



**Kenlaysia Trading Limited v Independent Electoral and Boundaries Commission
(Civil Suit 395 of 2013) [2023] KEHC 18935 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 395 OF 2013

CW MEOLI, J

JUNE 15, 2023

BETWEEN

KENLAYSIA TRADING LIMITED PLAINTIFF

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION DEFENDANT**

JUDGMENT

1. Kenlaysia Trading Limited, (hereafter the Plaintiff) by a plaint dated September 10, 2013 sued the Independent Electoral & Boundaries Commission (IEBC), (hereafter the Defendant) seeking judgment against the Defendant for the sum of Kshs 20,825,000/-; damages for breach of contract (both punitive and exemplary); costs of the suit; and interest from date of filing.
2. It was averred that the Plaintiff placed a bid in respect of Tender No IEBC/06/2011-2012, (hereafter tender contract) which it was subsequently awarded, to supply 25,000 IEBC Branded Registration/ Polling Center Banners at a cost of Kshs 2,450/- each, totaling Kshs 61,250,000/- and as a result, entered into a supply contract with the Defendant; that subsequently the Plaintiff was issued with a Local Purchase Order (LPO) for the total quantity in the contract and artwork for the initial 16,500 pieces.
3. It was further averred that the Plaintiff supplied the 16,500 banners. However, the Defendant failed to supply the artwork for the remaining 8,500 pieces despite the Plaintiff having already acquired all the material for the production of the remaining banners and thereby incurred expenses towards the supply of the remaining banners. That despite the Plaintiff's demand to the Defendant be supplied with the artwork for the remainder of the banners, the Defendant refused, failed and or ignored the Plaintiff's request and consequently it has suffered loss.



4. The Defendant filed a statement of defence dated October 22, 2013 denying the key averments in the plaint. On June 22, 2015 it filed an amended statement of defence accompanied by a counterclaim of even date seeking inter alia a declaration that there was breach of contract on the part of the Defendant to the counterclaim; general damages for the tort of deceit; general damages for breach of contract; costs of the counterclaim; and interest on the above.
5. It was averred that the Defendant to the counterclaim in blatant violation of fundamental conditions of the contract and law, gave and or bargained, assigned, sublet or otherwise, disposed of the contract between the parties by entering into a supplier – client agreement with a company known as Hopeland Advertising and Design Limited (hereafter Third Party Company) for the supply of the subject registration and polling centre banners, without obtaining prior written consent from the Defendant. That because of the foregoing, the Plaintiff in the counterclaim terminated the said contract in accordance with the provisions thereof. That the fundamental condition of the contract was informed by the sensitivity of electoral related matters and the need to promote openness and accountability in the use of public finances. It was further averred that the fraudulent misrepresentation by the Defendant to the counterclaim constitutes deceit and the Defendant in the counter-claim is therefore liable.
6. The Plaintiff thereafter filed a reply to defence and a defence to the counterclaim reiterating the averments in its plaint and denying the key averments in the Defendant’s counterclaim. The foregoing formed the state of pleadings prior to hearing.
7. During the trial, the Charles Munge testified as PW1. Having identified himself as the managing director of the Plaintiff he proceeded to adopt his witness statement dated September 10, 2013 as his evidence- in- chief and produced the documents in the list of documents filed on September 18, 2015 as PExh. 1 - 7 save for the letter dated April 18, 2013 in PExh.6. He stated that pursuant to the agreement between the parties, he delivered as per the specifications the initial 16,500 pieces and that the remaining lot of 8,500 pieces required change of artwork which the Defendant failed to provide.
8. It was his further evidence that the Plaintiff wrote a letter to the Defendant informing it that finances in respect of the material for the artwork for the remaining 8,500 pieces were already committed, and upon request the Plaintiff received payment for the initial 16,500 pieces. He further stated that in a meeting held to resolve the issue, he was informed that the order in respect of the extra 8,500 banners had been issued to another party, and that the Defendant committed to compensating the Plaintiff accordingly. That a subsequent letter by the Plaintiff to the Defendant did not elicit a response necessitating the demand for payment of Kshs 20,825,000/- and the instant suit.
9. During cross-examination by the defence counsel, PW1 reiterated that he was the managing director of the Plaintiff but admitted he did not have any board resolution or authority to depose or file suit on behalf of the company. He stated that the Third-Party Company was given work by the Plaintiff in respect of the tender in question. That the agreement between the companies related to the same number of banners the Plaintiff was to supply to the Defendant and that a non-disclosure agreement was executed between the Plaintiff and the Third-Party Company. He asserted that the Plaintiff had made financial commitments to purchase material in order to supply the remaining 8,500 pieces of banners although he did not have any document in court to prove the assertion.
10. Upon re-examination he reiterated that the Defendant was not a party to the agreement between the Plaintiff and Third-Party Company which was confidential. That the reason he did not supply the remaining 8,500 pieces was a variation of artwork which was provided for in the contract between the Plaintiff and the Defendant. He asserted that the Plaintiff competitively bid for the tender and that the LPO binds all parties to the contract. In conclusion, he reiterated that there was a binding contract



between the Plaintiff and the Defendant, explaining that the contract included the remaining pieces that were not supplied, as a result of the variation of artwork by the Defendant.

11. On behalf of the Defendant, Bernard Ochari Nyachio testified as DW1. He stated that he was previously employed by the Defendant from 2010 to 2020 when he retired. He adopted his witness statement dated September 14, 2016 as his evidence-in-chief. It was his evidence that the Plaintiff was contracted through a procurement process to supply poll registration banners for the 2013 General Elections upon being identified as the lowest bidder in the advertised tender. That the Plaintiff was contracted to supply 25,000 banners at a cost of Kshs 2,450/- per piece and that the banners had definite specifications.
12. He produced the contract between the Defendant and the Plaintiff as D Exh.1 and confirmed that 16,500 banners had been supplied and paid for, leaving a balance of 8,500 unsupplied banners. That it came to the Defendant's attention that the contract had been subcontracted to a Third-Party Company when the latter company approached the Defendant and showed them the contract between it and the Plaintiff. He further stated that Third Party Company claimed that the Plaintiff owed it money for the printing of the banners supplied to the IEBC, and sought to find out if the Defendant had paid the Plaintiff for the supply. That the representative of the Third-Party Company then gave them a copy of the agreement.
13. He explained that at the time of inquiry by the representative of the Third-Party Company, the Plaintiff had not paid for the initial supply of banners and the information was relayed to the Third-Party Company. He produced the Non-disclosure Agreement between Hopeland Advertising and Design Ltd (Third Party Company) and the Plaintiff as D Exh.2, and the Supplier/Client Agreement between Hopeland Advertising and Design Ltd and the Plaintiff as D Exh.3. He reiterated that under Clause 3 of the tender contract herein the Plaintiff was not allowed to subcontract or re-assign the contract.
14. During cross-examination DW1 stated that at the material time he was a procurement manager with the Defendant. That the LPO issued to the Plaintiff was for 16,500 banners being the number of banners to be delivered by the Plaintiff in the first instance. He confirmed that the Defendant ordinarily supplied artwork to the banner providers and that it duly provided the artwork for the 16,500 banners initially delivered to the Defendant. That he did not know why the Plaintiff needed new specifications for the second lot of banners, yet the Defendant had already given the required specifications. He further stated that the Defendant did not change the specifications for the banners as such the need did not arise for new specification for the artwork.
15. It was his evidence further that the contract was terminated because the Plaintiff subcontracted the tender but admitted that he did not have before the court the said letter of termination. He asserted that the Plaintiff failed to deliver the entirety of the banners in the contract and that the contract was time-sensitive given the scheduled and imminent general election. That the Defendant later discovered that the Plaintiff had subcontracted to a third party hence a decision was made to award the contract to another party, given that time was of the essence. He admitted that there was no evidence placed by the Defendant before the court in respect of the award of the balance of the contract to another party or a formal termination letter of the contract between the Plaintiff and the Defendant. He affirmed that it was the Third-Party Company that brought to their attention the existence of the subcontract.
16. In re-examination he asserted that only 16,500 banners were supplied by the Plaintiff although the Plaintiff had the artwork and specifications to the entire quantity of the banners to be supplied. Hence there was no reason for new specifications which if done, would have entailed price variation. That such an adjustment would have had cost and timeline implications whereas the Defendant is bound



- by the Public Procurement and Disposal of Assets Act. In conclusion, he stated that the Plaintiff was paid the full amount for the 16,500 banners delivered.
17. Parties filed submissions at the close of the trial. Counsel for the Plaintiff relied on the decisions in [*Caleb Onyango Adongo v Bernard Ouma Ogur \[2020\] eKLR*](#), [*Pakatewa Investments Company Limited v Municipal Council of Malindi \[2016\] eKLR*](#) and [*Titus Muiruri Doge v Kenya Cannery Ltd \[1988\] eKLR*](#) to submit that the law recognizes a contract as an agreement between two or more parties intending to create legal relations with each other, creating legal duties and obligations between them. Pointing an accusing finger at the Defendant, counsel asserted that the Defendant failed to terminate the contract, and that the Defendant ought not to be allowed to renege the contract. While calling to aid Section 139 of the [*Public Procurement and Asset Disposal Act*](#), counsel argued that public procurement can only be varied or amended as allowed thereunder and that the Act provides for prompt and timely payments.
 18. On whether a tender contract existed between the parties, counsel submitted that it is not in dispute that the Plaintiff was awarded the tender and an LPO issued. That the tender and LPO created a legally binding contract between the parties herein. Concerning whether the respective parties performed their part of the contract dated May 15, 2012, it was submitted that the Plaintiff requested the Defendant to supply the artwork in respect of the LPO which it failed to do, thereby exposing the Plaintiff to great loss and damage. That on account of the foregoing the Defendant failed to fulfil its part of the contract and was therefore in breach.
 19. As to whether the non-disclosure agreement between the Plaintiff and the Third-Party Company invalidate the contract in question herein, counsel cited Clause 5 of the contract to argue that the foregoing was a mere smoke screen, and no evidence was led to demonstrate that the Plaintiff was in breach of contract or acted in deceit as alleged in the counterclaim. Further to the foregoing, no notice in writing concerning the Plaintiff's breach was ever raised by the Defendant as such it is estopped from claiming that the Plaintiff was in breach. That the contract required that if there was breach of terms on the part of the Plaintiff, the Defendant was at liberty and or ought to have issued notice in writing in respect of the said breach.
 20. Citing the decision in [*Anchor Limited v Sports Kenya; County Government of Kisumu \[2020\] eKLR*](#) counsel argued that the Plaintiff has proved its case on a balance of probabilities. That in signing the procurement contract and receiving the local purchase order, the Plaintiff was led to believe and relied on the promise made by the Defendant that it would receive payment upon supplying the banners. It was further submitted that the Defendant gave no indication of intent to rescind or otherwise amend the contract and therefore ought to be estopped from terminating the contract at this juncture. That the issue of subcontracting the contract is a ruse by the Defendant to escape its obligation to pay the Plaintiff. In conclusion, it was asserted that the Plaintiff has discharged both its legal and evidentiary burden on a balance of probabilities and as such the Defendant's counterclaim ought to be dismissed with Plaintiff's suit being allowed with costs.
 21. On the part of the Defendant, counsel in addressing the question whether the Defendant supplied the total number of banners contracted, anchored his submissions on the decision in [*Margaret Njeri Muiruri v Bank of Baroda \(Kenya\) Limited \[2014\] eKLR*](#) concerning both the court's role and respective parties' obligation in a contract. It was submitted that the Plaintiff, having executed the contract for supply of 25,000 banners, failed to deliver the entirety of the consignment in accordance with the terms and conditions of the contract.
 22. Concerning whether the provision of the artwork affected performance of the contract, counsel cited the decisions in [*Limo Stationers Limited v Independent Electoral & Boundaries Commission \[2012\]*](#)



- [eKLR](#) and [David George Bell & Another v Ashutosh Bhasin \[2019\] eKLR](#) to submit that the contract between the parties contained the necessary specifications for the supply and delivery of the banners hence the Plaintiff did not have to look further than the contract to obtain specifications for the banners and cannot justify blatant non-performance of the contract on want of artwork.
23. On whether there was a variation or alteration of the contract, counsel placing reliance on the provisions of Section 47 of the [Public Procurement and Asset Disposal Act](#) (repealed), and Clause 7 of the tender contract in asserting that the Plaintiff failed to tender evidence the stipulated process of varying the terms and conditions of the contract was undertaken as required by law. That the Plaintiff having already supplied the initial consignment of banners as per specifications, it was misleading on their part to allege that they did not have the necessary artwork to supply the balance of the banners. For these reasons, counsel submitted that the allegation of variation of the contract is without basis.
 24. As to whether the Plaintiff was in breach of the contract by subcontracting the same, counsel cited Clause 3 of the contract and the decision in [Mwangi v Kiiru \[1987\] eKLR](#) to submit that the contract expressly prohibited the Plaintiff from giving, bargaining, selling, assigning, subletting or otherwise disposing the contract or any part thereof or the benefit or advantage of the contract to any party without the written consent of the Defendant. That the Plaintiff's action of subcontracting the contract to the Third-Party Company was in breach of the contract that had the effect of discharging the Defendant from performing any of its primary obligations under the contract and entitling the Defendant to damages in any event.
 25. Counsel further relied on Clause 5(i) of the Tender Contract, Section 120 of the [Evidence Act](#), and the decisions in [Davies Mwangi t/a Kiamunyi Tyre Dealers & Auto Accessories v Firestone East Africa \(1960\) Limited \[2006\] eKLR](#), [John Mburu v Consolidated Bank of Kenya \[2018\] eKLR](#) and [Sita Reel Rolling Mills Ltd v Jubilee Insurance Company Ltd \[2007\] eKLR](#) to submit that upon the Plaintiff's breach, the Defendant was entitled to terminate the contract without reference and or notice as per the tender contract. Hence the Plaintiff was not entitled to damages. That in any event and without prejudice to the foregoing the Plaintiff by its conduct accepted the termination of the contract by its letter dated January 17, 2013 and is therefore estopped by law from purporting otherwise.
 26. Concerning the Plaintiff's prayer for damages to the tune of Kshs 20,825,000/- it was submitted that the 8,500 banners were not supplied and delivered to the Defendant as required by the contract. Citing Clause 1 of the contract, Article 201 (d) of the [Constitution](#) of Kenya, Section 45(2)(a)(ii) of the [Anti-corruption and Economic Crimes Act](#), the decision in [Ethics & Anti-Corruption Commission v Vulcan Lab Equipment & Another \[2020\] eKLR](#) counsel contended that the Defendant was precluded both by law and the contract from effecting payment in respect of banners not delivered. Hence the Plaintiff was not entitled to damages in the sum claimed.
 27. Moreover, that based on the decisions in [Richard Okuku Oloo v South Nyanza Sugar Co Ltd \[2013\] eKLR](#), [Moses Ngendo v Josiah Anyangu Omutoko & Another \[2022\] eKLR](#) and [Hydro Water Well \(K\) Limited v Sechere & 2 Others \(Civil Suit E212 of 2019\) \[2021\] KEHC 22 KLR](#) the Plaintiff having failed to specifically prove that it had expended costs for material for the production of 8,500 banners, its claim for damages in the sum of Kshs 20,825,000/- could not be sustained. On the award of punitive and exemplary damages it was argued that the Plaintiff did not prove the said awards. The decision in [Godfrey Julius Ndumba Mbogori & Another v Nairobi City County \[2018\] eKLR](#) was called to aid in that regard.
 28. Regarding the counterclaim, it was argued that Defendant has proved that indeed the Plaintiff misrepresented its capacity to perform the contract when it had no such capacity and had to subcontract in order to perform the contract. That had the Plaintiff not fraudulently misrepresented



its capacity and ability to perform the contract, it would not have been awarded the contract. The decisions in *Trans Mara Sugar Co. Ltd & Another v Ben Kangwaya Ayiemba & Another [2020] eKLR*, *Premier Food Industries Limited v Triclover Industries (K) Limited [2021] eKLR* and Chitty on Contracts, 26th Ed Vol No 1, Pg 286, Para 430 & Pg 289, Para 436 were called to aid in respect of the foregoing.

29. On whether damages ought to be awarded to the Defendant, counsel relied on the decision in *Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR* to contend in exceptional circumstances that courts do award general damages for breach of contract especially where it is shown that the Defendant has been oppressive, high handed, outrageous, callous, and underhanded. That the Plaintiff fraudulently misrepresented its capacity to fulfil the contract and the Defendant is entitled to an award of damages for breach of contract. The court was therefore urged to dismiss the Plaintiff's suit and allow the counterclaim.
30. The court has considered the pleadings, evidence as well as the submissions of the respective parties. The question for determination is whether on a balance of probabilities the parties have established their respective claims and if so, what relief(s) ought to be granted. The court proposes to deal simultaneously with the two claims before it.
31. The Court of Appeal in *Wareham t/a AF Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91*, stated that: -

' We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.'
32. Further, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others (1987) KLR 347* the Court of Appeal stated that:

' [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.'
33. The parties' respective pleadings have been elaborately captured elsewhere in this judgment, obviating the need to restate the same again. The dispute herein revolves around alleged breach of a procurement Contract Tender No IEBC/06/2011. It is undisputed that pursuant to a competitive tender, the Plaintiff was awarded a contract to supply 25,000 branded registration/polling center banners to the Defendant. It is further undisputed that the Plaintiff supplied 16,500 of the banners and its accounts were settled to the tune of Kshs 40,425,000/-.



34. The Plaintiff's claim crystallizes on the allegation that the Defendant varied the contract as regards the artwork for the banners but failed to supply the necessary artwork for the remaining 8,500 banners when the Plaintiff had already acquired all the material for the production of the remaining banners, incurring expenses. Which act constituted a breach of contract on the part of the Defendant thus entitling the Plaintiff to damages.

35. It is pertinent to observe here that the role of the court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR*, the Court held that; -

' A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.'

36. The tender contract (Tender No IEBC/06/2011-2012) at the heart of the matter was produced as PExh.2 and DExh.1 respectively. PExh.1 being the notification of award of the tender to the Plaintiff clearly stated that the tender was for the supply of 25,000 IEBC branded Registration/Polling Centre Banners at a unit price of Kshs 2,450/- totaling Kshs 61,250,000/. It is not disputed that the Plaintiff supplied 16,500 banners and was paid for the said supply. The clauses pertinent to this dispute as contained in PExh.2 provided as follows; -

' 1. General conditions of contract

i .

ii. Any notice or other communication whatsoever which the commission is required to give or make to the contractor/supplier in terms of the contract shall without prejudice to any other method of giving or making it, be sufficiently given or made if it is sent by post in a letter addressed to the contractor/supplier at the last known place of abode or business of the contract, and if the letter is not returned through the post undelivered, such notice or communication shall be deemed for the purpose of the contract to have been given or made at the time at which the letter would in the ordinary course of post have been delivered.

2 .

3. Transfer and Assignment

The contract shall not give, bargain, sell, assign, sublet or otherwise disposed of the contract or any part thereof or the benefit or advantage of the contract or any part thereof without the previous consent in writing of the commission.

4 .

5. Termination of Contract

i. In case the contract/supplier shall be in breach of any of the terms and conditions of this agreement, or shall on any occasion fall in the due and punctual supply of any of the articles when to be supplied under the contract, or shall repeatedly offer any article



of an inferior quality to that contracted for, or at any time fail to replace such articles when properly rejected, the contractor/supplier shall be deemed to have failed in the due performance of the contract and the commission shall be at liberty by notice in writing or otherwise to determine the contract, but without prejudice to the commission's rights of retention and recovery in respect of any loss or damages sustained.

ii .

6 .

7. Alteration of Specifications

The commission reserves the right to alter from time to time any specifications, patterns and drawings relating to the contract, and as from the date specified by it for any such alteration, the articles shall be in accordance with the specifications, patterns and drawings so altered. In any event of such alteration involving and alteration in the cost of, or in the period required for, production, a revision of the contract prices and of the time of delivery shall be made by the parties to this contract or agreement or in the event of disagreement by an arbitrator appointed by the parties in relation to the articles which are the subject of the alteration, but in all other respects the contract shall remain unaltered.' (sic)

37. The court proposes to first deal with the disputed issue of alleged alteration of specifications and or variation of artwork in respect of the contract. Annexed to the subject contract, were: - (a) the tender form and price schedule submitted by the tenderer; (b) the schedule of requirements; (c) the technical specifications; and (d) the procuring entity's notification of award. Annexure (c) to the contract provided specifications for the PVC Banners and in view of PW1's evidence, the foregoing must constitute the specifications and information required for the production and delivery of the 1st batch of 16,500 banners to the Defendant, which fact is undisputed. What PW1 alleges is that mid-contract, the Defendant altered the banner specifications and the said action that hindered the Plaintiff from supply the remaining 8,500 banners when the Plaintiff had already financially committed themselves to supply the full lot of banners in the contract.
38. The Defendant through DW1, vehemently denied this position, arguing that they were unaware of reasons why the Plaintiff needed new specifications for the banners, yet the Defendant has already given the required specifications. That the Defendant did not change the specifications for the banners and as such the need did not arise for new artwork. As proof of the Plaintiff's allegation in the foregoing respect the PW1 adduced into evidence a bundle of letters as PExh.6. Of particular interest are the letters dated October 19, 2012 and December 20, 2012 whose contents read as hereunder respectively;

' October 19, 2012

RE: Completion of first batch of banners

We are pleased to advise that we have successfully completed delivery 16,500 voter registration banners as per your LPO No 1719815 and instructions. The remaining balance of 8,500 PCs will be delivered as per schedule once we receive the artwork for the polling station banners. The materials for these are in our stores and all the financial commitment in place.



Whilst we are waiting for the artwork for the 8,500 PCs, we request that you consider paying us for the 16,500pc already delivered and consequently attached our invoice No 053 for this.' (sic)

December 20, 2012

Re: Completion of first batch banners

We attach a self-explanatory letter which we sent to you in October. We now understand that the artwork for the polling banners is finally available and would request a copy so we can complete order LPO No 1719815 for the balance 8,500 pieces. As advised all the requisite materials are in our stocks. Please advise soonest.' (sic)

39. A cursory look at the LPO No 1719815 produced as PExh.3 reveals that the description of goods is captured as 'Supply and Delivery of IEBC Branded Registration/Polling Center Banners'. The same description is replicated in the notification of the tender PExh.1. Thus, what the Plaintiff was contracted to supply was a total of 25,000 IEBC Branded Registration/Polling Center Banners as per the specifications issued in the Annexure (c). Therefore, it can reasonably be construed from the contract, that the Plaintiff was under an obligation to supply the 25,000 banners as per specifications in Annexure (c) to the PExh.2 or DExh.1.
40. However, Annexure (c) to the contract did not detail the specific artwork to be used on the banners. Further neither party demonstrated the specific nature of the artwork to be imprinted on the banners. However, it can be reasonably deduced that at contracting the Defendant must have shared a sample of either the banner to be supplied and or the artwork to be reproduced on the banners to enable the production and admitted delivery of the first batch of banners. Further it would be reasonable to deduce that if in any event alterations to the artwork were to be carried out, the same ought to have been done as prescribed for in the tender contract, or at least in writing.
41. Thus, save for the Plaintiff's letters PExh.6, no communication from the Defendant regarding the alteration of artwork alleged in P.Exh. 6 was tendered or cited, in confirmation of the allegation that such alteration was instigated by the Defendant and caused the non-delivery of the remaining batch of banners. Moreover, there is no evidence that the Defendant invoked the process envisaged in Clause 7 of the contract in that regard. Clause 7 reserved the Defendant's rights on alteration of specifications. As things stand, it appears that the Plaintiff was to supply the banners as originally specified, there being no indication that the Defendant initiated the alterations of artwork on the banners.
42. In any event, nothing stopped the Plaintiff from supplying the remainder of the banners as originally contracted when the Defendant allegedly failed to respond to their requests considering the time sensitive nature of the tender contract. It is relevant that the tender contract was performed during the dispensation of *Public Procurement and Asset Disposal Act*, 2005 which has since been repealed by *Public Procurement and Asset Disposal Act* No 33 of 2015. The Defendant argued that the Plaintiff failed to tender evidence of variation of the terms and conditions of the contract were undertaken as required by Section 47 of the repealed statute and Clause 7 of the tender contract.
43. Section 47 of the *Public Procurement and Asset Disposal Act* 2005 (repealed) provided that; -
 - ' An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if—
 - a. The amendment has been approved in writing by the tender committee of the procuring entity;



- b. Any contract variations are based on the prescribed price or quantity variations for goods, works and services.'

44. He who alleges must prove, and the two letters tendered by the Plaintiff appear inadequate to shore up the Plaintiff's allegation that the Defendant altered the artwork prior to the supply of the second lot of banners and therefore its failure to supply. This court upon reviewing the material tendered by PW1, finds that the alleged variation of artwork by the Defendant was not proved. Consequently, the Plaintiff was at all material times at liberty to supply the remainder of the banners as initially contracted. While the Third-Party Company did not adduce any evidence at the trial, it appears likely that given the action taken by the said party as described by DW1, and if the Defendant's evidence on the counterclaim is accepted, that the Plaintiff and the Third Party Company may have fallen out by the date of P.Exh. 6, hampering the ability of the Plaintiff to perform its part of the contract with the Defendant. Could P. Exh.6 been a mere red herring by the Plaintiff to obfuscate matters?
45. Regarding the alleged breach of the tender contract by the Plaintiff, DW1 stated that mid contract it was revealed to the Defendant by the Third-Party Company's representative that the contract been subcontracted to the Third-party company. That in proof of the assertion, the representative proffered DExh.3. PW1 in his oral evidence admitted but attempted to justify the Third-Party Company involvement in the tender. He further attempted to impeach DExh.3, on grounds, not that it was not executed between the parties therein, but rather that that the same was intended to be confidential by dint of DExh.2, the non-disclosure agreement. And that, DExh.3 was un-procedurally procured by the Defendant. DW1's evidence was that both DExh.2 & DExh.3 were brought to their attention by Third Party Company.
46. Pursuant to DExh.3, the goods to be supplied to the Plaintiff were enumerated as follows; -
- ' 7. Project Costs
- The quantities requested 25,000 banners. Banner specifications: 3x1 metre with 10 eyelets on 510gsm PVC material. Unit cost per banner: Kshs 1,250. Total Project Cost (25,000x1250) = Kshs 31,250,000 (Thirty one million two hundred fifty thousand only)
- The above prices are inclusive of 16% VAT
- The Client will order 7250 banner initially with the order for the balance of 17750 being given subject to satisfactory delivery of the first batch under these terms.' (sic)
47. Clause 3 of PExh.2 clearly provided for the fact that 'The contractor shall not give, bargain, sell, assign, sublet or otherwise disposed of the contract or any part thereof or the benefit or advantage of the contract or any part thereof without the previous consent in writing of the commission'. Evidently, the Plaintiff's plea concerning the propriety of the Defendant's reliance on DExh.3 does not avail much in this instance, as the Defendant was not a party to the non-disclosure agreement between the Plaintiff and the Third-Party Company.
48. Significantly for this case, the admitted execution of the said agreement by the Plaintiff amounted ex facie to subcontracting or assigning of the contract (PExh.2) between the Plaintiff and the Defendant. Notably, items to be supplied in PExh.2 were charged in DExh 3 at a relatively lower unit price of Kshs 1,250 per banner suggestive of a profit motive and/or inability on the part of the Plaintiff to carry out the tender contract. Whatever the reason, this court agrees with the Defendant that the Plaintiff



breached the tender contract by subcontracting or re-assigning performance of the same to the Third-Party Company.

49. As to the formal action consequently taken by the Defendant, the evidence is none too clear. Clause 5(i) of the tender contract provides that 'in case the contractor/supplier shall be in breach of any of the terms and conditions of the agreement the contractor/supplier shall be deemed to have failed in due performance of the contract and the commission shall be at liberty by notice in writing or otherwise to determine the contract, but without prejudice to the commissions rights of retention and recovery in respect of any loss or damages sustained'.
50. As earlier observed, the Plaintiff was in breach of the Clause 3 of the contract, and the contents of its letters of January 16, 2013 and that of January 17, 2023 (both in PExh.6) , the latter which came after a meeting of the parties a day earlier, appear to betray awareness that the Defendant was not going to proceed with the tender contract in respect of the remainder of the 8,500 banners that were yet to be supplied.
51. Clause 5 (i) reserved the Defendant's right of the Defendant to terminate the contract either by notice in writing or otherwise. It seems possible that in the initial meeting held on January 16, 2013, the Defendant's intention to cease contractual obligations in respect of the tender contract may have been conveyed to the Plaintiff which may on its part have conveyed the fact that it had financially committed itself to supplying the remainder of the banners to the tune of Kshs 20,825,000/-.
52. Hence the tone of the Plaintiff's letters after January 17, 2013 in PExh.6. It seems therefrom that the Plaintiff had accepted its karma and was pleading for some future favourable consideration in respect of a different contract of supply. The letter, was garnished with a feeble demand for consideration of payment of advance commitments in respect of the outstanding banners, and stated in part that:
- ' We note that another tender was awarded for similar banners, and we appreciate your commitment that the commission will give us alternative business to shield and mitigate against our loss, as you may have duplicated the order and issued it to another supplier.'
53. The above findings should dispose of the Plaintiff's claim, but even if the Plaintiff had made out its case, it is doubtful that the court would have found the Plaintiff entitled to general damages and further damages pleaded in the sum of 20,825,000/-. As a rule, general damages do not issue for breach of contract. The Court of Appeal in Kenya [*Tourist Development Corporation v Sundowner Lodge Limited \[2018\] eKLR*](#) held that:-
- ' As a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi vs Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa JA expressing the view that such an award would amount to duplication'
54. An injured party would however be entitled to special damages in respect of actual loss suffered as a result of the breach. In Anson's Law of Contract, 28th Edition at Pg 589 - 590, it is stated: -
- ' Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal'.



55. However as held *Hahn -v- Singh [1985] KLR 716*:

' Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.'

56. The Plaintiff's claim for the sum of Kshs 20,825,000/- echoed the contents of the letter dated January 17, 2013 (in PExh.6). It read in part as follows:-

' We note that another tender was awarded for similar banners and we appreciate your commitment that the commission will give us alternative business to shield and mitigate against our loss, as you may have duplicated the order and issued it to another supplier.

While we concur that you need to deliberate on the way forward, your assistance that you will compensate us with another order in lieu of the balance of banners valued at Kshs 20,625,000.00 (read Twenty Million Six Hundred and Twenty Five Thousand Only) is welcome.' (sic)

57. Firstly, financial commitment for the amount claimed was not demonstrated. Secondly, the Plaintiff did not demonstrate expenditure of Kshs 20,825,000/- either by way of payment of the prospective supplier and or purchase of the requisite material for the banners. Thirdly, the Plaintiff appeared alive to the fact that the tender contract was not going to be performed as agreed and was thus soliciting further business in order to recoup the claimed balance on the initial contract. What then was the justification for claiming the sum of Kshs 20,825,000/- if there was no actual expenditure of the amount? The court, having reviewed the totality of the evidence tendered by the Plaintiff finds no proof of work done in respect of the demand for Kshs 20,825,000/-.

58. Regarding the Defendant's counterclaim against the Plaintiff, the court has already elaborately addressed the contract in question. Arising from the earlier analysis of alleged breaches of the contract, it was the court's finding that the Defendant did not breach the tender contract on its part, whereas the Plaintiff breached the same by subcontracting and or assigning it to a Third-Party Company. The question that begs is whether the Plaintiff's actions were deceitful and occasioned the Defendant any loss.

59. It is settled that the tort of deceit involves the making of a misrepresentation with the express intention of defrauding a party, subsequently causing loss to that party. Deceit takes the form of misrepresentation and more often, fraudulent misrepresentation. And fraudulent misrepresentation is the act of making an intentional or reckless misrepresentation of fact or opinion with the intention to induce a party into action or inaction on the basis of that misrepresentation. The Defendant at paragraph 21 of the counterclaim averred as follow:-

' 21. In furtherance to the contents of paragraph 20 hereinabove the fraudulent misrepresentation by the Defendant to the counterclaim constitutes deceit and the Defendant to the counterclaim is therefore culpable for damages.

Particulars of deceit by Defendant to the counterclaim

a. The defendant to the counterclaim knowingly and or without belief in its truth and or recklessly misrepresented to the defendant that it would not give and or bargain and or sell and



or assign and or sublet and or otherwise dispose of the subject contract without the written consent of the Defendant

- b. The defendant to the counterclaim knowingly and or without belief in its truth and or recklessly misrepresented to the defendant the fact that it had the capacity to deliver the subject banners when it lacked such capacity.'

60. The Defendant's claim of deceit as against the Plaintiff is two pronged. Firstly, it is premised on the Plaintiff's act of misrepresenting it had the capacity to fulfil the contract and concurrently, the fact that it would not sublet and or assign the contract to a third party.
61. On the latter, this court already found that the Plaintiff's action of subcontracting and or assigning the tender contract by dint of DExh 2 and DExh.3 constituted a material breach of Clause 3 of PExh.2 and thus entitling the Defendant to terminate the contract. Based on the evidence of DW1 and perusing DExh 2 & 3 and considering PW1's inept response thereto, it appears more likely than not that at the execution of the agreement with the Defendant, the Plaintiff already had the Third-Party Company waiting in the wings to carry out the obligations sub-contracted to it. And perhaps, the inability of the Plaintiff to supply the balance of the banners to the Defendant was due to a dispute between the Plaintiff and the Third-Party Company over payment in respect of the first batch of banners, as evidenced by the Third Party's inquiries and disclosures to the Defendant.
62. It is believable, as asserted by the Defendant, that the centrality of the clause prohibiting subcontracting of the tender lay in the sensitivity of the electoral material (and process), and the observance of timelines of the imminent general election. Thus, the clause was an important term of the contract. It appears that while the Plaintiff represented to the Defendant that it would be the company responsible to carry out the terms of the contract, hence inducing award of the contract to itself, this representation was patently false, regardless of whatever capacity the Plaintiff possessed at the time. Evidently, the Plaintiff's execution of the non-disclosure agreement with the Third-Party Company was intended to conceal the Plaintiff's misrepresentations to the Defendant. This is deceit, a tort.
63. According to RF V Heuston , Salmond on the Law of Torts (17th ed 1977) p.387:
- ' The tort of deceit consists in the act of making a willfully false statement with the intent that the plaintiff shall act in reliance on it, and with the result that he does so act and suffers harm in consequence. There are four main elements in this tort:
- (1) There must be a false representation of fact; (2) the representation must be made with knowledge of its falsity; (3) it must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in in damage to him; (4) it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing'.
64. The same cannot be said of the former ground as particularized by the Defendant at paragraph 21(b) of the amended Defence and Counterclaim reproduced above; there was no firm evidence in proof of the averments regarding want of capacity by the Plaintiff to perform the contract, beyond surmises.
65. Moreover, the Defendant did not demonstrate, beyond the necessity of procuring a new supplier, the specific damage incurred as a result of the Plaintiff's breach of contract and deceit such as expenses incurred in procuring the new supplier. The potential risk associated with the unauthorized subcontracting of the tender to the integrity of the electoral material, though probably obvious, is difficult



to quantify. However, a claimant who has not, in fact, suffered any loss by reason of a breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal as stated in Anson's Law of Contract, 28th Edition. The Plaintiff therefore cannot escape liability and the Court will award the Defendant a nominal sum of Kes 100,000/- by way of nominal damages for breach of contract and deceit.

66. The upshot is that the Plaintiff's suit is dismissed with costs to the Defendant while the Defendant's counterclaim is allowed, and judgment entered for the Defendant against the Plaintiff in the sum of Kes 100,000/- (One Hundred Thousand). The Defendant is also awarded the costs of the counterclaim and interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Makori

For the Defendant: Mr. Lwanga h/b for Mr. Mukele

C/A: Carol

