



**Baylem Limited v Moi Teaching and Referral Hospital (Commercial Appeal E009 of 2023)  
[2023] KEHC 23706 (KLR) (Commercial and Tax) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23706 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E009 OF 2023**

**DAS MAJANJA, J  
OCTOBER 19, 2023**

**BETWEEN**

**BAYLEM LIMITED ..... APPELLANT**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon.E.M. Kagoni, PM dated 1st March 2021 at the Nairobi Magistrates Court, Milimani in Civil Case No. 635 of 2019)*

**JUDGMENT**

**Introduction and Background**

1. Before the court for determination is an appeal filed by the Appellant that is grounded in its Memorandum of Appeal dated 18.01.2023 where the Appellant seeks to set aside the dismissal of its suit by the subordinate court in its judgment of 01.03.2021.
2. In the suit before the Subordinate Court, the Appellant sought ksh 9,414,723.47 which it claimed was the variation amount and interest arising from a tender awarded to it by the Respondent on 15.06.2011 to supply, deliver, install and commission mortuary equipment (“the Contract”). The Appellant claimed that after it delivered the equipment, it held discussions with the Respondent about the price variation of the contract by 24% due to fluctuation and change in the exchange rate of the Kenya Shilling to the Euro that occurred between January and September 2011. However, the Respondent refused to honour this request leading the Appellant to file the suit.
3. In its response, the Respondent stated it paid the Appellant the contractual sum of ksh 23,416,914.47 after the Appellant serviced the tender without reservation. The Respondent stated that it declined the



variation request as the Appellant ought to have made the variation request in December 2011 when it was issued with the Local Purchase Order.

4. The suit was set down for hearing with each side calling one witness and producing evidence. After considering the pleadings and evidence, the trial magistrate rendered the judgment on 01.03.2021. In the judgment, the court stated that although price variation was allowed under Clause 3.13 of the Contract, it was not allowed for contracts that do not go beyond the 1-year mark and that where such variation was allowed, it could not go beyond the 10% mark of the original contract price.
5. The trial magistrate further found that as per Clause 2.11 of the Contract, equipment which was sourced from Kenya ought to have been quoted in Kenya Shillings whereas equipment sourced from outside Kenya could be quoted in US Dollars or any other freely convertible currency. According to the Subordinate Court, “any other freely convertible currency” meant any currency in the world as long as it was freely convertible. That the fact that Kenyan currency cannot be converted and is taken as is when such price is quoted effectively meant that such intention of the parties did not have the Kenyan currency in contemplation since such currency could not be converted. The trial court held that such a finding meant that the Appellant’s witness, having knowledge that the equipment was to be sourced from Germany earlier on before execution of the contract effectively meant that failure to so quote the price in the currency applicable was fatal to the claim.
6. The trial magistrate held that the intention of the parties under Clause 2.11 of the Contract was to bring the notice of the institution issuing the tender the possible quotation of prices for equipment sourced from Kenya and outside and that failure to bring such notice despite clear contractual stipulation collapsed the Appellant’s claim. The trial magistrate therefore dismissed the Appellant’s suit, a decision that has precipitated the present appeal.
7. The appeal has been canvassed by way of written submissions and since the parties advance the positions I have already summarized above, I will not highlight the submissions but only make relevant references in my analysis and determination below.

### **Analysis and Determination**

8. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the [Civil Procedure Act](#) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion, a position affirmed in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123.
9. The main issue for resolution in this appeal is whether the Subordinate Court arrived at the correct conclusion both in law and fact in its finding that the Appellant was not entitled to the variation amount and interest sought in its suit.
10. It was common ground that the parties entered into the Contract and it is also not in dispute that after the Appellant performed its part of the Contract by supplying, delivering and commissioning the equipment, it issued the Respondent with an invoice based on the original contract sum but later made a request for variation of the contract price by 24% based on the fluctuation in the exchange rate of the Kenyan Shilling that occurred between January – September 2011. The Respondent declined the request for the reasons that the Appellant had already invoiced the Respondent on the original contract amount after the delivery and commissioning.
11. The trial magistrate agreed with the Respondent’s decision to decline the request for variation but disagreed with the reasoning. The trial court was guided by the terms of the Contract at Clauses 2.11 and 3.13 which provide as follows:



- 2.11 Tender Currencies
- 2.11.1 Prices shall be quoted in the following currencies:
- a. For equipment that the tenderer will supply from within Kenya, the prices shall be quoted in Kenya Shillings; and
  - b. For equipment that the tenderer will supply from outside Kenya, the prices may be quoted in US Dollars or in another freely convertible currency
  - c. Cost of installation and commissioning will be in Kenya Shillings
- 3.13 Prices
- 3.13.1 Prices charged by the tenderer for equipment delivered and installation performed under the Contract shall not, with the exception of any price adjustments authorized in Special Conditions of Contract, vary from the prices by the tenderer in its tender
- 3.13.2 Contract price variations shall not be allowed for contracts not exceeding one year (12 months)
- 3.13.3 Where contract price variation is allowed, the variation shall not exceed 10% of the original contract price
- 3.13.4 Price variation requests shall be processed by the procuring entity within 30 days of receiving the request
12. The trial magistrate concluded that based on the aforementioned provisions, the Appellant's failure to quote the price in the currency applicable was fatal to its claim especially based on the fact that it had prior knowledge that it would be importing the equipment from outside the country. Further, that the Appellant could not quote its price in the Kenyan currency since Kenya's currency could not be converted. I disagree with the aforesaid conclusion. As submitted by the Appellant, I find that the trial magistrate erred in assuming that the Kenyan currency is not a convertible currency as this is not a matter the court could take judicial notice of and was not supported by any evidence.
13. I accept the Appellant's submissions that the use of the word 'may' in Clause 2.11.1 (b) above gave the quoting party discretion of using either the US Dollar or such other convertible currency. Since there was no evidence that the Kenyan currency was not freely convertible, the Appellant could not be faulted for using it in its invoices or price quotations. I therefore find and hold that the trial magistrate erred in finding the use of the Kenyan currency in its price quotation or invoice was fatal to its claim. Further, since the Respondent admitted that it was aware that the equipment was being imported from Germany and still went ahead to pay the invoice indicates that there was nothing fatal in the Appellant quoting the price in Kenya shillings as the Respondent was amenable to the price as quoted.
14. However, this does not answer the question whether the Appellant was entitled to the variation sought. From the provisions cited above, I find that price adjustments could only be allowed as authorized in the "Special Conditions of Contract". I have gone through the said conditions and I find that fluctuations of the exchange rate are not a factor that could affect the price quoted and that there was in fact no fluctuation clause in the Contract as has been submitted by the Respondent. Such a term could not be introduced by either party or implied by court (see *B.A.T. Kenya Limited v MEA Limited* NRB CA Civil Appeal no 290 of 2000 [2001] eKLR).
15. I also find and hold that the variation could not be allowed as Clause 3.13.2 of the Contract disallowed variations for contracts not exceeding one year. In this case, the Contract was explicit on the subject period for variations and that it was for one year. Further, the variation of 24% of the contract sum



sought by the Appellant was way above the permitted contractual variation of upto 10% of the contract sum.

16. The Appellant contended that the Respondent had admitted in its evidence that the variation was tenable. I agree with the Respondent's submission that this must have been a typographical error of the proceedings as a wholistic and contextualized appreciation of the Respondent's defence indicates that it had all along declined the variation request. In any case, oral testimony cannot vary contractual provision (see *Bid Insurance Brokers Limited v British United Provident Fund* [2016] eKLR).

### **Disposition**

17. Despite my disagreement with part of the reasoning of the trial magistrate on the issue whether the Kenyan currency is convertible, I agree with the conclusion that the variation sought by the Appellant under the Contract was not permitted. I therefore dismiss the appeal. The Appellant shall pay costs of the appeal assessed at ksh 120,000.00 only.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

