLR).
22. It submitted that the plaintiff did not particularised the loss suffered or specific damages suffered for breach of the MOU or the contract but has instead pleaded for aggravated damages for unlawful termination of the MOU.

#### **Analysis and determination.**

23. The court having heard both parties oral and documentary evidence, perused their submissions and the attendant authorities finds that it is true that there was a Memorandum of Understanding between the plaintiff and the defendant who had won a tender from the interested party. The said agreement was between them and the other two parties Tarita Electric company Limited and Umeme Limited.
24. The plaintiff and the other two were basically subcontractors in the whole deal. It is also evident from the volumes of back and forth correspondences that the parties had a long engagement prior to this and the roles of the subcontractors and the plaintiff in particular had been agreed upon.
25. Was the Memorandum of Understanding binding on the parties.? In my humble view, yes. I state so because it was signed by all the parties and whether it was to secure an extension of the Bid Bond from Family bank or not the terms were well spelt out. The addition by pen by the defendant stating "only for the family bank bid bond" in my view appears cheeky and suspicious. This is for the simple reason that it appears and afterthought and such a serious contract cannot have some insertion without the input of the rest of the parties.
26. I agree with the plaintiff's submissions that the best that the parties would have done was to have an addendum to the MOU and insert such terms and or retype it afresh. Otherwise one can easily



conclude that it was either a mistake or made after the MOU had been signed or it was meant to conceal some ulterior motives.

27. Having stated so, is it therefore true that the defendant breached the said MOU.? That was the case till the introduction of the consent agreement dated 6<sup>th</sup> July 2018. The said consent states as hereunder;

“By consent;

- (1) The defendant to pay the plaintiffs the sum of kshs, eleven million (kshs 11,000,000) in full and final settlement of this matter.
- (2) The suit herein be marked as settled.
- (3) Each party to bear their own costs of this suit.”

28. The same was signed by Conrad Maloba & Associates Advocates for the plaintiffs and Wanam Sale Advocates for the defendant.

29. What followed thereafter was withdrawal of the suit against the defendant by the other two plaintiffs mentioned above. The plaintiff then was allowed to amend its plaint so as to proceed with the suit against the defendant alone.

30. The court records do not indicate that the above consent was set aside. There is on record a letter received in court dated 12<sup>th</sup> July 2018 from Mwadumbo & Co. Advocates addressed to m/s Conrad Maloba & associates writing on behalf of the plaintiff requesting for all correspondences leading to the signing of the consent. The tenor and content of the letter is that the plaintiff now their client was not briefed of the said consent.

31. By their letter dated 20<sup>th</sup> July the said law firm of Mwadumbo & co wrote to Conrad Law Consultancy stating among others that;

“...we note that you are yet to formally respond to our dated 12<sup>th</sup> July 2018. As such we return the consent forwarded vide our letter dated 20<sup>th</sup> July 2018 UNEXECUTED pending receipt of all the correspondences leading up to the agreement that all plaintiffs receive kshs11,000,000 in full and final settlement of this matter. This decision is informed by the fact that our client has information that the amount is distributed for settlement was kshs300000.”

32. It appears that there was no response from the defendant’s counsel and thereafter the plaintiff filed its amended plaint.

33. For all intent and purposes therefore the suit against the defendant had been withdrawn by the plaintiff despite being allowed to amend its plaint. The correspondences between the parties were in my view purely academic as the consent was not set aside. The plaintiff, reading from the tenor of the consent suggested that he was uncomfortable with the terms of the consent. The amount paid out was more than kshs11 million, namely kshs,30 million.

34. At the same time, it appears then that the erstwhile advocates gave it a raw deal in the negotiations and that is why the current advocates were asking for documentations leading up to the consent.

35. It was the defendant’s submissions that it had acted on the consent. This has not been denied or approved by the plaintiff or at all. To the extent therefore that the consent which was duly filed in court is still existing, this court takes it that the plaintiff has been paid and if not then the best way is to proceed to recover the sum from the defendant especially the portion due to it.



36. On the other hand, there is no evidence that the consent was entered fraudulently so as to attract any reason to set it aside. In any event the plaintiff has not made any complaint against its former counsels concerning the said consent.
37. Although the said consent was not adopted as the order of the court, the same forms part of the pleadings and as a result the rest of the plaintiffs relied on it in withdrawing the suit against the defendant. The said consent was paid for on 6<sup>th</sup> July 2018 and received on the same day at the registry.
38. In the case of Kenya Commercial Bank Ltd –vs- Specialised Engineering Co. Ltd [1982] KLR 485, Harris, J correctly held, inter alia, that: -
- “...1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...”
39. For this reasons, I do not see any reasons to proceed to discuss the other issues raised by the parties in their submissions which are heavy. For instance, the question whether the suit is sustainable or not and whether the plaintiff is entitled to aggravated and exemplary damages for now is moot for the reasons stated above.
40. In the premises, the plaintiffs suit against the defendant is hereby dismissed. Each party shall bear its own costs.

**Dated signed and delivered at Nakuru via video link this 15<sup>th</sup> day of June 2023.**

**H. K. CHEMITEL.**

**JUDGE**

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