



Sambeat Investment Limited v National Social Security Fund Board of Trustees (Civil Suit E265 of 2020) [2023] KEHC 19178 (KLR) (Commercial and Tax) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E265 OF 2020**

EC MWITA, J

JUNE 16, 2023

BETWEEN

SAMBEAT INVESTMENT LIMITED PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . DEFENDANT

JUDGMENT

Background

1. In May 2017, National Social Security Fund (NSSF) advertised a tender (No. 16/2016-2017), for supply, installation, testing and commissioning of three new generators 150KVA, 500KVA and 630 KVA at its premises in Social Security House, Nairobi for Kshs. 43,747,400.
2. Sambeat Investment Limited (Sambeat) won the tender and signed the contract on 17th October 2017. Sambeat delivered the three generators on 14th August 2018 and went ahead to install the 150KVA generator.
3. On 5th December 2018, NSSF sought assistance from the State Department of Public Works of the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development (Public Works) to supervise implementation of the project. On 25th January 2019, Public Works personnel conducted load test capacity for the 500KVA and 630 KVA generators in the presence of representatives from both NSSF and Sambeat.
4. The load test report was submitted to NSSF through letter dated 26th February 2019. The report confirmed that load tests on the two generators were satisfactory and could support the load capacity of the areas to be served. The report also confirmed that the 150KVA generator was not tested because it had already been installed and was supporting NSSF's critical load in the data centre.



5. On 5th March 2019, NSSF forwarded a copy of the report to Sambeat and instructed Sambeat to proceed and install the remaining generators. NSSF also sought a proposed work plan which Sambeat submitted on 19th March 2019. Sambeat requested for partial payment of 50% of the contract sum (Kshs. 21,873,700) to enable them proceed with the works.
6. Meanwhile, NSSF appointed an Inspection and acceptance committee (acceptance committee) in accordance with section 48 of the Public Procurement and Assets Disposal Act (PPADA) and clause 5.2 of the contract. The committee inspected the generators to ascertain their conformity with the accompanying documents. The committee issued a report on 8th April 2019 recommending rejection of the generators because they were counterfeit.
7. On 28th August, 2019, NSSF notified Sambeat that the generators had been rejected. Sambeat was to uninstall the 150KVA generator, re-install the old generator and take away the three generators within three weeks at its cost. NSSF gave Sambeat two months to supply correct generators as specified in the contract.
8. On 5th September 2019, Sambeat requested for reasons for the rejection of the generators. NSSF responded on 23rd September 2019 pointing out the findings of the acceptance committee regarding discrepancies between details in the generators and alternators from those contained in the accompanying documents.
9. In some instances, the engine and alternator had similar serial numbers despite being manufactured by two different companies. Some serial numbers for the generators did not match those in the manufacturer's certificates. NSSF's inquiries from Ente Certificazione Macchine (ECM) the company that handled the testing and certification of the generators revealed that the certificates were fake and counterfeit.
10. Similarly, NSSF's request to Orksa Jenerator, the manufacturer of the generators, to verify the certificates was turned down. In the email dated 21st April 2019, Orksa declined to verify the certificates, stating that although they manufactured 150KVA Ricardo, there was no 500KVA Ricardo and 630 KVA Ricardo. The correct make was 500KVA KangWoo and 630KVA KangWoo. Orksa stated that the right documents would be sent.
11. Faced with this situation, NSSF sought a second opinion from Public Works concerning the matters raised in the acceptance committee's report. Public Works responded through letter dated 7th April 2020 confirming that the generators were not genuine and they did not meet the contract specifications.
12. On 12th May 2020, NSSF issued a notice terminating the contract. In response, Sambeat's advocates issued a demand letter dated 28th May 2020 calling for payment which did not elicit a positive response, precipitating institution of this suit.

Plaint

13. By amended plaint dated 13th January 2021, Sambeat sought judgment for Kshs. 36,748,000 with interest at commercial rates from 9th August 2018 until payment in full; special damages of Kshs. 15, 493,778.1 with interest at commercial rates from date of filing suit until payment in full; special damages of Kshs. 4,614,498.23 for loss of business opportunities with interest at commercial rates from date of filing suit until payment in full; general damages for loss of business with interest at court rates and general damages for breach of contract with interest at court rates, costs of the suit and interest.



Sambeat further claimed Kshs. 500,000 in lieu of the uninstalled 150KVA generator which it was to buy and whose price had been subtracted from the contract sum.

14. Sambeat's case was that the 150KVA generator had been installed on NSSF's instructions; was fit for the purpose and was in use.
15. Regarding the delay in installing the 500KVA and 630KVA generators, Sambeat averred that the delay was caused by NSSF which had asked that they wait for uninstallation of the old generators.

Evidence

16. Sambeat called Peter Mari Njuguna, (Mr. Njuguna) who adopted his witness statement as his evidence and produced the two bundles of documents as exhibits 1-35 and 36-45, respectively.
17. Mr. Njuguna confirmed that the generators were to be inspected by NSSF but was not informed of the Inspection committee until after the generators had been rejected. Mr. Njuguna admitted that NSSF asked Sambeat through letter dated 15th May 2020 to uninstall the 150 KVA generator and collect the three generators but Sambeat did not.
18. Mr. Njuguna asserted that the generators met the tender specifications and were accepted on 5th March 2019 through acceptance report from Public works that was sent to Sambeat.
19. According to Mr. Njuguna, Sambeat complained about the second opinion from Public Works because it was not only sought more than one year after delivery of the generators, Sambeat was also not notified or involved when the second opinion was sought. That was why Sambeat declined to uninstall and take away the generators.

Defence

20. NSSF filed an amended statement of defence denying Sambeat's claim. NSSF's averred that the generators were to be delivered, installed, tested and commissioned within 14 weeks after the signing of the contract. Although the generators were delivered on 14th August 2018 and load test done on 25th January 2019, the acceptance committee found the generators non-compliant and advised that they be rejected.
21. The acceptance committee found that the generators did not meet tender specifications and the accompanying certificates were counterfeit or fake. Sambeat was given two months to supply generators that were in conformity with the contract or get proper documents but did not.
22. NSSF denied accepting the generators and contended that the load test report of February 2019 was done to confirm if the generators could sustain the load but not whether they conformed with the tender specifications.
23. NSSF denied that Sambeat discharged its contractual obligations given that it failed to perform its part of the contract. NSSF maintained that Sambeat was estopped from relying on the doctrine of legitimate expectation to advance its case. NSSF again denied instructing Sambeat to carry out routine maintenance of the 150KVA generator. NSSF further denied Sambeat's claim for the Kshs. 500,000 for the old 150KVA generator given that all the generators were rejected.

Evidence

24. Rosemary Oluoch, (Ms. Oluoch), the procurement manager adopted her witness statement and produced the bundle of documents as defence Exhibits 1-12. Ms. Oluoch stated that Sambeat delivered the 3 generators, uninstalled the old generator and installed the 150KVA generator. Sambeat was also



- to take the old generator if the new generators were accepted. The generators were however rejected because they did not meet tender specifications.
25. Ms. Oluoch admitted in cross examination, that the 150KVA generator had been installed and was still in use; that the old 150 KVA generator was released to Sambeat; that the acceptance committee issued its report on 8th April 2019, but she could not tell when the inspection was carried out; that the report did not show that Sambeat was represented during inspection; and that she was not aware if Sambeat was notified of the inspection and acceptance committee.
 26. Ms. Oluoch also admitted that although the tender document gave technical specifications, it did not specify the brand of generators to be supplied.
 27. Regarding the claim that the generators were counterfeit, Ms. Oluoch admitted that there was no document to show that the certificates were counterfeit except the emails.
 28. According to Ms. Oluoch, NSSF received an email from Orksa confirming the identity of the generators with some corrections on their details and stated that correct documents would be sent but she was not aware if the documents were actually sent.
 29. Ms. Oluoch pointed out that on 2nd February 2019, NSSF received an email from ECM, stating that the certificates were fake and counterfeited. She could not, however, confirm that the generators supplied had the same numbers as in the letter dated 13th June 2019 from Yildrim Makine. Ms. Oluoch also admitted that the second opinion from Public Works dated 7th April 2020 in response to NSSF's letter of 18th March 2020.
 30. Ms. Oluoch clarified that Sambeat was responsible for uninstalling the generators before installing the new ones.

Submissions by Sambeat

31. Sambeat asserted through written submissions that the report from Public Work indicated that the load test results compared well within the factory test result. The maximum current attained was acceptable and the conclusion was that the generators could support load capacity for the area they were to serve.
32. The load test also found that the fuel tanks had enough capacity to enable the generators run for the specified eight hours at full load. The report further confirmed that the 150 KVA generator was not tested because it was already in use supporting critical load.
33. Relying on section 20 of the *Sale of Goods Act*, Sambeat argued that the property in the three generators passed to NSSF once the 150 KVA generator was received and installed. The property in the 500KVA and 630KVA generators also passed once they were tested and approved thus, NSSF was liable to pay for them.
34. Sambeat took the view that under section 28 of the *Sale of Goods Act*, it was NSSF's duty to accept and pay for the goods in accordance with the contract of sale. Under section 29 of the Act, delivery and payment are concurrent conditions.
35. Sambeat urged that by continuing to use the 150KVA generator to carry its critical load, writing the letter dated 5th March 2019 confirming acceptance of the 500KVA and 630KVA generators, NSSF was deemed to have accepted the generators and was, therefore, bound to pay for them.
36. Sambeat also relied on sections 39(1)(a) and 49(1) of the *Sale of Goods Act* to assert that as an unpaid seller it could maintain an action for the price of the goods supplied.



37. Sambeat cited the decision in Isaac Mugweru Kiraba t/a Isamu Retri-Electricals v Net Plan East Africa Ltd (Civil Suit No. 473 of 2011) [2018] eKLR for the proposition that a seller who claims for the price of goods ought to succeed if he proves delivery at an agreed or reasonable price and no known defence is set up by the buyer.
38. Sambeat again cited the decision in Maxam Limited v Heineken East Africa Import Company Limited & another (Civil Case No. 29 of 2016) [2019] eKLR that legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage.
39. Sambeat submitted that it would be unlawful for NSSF to use the generator for about four years and continue using it while the proceedings were ongoing and still hold the position that it is not pay for the generators.
40. To support the claim for special damages for lost business opportunities and interest on unpaid loans, Sambeat relied on the report by Mella-Aling & Associates dated 11th July 2020. Sambeat urged that the suit be allowed as prayed.

Submissions by NSSF

41. NSSF submitted that the generators did not meet specifications and the accompanying documents were counterfeit/fake, a fact Sambeat did not controvert.
42. NSSF contended that the contract was legally and legitimately terminated because of breaches. For that reason, Sambeat's claims are misconceived.
43. NSSF relied on African Highlands Produce Ltd v Kisorio (Civil Appeal No. 264 of 1999) [2001] 172 for the position that it was Sambeat's duty to take all reasonable steps to mitigate the loss suffered, if any, in respect of which it had sued.
44. NSSF again relied on David Bagine v Martin Bundi (Civil Appeal No. 283 of 1996) [1997] eKLR that special damages must be pleaded and strictly proved. NSSF urged that the suit be dismissed with costs.

Determination

45. I have considered the evidence, exhibits produced and arguments by both sides. The issues that arise for determination are; whether Sambeat discharged its obligations under the contract; whether NSSF was right in terminating the contract and whether Sambeat is entitled to the reliefs sought.

Discharge of obligations under the contract

46. Sambeat argued that it discharged its obligations under the contract and supplied the generators. Sambeat blamed NSSF for conducting inspection late and without being involved. Sambeat relied on sections 20, 28 and 29 of *Sale of Goods Act* to support its position that goods had been delivered and was entitled to be paid. NSSF on its part argued that Sambeat did not discharge its obligations and was not entitled to payment.
47. Sambeat was to supply, deliver, install test and commission three generators, 150 KVA, 500KVA and 630KVA 3 face 415v,50Hz) at NSSF's premises. The contract was signed on 17th October 2017 while the three generators were delivered on 14th August 2018.
48. The 150 KVA generator was installed before the load capacity test or inspection. The other two generators (500KVA and 630KVA) were tested for load capacity by Public Works on 25th January 2019.



- Their load capacity was found to be satisfactory. The load capacity for the 150KVA generator was, however, not tested because the generator had already been installed and was in use supporting critical load (data) which could not allow disconnection for purposes of testing.
49. The acceptance committee was formed and after inspecting the generators, it recommended their rejection because the generators did not meet tender specifications and certificates accompanying the generators were found to be counterfeit or fake. for those reasons, NSSF terminated the contract.
 50. Sambeat argued that it had discharged its obligations under the contract and faulted NSSF for unlawfully terminating the contract even though generators delivered met terms of the contract.
 51. I have gone through the evidence, and exhibits produced in this case. The contract was for supply, installation, testing and commissioning of three generators at NSSF's premises. Sambeat delivered the three generators on 14th August 2018 and had the 150KVA generator installed. The 500KVA and 630KVA generators were not however installed.
 52. A load test was conducted on the 500KVA and 630KVA generators with the result that they could sustain the load capacity. Load capacity test was not conducted on the 150KVA generator because it had already been installed and was supporting critical data.
 53. The load test report was sent to NSSF which in turn wrote to Sambeat on 9th March 2019 referring to that load test report and instructed Sambeat to proceed with installation of the generators, even though the 150KVA generator had already been installed by the time load test was done. NSSF asked Sambeat to provide a work plan with regard to installation of the generators. There was no evidence that the two generators were installed.
 54. There is no denial that the Public Works personnel only conducted load test on two generators and nothing more. In other words, the test was not on whether or not the generators met tender specifications but rather whether they could sustain the load capacity as per the tender document. That was why the report on the load test which NSSF forwarded to Sambeat in the letter dated 9th May 2019 from NSSF was clearly headed "Generators Load Test Report."
 55. It is also clear from the evidence on record and documents produced, that the acceptance committee had not inspected the generators prior to the installation of the 150KV generator. The committee was formed after the generators had been delivered, one of them installed and load test done. That is why Sambeat argued that the inspection had been done after several years and after installation of one generator.
 56. It was the acceptance committee that raised issues regarding the authenticity of the documents accompanying the generators and concluded that the generators did not meet tender specifications, thus were for rejection. Following the committee's recommendation, NSSF sought a second opinion from Public Works and was informed that the generators did not meet tender specifications.
 57. Based on that opinion, on 28th August 2019, NSSF informed Sambeat that the generators did not meet tender specifications. The contract was terminated on 12th May 2020. Sambeat was given 2 months to supply and deliver suitable generators.
 58. Sambeat took issue not only with the acceptance committee but also the second opinion from Public Works, noting that it was neither notified of the inspection nor the second opinion. Sambeat argued, therefore that the termination of the contract was unlawful.
 59. According to the documents, the contract was executed on 17th October 2018 while the generators were delivered on 14th August 2018. Load capacity test was conducted for two generators on 25th January



2019 in the presence of representatives from Sambeat and NSSF. As already alluded to, one generator had been installed prior to the load test and inspection and was in use.

60. The case for NSSF is that the committee was established in accordance with section 48 of the *Public Procurement and Asset Disposal Act* (PPADA) and clause 5.2 of the contract. The acceptance committee found that based on the accompanying documents, the generators were counterfeit.
61. Section 48 of PPADA provides that the accounting officer of the procuring entity may establish an inspection committee and the section goes ahead to enumerate the mandate of the committee.
62. Section 48(4) (d) states that the committee shall “ensure that all required manuals or documentation has been received.” The section does not require presence or representation of the contractor, in this case, a representative from Sambeat.
63. Cause 5.2 of the contract states as follows:

The generators supplied by the contractor shall be received subject to the client’s inspection and approval within a reasonable time after delivery. If the specifications or warranties are not met, the generators shall be returned at the contractor’s expense.
64. The contract was clear that NSSF had the right to inspect the generators and accept/approve them within a reasonable time. The contract did not also require Sambeat’s representation during such inspection.
65. The acceptance committee inspected the generators and, in particular, the accompanying documents and determined that the documents were counterfeit. Sambeat’s argument is that inspection took place long after the generators had been delivered and one of them installed and was in use.
66. The contract stated that inspection would be done within a reasonable time after delivery. No specific timeline was set by the contract. Use of the word “reasonable time” in the contract must be read and understood to mean the necessary expertise required taking into account the nature of the goods supplied or delivered and the depth of the inspection.
67. In the present case, what were delivered were generators which required technical knowhow and experience for purposes of a meaningful inspection which NSSF may not necessarily have.
68. The generators were delivered on 14th August 2018 while load capacity test was done on 25th January 2019 with the assistance of personnel for Public Works. Thereafter, the acceptance committee was established, inspected the generators and issued a report dated 8th April 2019. It was the acceptance committee that was to check and verify documentation as required by section 48(4)(d) of PPADA.
69. The inspection identified the issues that formed the basis for recommending that the generators be rejected. Taking these factors into consideration and the nature of inspection and expertise required, the period between delivery of the generators and inspection cannot be said to have been unreasonable.

Were the documents genuine

70. In determining whether Sambeat complied with its obligations under the contract, one has to determine whether the documents accompanying the generators were supplied.
71. The tender document did not specify the brand of generators to be supplied and delivered. The decision on the brand, was left to Sambeat. However, whichever brand to be delivered, the supporting documents such as certificates and manuals, had to be genuine and unquestionable. The core of the



dispute in this suit centres on the genuineness of the certificates accompanying the generators that were delivered.

72. The documents relating to the generators that Sambeat submitted showed that the manufacturer of the generators was Orksa Jenerator. According to the certificates the 150 KVA generator was Ricardo-HC1-44E, Serial No. 17080c. The certificate for the 500KVA generator showed that it was Ricardo-HC1544D, Serial No. AZ1500012, while the 630KVA generator was Ricardo-HC1544E, Serial No. 541S-D
73. On 19th April 2019, Mr. Mati Bonventure of NSSF sent an email to Orksa Jenerator requesting them to verify the authenticity of the certificates for the three generators. Orksa replied on 21st April 2019 through Teoman Orgun stating: “We do not verify these documents. There is no 500KV Ricardo. It is 500KV KangWoo. There is also no 630 KV Ricardo. It is 630KV KangWoo. 150KV Ricardo is true but the alternators for all powers are not Stamford...” The email stated that the right documents will be sent “to you”-meaning NSSF since the inquiry had come from NSSF.
74. On 2nd February 2019, another email was sent by Andrea Sacchi of ECM to Mr. Mati conveying the message that the certificates for the generators were fake and counterfeit. The email requested for the name and contact of the person or organisation that provided those certificates.
75. During the hearing, Sambeat did not deny that there were discrepancies in the certificates produced regarding the generators. Sambeat produced a letter dated 13th June 2019 from Yildirim Makine as confirmation that the generators had been properly sourced from Orksa. There is also another undated letter from Orksa stating that they were the manufacturers of the generators and gave what would be the correct details of the Generators.
76. It is significant to note, that the letter was addressed to NSSF but was undated. No reason was given on whose instructions the letter was addressed to NSSF and why, given that NSSF was not directly dealing with Orksa with regard to procurement of the generators. The letter also stated that certificates had since been supplied to Yildirim Torna, again an entity not known to NSSF. Sambeat did not produce those certificates and no reason was given for the failure to do so if indeed those certificates were available.
77. Sambeat’s duty under the contract was to supply, deliver, install, test and commission the three generators. The generators had to meet technical specifications which could be supported by documents such as the certificates accompanying those generators and manuals. The authenticity of the certificates was, however, shown to be questionable given the revelation from Orksa that the 500KVA and 630KVA generators they manufactured were KangWoo and not Ricardo. Although Orksa confirmed that they manufacture 150KVA Ricardo generator, it stated that alternators for all the generators were not Stamford, raising further questions.
78. The witness from NSSF admitted that the tender document only gave technical specifications (load, fuel capacity and hours the generators could run) but not the type and model. That notwithstanding, Sambeat had an obligation to supply, deliver, install, test and commission generators whose identity and authenticity could be verified through documentation.
79. The evidence and documents produced showed that Sambeat did not discharge its obligations under the contract. The specifications of the generators delivered could not be confirmed by the documents supplied and produced in court. For instance, it was not clear whether the 500KVA and 630KVA generators delivered were Ricardo as the certificates showed or KangWoo as Orksa stated in the emails. There was also the issue of the type of alternators and why serial Numbers for engines and alternators



were in some cases shared. I therefore find and hold that Sambeat did not discharge its obligations to supply and deliver generators that were identifiable and verifiable in accordance with the contract.

Whether the contract was properly terminated

80. Sambeat submitted that NSSF unlawfully terminated the contract. The argument was that the generators having been delivered and accepted, the termination of the contract was unlawful. NSSF took the view, that the contract was properly terminated because the generators did not meet tender specifications.
81. The court has already held that the authenticity of the certificates was questionable and so were the generators supplied. This was because the acceptance committee identified unexplained discrepancies in the certificates and, as a result, recommended that the generators be rejected.
82. NSS communicated the decision to reject the generators to Sambeat and gave reasons for the rejection in the letter dated 23rd September 2019, NSSF pointed out discrepancies detected by the acceptance committee.
83. According to the report, the generators delivered did not match with the brochures and data documents. NSSF also pointed out that the engine and alternator for the 500KVA generator had identical serial numbers even though they were manufactured by different companies. The serial number for the alternator for 630KVA generator was also found to be identical to the serial number for the engine for 150KVA generator. Further still, the serial numbers for 150KVA and 630KVA generators did not match with what was in the manufacturers certificates for those generators. All these brought to question the authenticity of the certificates for the three generators and no doubt, the generators themselves and the reason for termination of the contract.
84. I have perused the acceptance committee's report dated 8th April 2019. The report noted that even though the generators' engines and alternators were manufactured by different companies, (Orksa and Cummins respectively), the 500KVA generator's engine type HC1544D was identical to alternator type HCI544D. Both had serial No. AZ1500010012.
85. The 630KVA generator's engine had serial no. S4L1S-D while the alternator's serial no. was 170808C. The serial number for the alternator given in the certificate was S4L1S-D. The 150KVA generator's engine had serial no. 170808C which was also the serial number for the alternator in the 630KVA generator. The serial number for the alternator was 030145/218 yet the certificate had serial number 170808C for the alternator.
86. The report further noted that Sambeat did not submit/provide Kenya Bureau of Standard's certificate of compliance. The report stated that attempts to verify the authenticity of the certificates revealed that they were counterfeit and fake. Those anomalies and discrepancies led to the recommendation that the generators be rejected for not meeting technical standards.
87. The issues raised in the inspection report regarding the authenticity of the certificates were not idle in so far as they related to the genuineness of the generators that were delivered. Although Orksa, the company that was said to have manufactured the generators, confirmed existence of 150KVA Ricardo, it pointed out that they manufactured 500KVA KangWoo and 630KVA KangWoo and not Ricardo in those two categories.
88. The documents accompanying the generators showed that 500KVA and 630KVA were Ricardo, which according to the supposed manufacturers, was not the case thus casting doubt on the make of the 500KVA and 630KVA generators.



89. In that respect, the brand of generators Sambeat delivered, whether Ricardo as shown in the documents or Kangwoo as stated by the would be manufacturers, remained unverified.
90. Taking all these into account and the fact that this was a contract where Sambeat had the sole discretion to decide which generators to deliver, I am satisfied that Sambeat did not perform its obligations under the contract. This was a fundamental non-performance which entitled NSSF to terminate the contract.
91. In the premise, NSSF was right in rejecting the generators since their brands were neither identifiable nor verifiable. The supporting documents could not also be authenticated. Absence of documents to confirm the brand of generators delivered, would substantially deprive NSSF the right to the warranties it would be entitled to under the contract were the generators to be accepted.

Whether to pay

92. Sambeat advanced the argument that having performed its obligations under the contract, the contract sum should be paid. Sambeat relied on the provisions of the *Sale of Goods Act* to support its position regarding payment.
93. The contract the parties executed was governed by the provisions of PPADA. Section 48 of PPADA and clause 5.2 of the contract permitted inspection of the generators before they were accepted or rejected. Delivery could not be complete before inspection and acceptance by NSSF as the procuring entity.
94. Although a load capacity test had been conducted, it was in respect of a component only of the generators, namely; whether the generators could cope with the load capacity. Inspection of the other aspects of the generators, including documentation, had to be completed later.
95. The acceptance committee was formed by the procuring entity and not outsiders (Public Works or Sambeat). The acceptance committee was thus formed to inspect the generators for purposes of accepting or rejecting them.
96. The contract was not about one component of delivery of the generators only. Sambeat was also to install, test and commission the generators. Final payment would therefore be made once commissioning of the generators had been successfully completed.
97. It is also plain that only one generator was installed before the inspection and rejection. In that respect, Sambeat cannot argue that since the generators had been delivered and were on site, it should be paid the full contract sum before installation, testing and commissioning of all the generators had been completed.
98. It is also true that Sambeat delivered and installed the 150KVA generator and it has been in use for some time now. The court would have ordered that the amount covering delivery and installation of this particular generator be paid. However, there is the issue of the authenticity of the certificates, particulars of the engines and the alternators which raises questions on the genuineness of the generator that was delivered and installed. This is a critical component for purposes of warranties in case of manufacturer's defects.
99. It was in this respect that clause 5.2 of the contract stated that the generators supplied would be received subject to inspection and approval. If the specifications or warranties were not met, the generators were to be returned at Sambeat's (contractor's) expense, meaning if the generators were to be rejected.
100. One of the aspects the acceptance committee was to check was documentation. Section 48(4) (d) of PPADA required the acceptance committee to ensure that all required "manuals or documentation"



had been received. Sambeat did not comply with this obligation and could not rely on the provisions of the *Sale of Goods Act* to urge that goods having been delivered, should be paid for. In the premise, NSSF cannot be called upon to pay for generators whose supporting documents were suspect.

101. Sambeat was given an opportunity to deliver generators that complied with the technical specifications but did not. Sambeat could, in the alternative, have submitted proper certificates in support of the generators supplied but again opted not to, thus lost the opportunity to comply with the contract requirements.
102. Regarding the claim for Kshs. 500, 000 for the old uninstalled generator, the short answer to this is that the claim could only succeed if the contract had been successfully performed. This is so because the amount for the old generator was to be deducted from the contract sum. This claim could not, therefore, succeed independent of the contract.

Conclusion

103. Having considered the evidence and exhibits, the court comes to the conclusion that there was no breach of contract since Sambeat did not comply with terms of the contract.
104. Sambeat did not prove that the generators delivered were the same generators in the documents supplied. The details in the documents also differed from those in generators. Orksa, the manufacturer of the generators, denied existence of 500KVA and 630KVA Ricardo. They manufactured 500KVA KangWoo and 630KVA KangWoo. This cast doubt on the brand of generators Sambeat delivered in the two categories. The rejection of the generators and subsequent termination was justified.
105. In that respect, there would be no justification for NSSF to pay for generators that had been properly rejected for lack of proper documentation.

Disposal

106. The suit is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023

E C MWITA

JUDGE

