**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.468 OF 2009**

**EZEMAK REFRIGERATION & CONTRACTORS LIMITED...PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....DEFENDANT**

**JUDGMENT**

**1.** The plaintiff **M/s EZEMAK REFRIGERATION & CONTRACTORS LIMITED** through a plaint dated 1st July 2009, filed on 2nd July 2009, sued the defendant herein **NATION MEDIA GROUP** seeking orders for:-

**a) Specific performance of contract.**

**b) In the alternative damages for breach of contract.**

**c) Kshs. 3,272,313/81.**

**d) Interest on (b) and (c) above**

**e) Costs of this suit.**

**f) Any other relief this court may deem fit and just to grant.**

**2.** The defendant **M/s MEDIA GROUP** filed statement of defence dated 14th September 2009 on 15th September 2009 denying the plaintiff's claim and prayed for the same to be dismissed with costs.

**3.** The plaintiff's suit against the defendant is simply seeking recovery of monies allegedly owed to it by the defendant under the Report made in August 2008 prepared by professional consultants, a firm of consulting Engineers, authorized by the parties herein.

**4.** During the hearing of the suit, the plaintiff called one witness, Irene Muthoni Macharia, who adopted her witness statement dated 26th November 2014 **(marked "IMM 1")** and gave further evidence. In brief she averred that as per contract entered between the plaintiff and the defendant the model of chiller agreed to be installed was **"CARRIER"** but it was changed to "**DRIC."** That Dr. Ezekiel Kiama was involved in the implementation of the system on the ground. That the approval on the change of the model was verbal following discussions between Dr. Ezekiel Kiama and the Defendant's technical manager.

**5.** That by a letter dated 11th October 2007 *(page 44 of the* joint Bundle Documents filed on 5th April 2018 *"the joint Bundle)"*, the defendant complained of the model of the chiller installed was different from the one mentioned in the contract; leading to a meeting between the parties on 28th May 2008 *(minutes at page 140 to 142 of the Joint Bundle), in which the change of the model was approved in writing (see minute 1/03-1 and 1/03-10).* Dr. Kiama was to supply a copy of the communication by the defendant authorizing the change of model from **"CARRIER"** to **"DRIC".** By letter of 28th May the defendant wrote to the plaintiff and reiterated the request to be supplied with the written approval for change of model. That by the delivery note dated 18th September 2002 *(page 43 of the Joint Bundle)* it was confirmed goods were delivered in good order and condition. That the plaintiff carried out installation but did not test or commission the system as they were not allowed to do so but were chased away. The witness testified that the plaintiff had been paid part of the amount due leaving the amount in dispute.

**6.** The defendant called one witness **SEKOU OWINO,** Head of the Legal Department, in the defendant company; who adopted his witness statement *(marked "SO 1")* dated 28th January 2014 and gave further oral evidence. He briefly testified that he was in attendance in the

meeting of 28th May 2008 which was also attended by Dr. Kiama, in which Dr. Kiama confirmed "all approval documents for replacing **"CARRIER"** model with **"DRIC"** had been issued by Nation Media Group *(see page 140 of the Joint Bundle).* He further averred Dr. Kiama indicated that the letter authorizing the change of specification would be delivered to the defendant *(page 141 of the Joint Bundle)* and that any formal action on air conditioning installation would only commence after the defendant received the letter clearly indicating acceptance of variation/charge and acceptance of appointed consultant and the finding subsequent. That both parties agreed to be bound by report of the professional consultation by a letter of 15th August 2008 *(page 9 Joint Bundle of documents).* The plaintiff rejected the full contract price assessed by the said experts on the basis that it was *"too low and not agreeable"* and was contrary to the recommendations by the professional consultants. He further averred the plaintiff failed to issue a fifteen (15) year warranty.

**7. DW1,** further testified that on 20th August 2008 the defendant forwarded to the plaintiff a cheque of Kshs. 4,199,517 in full and final settlement of the sums due to the plaintiff and notified the plaintiff that the payment signified finalization of the matter *(page 153 of the Joint Bundle),* which cheque was received by the plaintiff and confirmed that the plaintiff had no further claims against the defendant. That therefore upon paying the aforesaid amount, the defendant invited bids for the installation of **VRF/VRV** air conditioning system at their premises *(page 11 of Joint Bundle)* and the equipment installed by the plaintiff removed and ceased to be in use.

**8.** At the close of the defence case, both the plaintiff and the defendant's Advocates filed written submissions. The plaintiff's written submissions together with authorities in support were filed on 10th July 2018 whereas the defendant's submissions and supportive authorities were filed on 20th July 2018. I have very carefully considered the pleadings, the rival evidence and submissions by both parties. Briefly the issues for consideration can be summarized as follows:-

**a) Whether the defendant authorized the change of model of the chillers from "CARRIER to "DRIC"?**

**b) Whether the parties agreed to be bound by findings by professional consultants and if so whether any party, is in breach and what are the consultancies thereof?**

**c) Whether the defendant is indebted to the plaintiff as claimed in the plaint?**

**A. Whether the defendant authorized the change of model of chillers from "CARRIER" to "DRIC"?**

**9.** The plaintiff avers that it changed the model of the chillers from **"CARRIER"** to **"DRIC"** after obtaining approval from the defendant.

**10. Section 107 of the Evidence Act,** provides that he who alleges must prove. In this case it is upon the plaintiff to prove that the defendant gave approval of change of the model from **"Carrier"** to **"Dric." PW1** Irene Muthoni Macharia testified that the plaintiff verbally discussed the matter within the defendant. That as it was incumbent upon the plaintiff to finalize the work within the shortest time possible and considering the duration it was to take to import the *"carrier"* model of equipment *(8 months)* from Malaysia, the plaintiff's personnel in consultation with the defendant sole Engineer, Mr. Tom Onduso, they agreed to import **"DRIC"** model which took five (5) months to source, assemble, test and produce to Kenya from Egypt. The verbal agreement was made in presence of Dr. Ezekiel Kiama, representing the plaintiff and Engineer Tom Onduso, representing the defendant, none of whom gave evidence and no explanation was given by either party why the two did not gave evidence on this issue.

**11.** It is on record that after the work commenced of installation of the system, the defendant questioned the change of model from **"Carrier"** to **"Dric"** model initially agreed between the parties, provoking several meetings between the plaintiff's and the defendant's personnel. It should be noted, interestingly, even after questioning the change, the defendant did not dare call upon the plaintiff's personal to halt the work, nor did they express any displeasure with the change from **"carrier"** model to **"Dric",** but instead, asked for the price variation all of which culminated into appointment of experts namely professional consultants with specific mandate which included:-

**i) Check and compare the complete function of the current chiller supplies as DRIC to the one initially supposed to have been supplies as CARRIER.**

**ii) Check on all importation documents to enable conformance to standards.**

**iii) Check all fan coils supplied and confirm they are specified in the contract and functioning well.**

**iv) Check on all duct works, piping and installation and confirm they are as specified in the contract and functioning well.**

**v) Evaluate contract price in light of contractual and technical findings.**

**vi) Offer conducive recommendations.**

**12.** The defendant by his own conduct of not raising any objection on **"Dric"** model but on the pricing and in participating in appointment of experts professional consultants with specific mandate including evaluating contract price in light of contractual and technical finding and setting conducive recommendation and agreeing to be bound by the recommendations clear indication that they had authorized the change of model. They are by their very own conduct, act or omission estopped from denying approval of the change.

**13. Section 120 of the Evidence Act** provides:-

**"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding**

**between himself and such person or his representative, to deny the truth of that thing."**

From the above-mentioned section I find that the defendant is estoppped from denying the approval of the change of model. I find the plaintiff has proved that the defendant authorized the change of model of the chillers from *"Carrier"* to *"Dric"* in various meetings held between the parties, authorizing installation and in appointing the experts namely professional consultants to carry out specified mandate and in failing to halt the works. The defendant is therefore estopped from denying its approval of the change of the model.

**B. Whether parties agreed to be bound by findings by professional consultants and if so whether any party is in breach and what are the consequences thereof?**

**14.** In the instant case, it is not in dispute that the plaintiff and the defendant agreed to be bound by the report prepared by the professional consultants, following their audit of the system installed by the plaintiff. It is however alleged by the defendant, that the plaintiff failed to provide warranty in which it is alleged the plaintiff under Recommendation No.5 was required to issue a minimum warranty period of fifteen (15) years to give full comfort to the defendant. The defendant urges the issuance of the warranty was a condition precedent to the performance of any other obligations by the defendant going forward under the report.

**15.** In the evidence of **PW1** and **DW1** it was admitted that no warranty was issued. It is averred by the defendant that the failure to issue the warranty is that, if the defendant opted to retain the system and it malfunctioned, the defendant would solely be responsible and as such that was a substantial risk in view of the recommendation No.6 which the professional consultants noted:-

> **"That the air conditioning cooling demand at the Defendant's premises was in the region of 180TR and that the installed system only had a capacity of 90TR which could not support the cooling demand and that other alternative measures needed to be employed to supplement the existing system."**

**16.** In the plaintiff's evidence by a letter dated 27th November 2017 *(page 17 of the Bundle)* the plaintiff wrote and confirmed to the defendant of finalizing of its works, and was ready for commissioning and handover the works starting the 3rd to 6th December 2017. The plaintiff confirmed the manufacturers engineers were to be on site to commission the equipment and issue a certificate of warranty. The defendant were to confirm or decline but did none of the two. The parties in the case had agreed to be bound by a report by the professional consultants who in fact in their report confirmed that installed equipment will give similar results upon testing and commissioning. The plaintiff had confirmed their readiness to hand over the installed equipment, train the defendant personnel on how to operate the equipment and give a certificate of warranty but were not given any opportunity to do so but were chased away *( see page 5 of the Bundle).* I therefore find the plaintiff's were denied an opportunity to commission, hand over and issue warranty by the defendant who denied them access and the defendant tempered with the warranty by putting the equipment to use for nine (9) months before commissioning and hand over. It is strange that the defendant started using the equipment installed before commissioning and did not return the same if they were not satisfied with it's service. It was wrong and unjustified for the defendant, to have the plaintiff's personnel access or chase them and denied them the commissioning and hand over. The consultants in this matter recommended that upon testing and commissioning that indeed works had finalized hence the defendants are blame for failure to have allow the plaintiff to test and commission the equipment. The plaintiff could not issue warranty when the defendant had tampered with the warranty as it had put the equipment into use for 9 months without service and even before equipment were commissioned and when it was running for 9 months without maintenance.

**17.** The defendant its acts and omissions breached the agreed terms which required it to be bound by the experts finding. The defendant's acts of taking the equipment and making use of them for 9 months without commissioning and hand over, chasing the plaintiff's from the site amount to unjust enrichment of itself as was clearly stated in the case of **Chase International Investment Corporation** and **another Vs. Laxman Keshra and 3 others (1978) eKLR,** where the Court of Appeal:-

> **"According to Goff and Jones' Law of Restitution, the principle of unjust enrichment presupposes three things: (1) that the defendants has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expenses of the plaintiff; and (3) that it would be unjust to allow him to retain the benefit. I think the circumstances of his case are such that the principle would apply and would justify an order that Chase do pay for the benefit it received from the two lodges built or completed at the expense of Laxmanbhai. I concur in the order proposed by Law JA."**

**18.** Similar position was again restated in **Monicah Njuguna Vs. Rose W. Githua [2014] eKlR**, where the Court in reiterating the above exposition had this to say-

> **"The doctrine of unjust enrichment is neither contractual nor tort. It is in my view an equitable remedy for restoration of justice, and is premised on the following principles-which form the basis for restitutionary claims-**
>
> **1) Non-voluntary confinement of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payer and payee,**
>
> **2) Voluntary confinement of benefit for total failure of consideration,**
>
> **3) Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust,**
>
> **4) Ultra vires demand,**
>
> **5) Abuse of power entrusted to the defendant by Parliament or by contractual instrument such as debenture or other agreement,**

**6) Illegitimate use of self-help sanction,**

**7) Vindication of equitable title to property,**

**8) Money had and received."**

**19.** From the evidence, which is not controverted by the defendant, I find the plaintiff's equipment's were installed and used without commissioning due to defendants breach of the agreed terms, and that there were no complaints lodged with the plaintiff on the performance of the equipment for the period of use. I find that the defendant was amenable to the system supplied and cannot be heard to state otherwise having failed to stop its installation. The defendant enjoyed the services rendered by the plaintiff and in view of that fact, it is estopped from evading its obligations under the contract after enjoying the benefits. By deciding otherwise would amount to allowing the defendant to have unjust enrichment. Equity and social justice is not intended to allow the defendant to keep on benefitting at the expense of the plaintiff.

**C. Whether the defendant is indebted to the plaintiff as claimed in the plaint?**

**20.** The plaintiff claim is for Kshs. 3,273,373/81 being the difference between the sum of Kshs. 12,927,269/50 excluding **VAT,** *(full contract price)* and Kshs. 9,653,955/69 excluding **VAT** *(the Value of working on the ground)* as assessed by professional consultants.

**21.** In **quest Resources Limited Vs. Japan Port Consultants Limited Hccc No. 406 of 2011 [2015] eKLR** the court cited with approval literary work in chitty on contract, 30th Edition at page 383 thus:-

> **"The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation."**

**22.** In **Nakana Trading Co. Limited Vs. Coffee Marketing Board [1990-1994] E.A 448,** the High Court in Kampala held as follows on the issue of whether there was a breach of contract.

> **"In contract, a breach occurs when one or both parties fail to fulfil the obligations imposed by the terms since the contract between the parties was reduced in writing, the duty of the Court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous."**

**23.** In this case, I have found from the evidence of **PW1,** the plaintiff, as a party to the contract performed exactly what it had undertaken to do, however the defendant frustrated the commissioning and hand over of the equipment by chasing the plaintiff from the site and denied the plaintiff an opportunity to provide warranty. I find the plaintiff is an innocent party and is entitled to release from any further performance of any obligation over the contract. The claim of Kshs. 3,273,313/81 lies because the defendant deliberately and without any explanation refused the plaintiff testing and commissioning of the system as was recommended by professional consultants. The system was not tested nor commissioned after release of the report as the defendant denied the plaintiff to do. I find the failure was totally caused by the defendant's refusal to allow the plaintiff to do so. The consultant varied the initial price from Kshs. 15,191,965,269 and recommended Kshs.12,927,269/- out of which the plaintiff admitted having received Kshs. 9,653,995/- leaving a balance of Kshs. 3,273,314/-.

**24.** The plaintiff through a letter dated 27th November 2007 *(page 17 of the Bundle)* wrote and confirmed to the defendant that it had finalized its work and was ready to commission and hand over the works starting the 3rd to 6th December 2007. The defendant declined to confirm and as such I find the plaintiff are not to blame for failure to commission or provide warranty as the defendant had already taken over and used the system frustrating all the plaintiff's efforts to commission, hand over and provide warranty.

**25.** In view of the above I am satisfied the plaintiff proved on balance of probability that the defendant is indebted to the plaintiff to the sum claimed in the plaint.

**26.** I accordingly find and hold the plaintiff has proved its claim as against the defendant and enter judgment in favour of the plaintiff as follows:-

**a) Kshs. 3,273,374/-**

**b) Costs of the suit to the plaintiff.**

**c) Interest on (a) above at court rate from the time of filing the suit till payment in full.**

**Dated, signed and delivered at Nairobi this 4th day of October, 2018.**

**…….**

**J .A. MAKAU**

**JUDGE**