



**XRX Technologies Limited v Maseno University (Civil Case 361 of 2016)
[2024] KEHC 15515 (KLR) (Commercial and Tax) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 361 OF 2016
WA OKWANY, J
DECEMBER 5, 2024**

BETWEEN

XRX TECHNOLOGIES LIMITED PLAINTIFF

AND

MASENO UNIVERSITY DEFENDANT

JUDGMENT

1. The Plaintiff herein XRX Technologies Limited (“XRX”) sued the Defendant (“the Customer”) seeking, inter alia, special damages arising out of a Facility Management Service Agreement.
2. In the Judgment delivered on 24th September 2020, this court found that the Defendant was truly indebted to the Plaintiff for the services rendered in respect to their contract. The court was however unable to determine the exact amount due to the Plaintiff and instead directed the parties to agree on a joint professional body or person to conduct an audit of their dealings from inception to the time of termination of the Agreement and to file an independent report (Statement of Accounts) for its consideration.
3. The matter was subsequently mentioned 17th December 2020 when the advocates appearing for the parties indicated that they were unable to agree on a joint expert. This prompted the court to direct that the Chairman of Institute of Certified Public Accountants of Kenya (ICPAK) appoints an auditor/accountant pursuant to the court’s said judgment of 24th September 2020.
4. When the matter subsequently came up for mention on 8th June 2022, Ms. Muthee, learned counsel for the Plaintiff, urged the court to deliver its final verdict since the expert appointed by ICPAK had filed his report on 19th January 2022. Mr. Iminza, advocate for the Defendant, on his part, opposed the report while arguing that they were not involved in its making. Mr. Iminza added that he had objected to the appointment of the expert and requested for an all inclusive report. In a rejoinder, Ms. Muthee



contended that the Defendants had refused to participate in the preparation of the report. The court then directed that the experts report be filed for its perusal.

5. As at the time that I went on transfer to Nyamira High Court sometime in October 2022, final orders had not been issued in the case. Vide an order of 20th June 2023, the Presiding Judge, Commercial and Tax Division, sent the file to Nyamira High Court for the purposes of its finalisation. I thereafter mentioned the case several times when none of the parties attended court, but when the matter came up for mention on 22nd July 2024, counsel for the Plaintiff yet again informed the Court that an expert's Report dated 19th January 2022 had already been filed for the court's consideration.
6. I have perused the report and the documents filed by the accountants appointed by ICPAK, M/s Matengo & Associates, bearing in mind the Defendant's claim that the said report was one-sided as they were not involved in its preparation. I note that the chairman for ICPAK exchanged various correspondences with the parties herein with respect to appointment of an independent auditor as follows: -
 - i. Vide a letter dated 8th January 2021, counsel for the Plaintiffs wrote to ICPAK Chairperson requesting him to appoint the expert in terms of the court order of 17th December 2020. The letter was also copied to the Defendant's lawyers Owiti, Otieno & Ragot Advocates.
 - ii. Through a letter dated 19th April 2021, ICPAK informed the parties that it had appointed CPA Robert Nyabuti Mabeya & Associates as the expert in the matter. The Plaintiff's advocates however objected to the said appointment through their letter of 5th May 2021 thereby prompting ICPAK to review the appointment through their letter of 7th August 2021 wherein they communicated the appointment of CPA Matengo of Matengo & Associates.
 - iii. Through their letter dated 17th August 2021, the Defendant's advocates wrote to ICPAK expressing their displeasure at the manner in which the expert was appointed as the auditor without their notice. The Defendant's advocates contended that while the advocates for the Plaintiff was accorded an opportunity to object to the appointment of the initial expert, they were not aware of such an appointment and only came to learn about it, in passing, through correspondence copied to them. The Plaintiff's advocates indicated that they were not agreeable to the appointment of M/s Matengo Associates as the expert and added that they will not be responsible or liable for any steps taken by the said auditor.
 - iv. ICPAK responded to the Plaintiff's objection to the auditor's appointment on 7th September 2021 and stated, in part, as follows: -

“Please note that the appointment of the two firms of accountants i.e. Robert Mabeya & Associates and Meshack Matengo & Associates by the institute have not been influenced in any way by any of you. These firms are of good standing with the institute.”
7. Ms. Matengo & Associates (the Accountants) thereafter took up their appointment by signing the Letter of Engagement and vide a letter dated 21st October 2021, addressed to the said accountants and copied to the Defendant's advocates, the Plaintiff forwarded a copy of the judgment and a schedule and bundle of documents filed in court by both parties to enable them carry out the audit exercise. In the said letter, the Plaintiff's advocates requested the Defendant's advocates to confirm if all the documents were in order.
8. On 8th November 2021, the Accountants wrote to the Defendant's advocates requesting them to avail certain documents that were missing from their schedule of the documents filed in court to



enable them complete the audit. The Defendants did not furnish the Accountant with the requested documents and in a letter dated 22nd November 2021 addressed to the Defendant's advocates and copied to the Plaintiff, the Accountant stated as follows: -

“We refer to the above matter and our previous correspondences.

Refer to our last letter dated 8th November 2021, in which we had requested for specific statements which are missing from your client's file. We have not had any feedback from your end.

We would advise you that we may have to issue our independent audit without reference to the documents that were requested from you, due to constraints of time.

Kindly therefore provide us with the missing documents in order to enable us complete the exercise.”

9. From the above narration of the sequence of correspondence leading to the preparation of the Accountant's report, it is clear that the parties herein were given an opportunity to agree on the expert to conduct an audit of their dealings and come up with a report which opportunity they squandered by failing to reach a compromise on the firm to carry out the exercise. It is on this basis that the court was left with no option but to seek the assistance of ICPAK in respect to the appointment of a suitable expert for the job.
10. Having regard to the above foregoing position, I find that ICPAK was not under any obligation to seek the concurrence of the parties before appointing the expert as the Defendant's advocates appeared to suggest. My take is that it was incumbent upon the parties to cooperate with the appointed expert by submitting their respective documents and books of accounts for purposes of the audit.
11. A perusal of the correspondence between the Accountant and the parties' advocates also reveals that the audit was carried out based purely on the documents that the parties had filed before the court. It is however not clear if the Defendant heeded to the Accountant's request made in the letter dated 8th November 2021 for specific statements in light of their communication that they would not have anything to do with the appointed firm of accountants.
12. It is my finding that in the circumstances of this case, the Defendant's refusal to submit itself to the audit is an act that is akin to wilful disobedience of a lawful court order geared at holding the finalisation of the case in abeyance for an indefinite period. I say so because it is instructive to note that judgment was delivered in this matter in September 2020 after which parties were directed to agree on an independent auditor and file a Report within 45 days from the said judgment date. It is now more than four (4) years since the said judgement was delivered and the Defendants have neither moved the Court on their preferred way forward nor sought to file their own independent audit report for this court's consideration. The Defendants have not also attended court for the mentions despite several notices being sent to them. This court is therefore left with no option but to render its final verdict based on the only available audit report.
13. I have considered the contents of the Statement of Accounts and the Report filed by CPA Meshack Matengo of Matengo & Associates dated 19th January 2022. The report shows that the total outstanding balance due to the Plaintiff stands at Kshs. 44,873,241.47.
14. Turning to the prayers and reliefs sought in the Plaintiff, I note that the Plaintiffs sought Special Damages in the sum of Kshs. 44,873,231.40 which is a slight variance from the expert's findings. I therefore find that the Plaintiff proved its case, against the Defendant, on a balance of probabilities and I allow the prayers sought in the Plaintiff as prayed. In conclusion I make the following final orders: -



- i. Special Damages of Kshs. 44,873,241.47.
- ii. Interest on (a) above at 2% until payment in full.
- iii. Costs of the suit
- iv. Interest on (c) above.

15. It is so ordered.

JUDGMENT/FINAL ORDERS DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

