**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMDIRALTY DIVISION**

**HCCC NO. 299 OF 2016**

**AGA KHAN HEALTH SERVICE KENYA……...……. PLAINTIFF**

**VERSUS**

**SYSTEMS INTERGRATION LIMITED**

**T/A SYMPHONY…….……..……..1ST DEFENDANT**

**TECHMED AFRICA LIMITED…...…..……..……. 2ND DEFENDANT**

**PRANAW TIWARI ……..…..……..…….....……3RD DEFENDANT**

**RULING**

1. To be determined by this Ruling are Prayers 5 and 6 of the Notice of Motion dated 25th July 2016 for the following Prayers:-

> **5. A permanent Injunction do issue restraining the Defendant by itself, its servants, agents employees, or any person acting in league with the Defendants from interfering and/or accessing remotely or otherwise with the Care 2000 Hospital Management Information System (HMIS) (hereafter referred to as "care 2000 software") pending the hearing and determination of this suit or pending further orders of the court.**
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> **6. A mandatory injunction do issue against the Defendant/Respondents to avail and deliver functional computer programmes, source code, and other software enhancement documentation of Care 2000 Hospital Management Information System (HMIS) (hereinafter referred to as "care 2000 software system") installed at the Plaintiff's Hospital to the Plaintiff pending the hearing and determination of this suit and/or pending further order of the court.**

2. The Application is presented by Aga Khan Health Service Kenya (The Plaintiff) against all the three Defendants namely, Systems Integration Limited Trading as Symphony, Techmed Africa Limited and Pranaw Tiwari and was brought simultaneously with the filing of a Plaint of even date.

3. On 3rd August 2007, the Plaintiff entered into an Agreement with the 1st Defendant for Licensing, customization and Implementation of Care 2000 Hospital Management Information System (HMIS). Clause 3.13 of the Agreement provided the duration of the Agreement to begin at the commencement date

and to endure for the implementation period outlined in the project plan.

4. Clause 13 of the Agreement set out the start date to be 15th August 2007 and the end dated to be 17th May 2009 and a four phase implementation period from 15th August 2007 to 15th December, 2007, 15th December 2007 to 15th May 2008, 16th may 2008 to 15th November 2008 and 16th November 2008 to 17th May 2009.

5. It is common ground between the Plaintiff and the 1st Defendant that the consideration for the Agreement was fully paid and the 1st Defendant has no claim against the Plaintiff.

6. While the 1st Defendant asserts that it fully carried out its obligation under the terms of the Agreement, the Plaintiff complains of certain breaches. Those are set out in the Plaint and the Affidavit of Hallwachs Shikuku Shituma who swore an Affidavit on 25th July 2016 in support of the Motion now before Court.

7. The Deponent avers that the 1st Defendant breached clause 10 of the Agreement by supplying and delivering some software modules that failed to perform. The failed modules are set out in paragraph 13 of that Affidavit. This Court need not repeat the contents but cites two of the modules as examples that of Nursing Procedures and Dietary and Nutrition. It would also seem that another complaint of the Plaintiff is that some modules, for example for Clinical Profiles and Fixed Assets, were not delivered at all.

8. The Agreement obliged the 1st Defendant to offer support and maintenance services on terms and condition that were to be set out in a support and maintenance Agreement to be executed by the parties as least 6 (six) weeks before the completion of the 4th Phase of the implementation period. Mr. Shituma depones that upon installation of the Software System the 1st Defendant offered those Service through the 3rd Defendant and the 1st Defendant was duly paid. That towards the end of 2014, the 3rd Defendant made final and conclusive decisions as regards the support and maintenance services and the 1st Defendant had fallen out of the picture.

9. That on or about 29th October 2014 the 3rd Defendant informed the Plaintiff that it had taken over the operations of Symphony Health Care Technologies. Following this, sometime in January 2015, the 3rd Defendant informally introduced the 2nd Defendant to the Plaintiff as the entity to provide the Plaintiff with Support and Maintenance Services. And some of those Services were provided by the 3rd Defendant and duly paid for by the Plaintiff. The Plaintiff however maintains that the assignment of the software Agreement to the 2nd and 3rd Defendants was in breach of the terms of the Agreement and therefore illegal.

10. It is also the position of the Plaintiff that prior to the said assignment, the Plaintiff had requested for some customizations to the system and duly paid for the same to the 1st Defendant but the 1st Defendant failed to provide the services which included the 1st Defendant failing to provide a working Bar Coding Integration. The failure continued after the 2nd and 3rd Defendants took over from the 1st Defendant.

11. That following the failure of the 3rd Defendant to provide the Support and Maintenance Support Services, the Plaintiff has incurred losses and suffered inconvenience from the constant breakdown of the Software. That this has persisted notwithstanding negotiations between the Plaintiff and the 3rd Defendant (on behalf of the 2nd Defendant) in which the following assurances were given by the 3rd Defendant,

(i) The 2nd Defendant would resume the Support Services from its Development Centre and prioritize the items on the tracker to be developed.

(ii) The 3rd Defendant would give a credit note for an amount for a period to be agreed.

(iii) The Software source code would be provided for the use of the Plaintiff on agreed terms.

12. Following this, the 3rd Defendant availed a copy of the Support and Maintenance Agreement to the Plaintiff which the 3rd Defendant has failed and/or refused to execute todate.

13. It is the contention of the Plaintiff that it has acquired a perpetual Licence for use of the Software but it is frustrated and unable to maintain the Software System due to the Defendants refusal to release the source codes. In paragraph 51 of the Affidavit of Shituma he gives reasons why the Plaintiff shall suffer irreparable loss if the Court does not intervene:-

> **"THAT I know if the source code is not released to the Plaintiff the Plaintiff shall suffer irreparable loss for reason that:-**
>
> **a) The Plaintiff has acquired a perpetual license for use of the software but the Plaintiff is unable to maintain the software system due to Defendants refusal to release the source code and damages shall not be sufficient as clause 18 of the software agreement provides that the Defendants cannot be liable for loss of profits or loss of business.**
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> **b) Clause 18 of the software agreement limits the 1st Defendant's liability and provides that the Defendant shall not be liable for other special, indirect, punitive or consequential damages including loss of profits or business relating to their failure to perform, indeed the Defendants shall only be liable for payment of Kshs.US Dollars 272,875 being amounts paid for failed consideration as permitted by the software agreement.**
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> **c) The data on care 2000 software is encrypted (meaning secretive or hidden) and transferring this data to another system shall require the encryption source codes to be shared for de-cryption (reveal) and is only the Defendants who have the source codes which can assist the Plaintiff with de-cryption.**
>
> **d) The Defendant has installed the care 2000 software system to the Plaintiff's Hospital and its outreaches and the Plaintiff entirely relies on the same and it shall suffer immensely if not allowed to access the source code or have the source code deposited in escrow.**
>
> **e) The 2nd and 3rd Defendant have neglected and/or failed to support and maintain the Plaintiffs and in the event of their insolvency the Plaintiff shall not at all have access to the source codes.**

14. The 1st Defendant makes light of the issue. It avers that the Agreement was successfully completed and that it carried out its obligation under the terms of the Agreement. It makes the point that on 17th October 2104, the 1st Defendant sold its business to the 2nd and 3rd Defendants and this was after the successful conclusion of the Agreement. That the Sale Agreement entered between the 1st Defendant on the one part and the 2nd and 3rd Defendants on the other had a term in which all the obligations of the 1st Defendant were to be assumed by the 2nd and 3rd Defendants with effect from 1st August 2014.

15. For the 2nd and 3rd Defendants, Pranaw Tiwari (the 2nd Defendant) swore an Affidavit on 3rd October, 2016. The two deny the existence of any Agreement between the Applicant and them and they do not see the duty to provide sources codes. In any event it is the argument of the 2nd and 3rd Defendants that the orders sought cannot issue for the following reasons:-

> **a. In the agreement entered into between the Applicant and the 1st Defendant, there is no obligation obtaining from the 2nd and 3rd Defendants to deliver the so called Functional Computer Programmes, Source code, Object code, Files and other Software enhancement**

**documentation of care 2000 software system.**

**b. The 2nd and 3rd Respondents do not have in their possession the so called functional computer programmes, source code, object code, files and other software enhancement documentation of care 2000 software system.**

**c. That the 2nd and 3rd Defendants have not attempted in any manner to access remotely or otherwise the Applicants care 2000 software system.**

16. The allegations that the 2nd and 3rd Defendants have placed bugs or viruses on the Applicants System are denied as untrue and malicious.

17. The Court has considered the rival submissions of parties in this matter. The Principles applicable to the determination of the Application before Court are those that were set out in the famous case of **GIELLA VS. CASSMAN BROWN**. At this stage of the proceedings a primary duty of the Court is to assess whether the Plaintiff has established a prima facie case with probability of success. Yet in doing so the Court must be careful not to predetermine matters that must be left to trial.

18. On 3rd August 2007 the Plaintiff entered into an Agreement with the 1st Defendant for the Licensing, Customization and Implementation of an HMIS. On the reading of the Contract, the Court understands this to be the Provision of Information Technology Services.

19. From the Pleadings, Application and submissions filed by the Plaintiff, the Plaintiff identifies three issues that will concern the Trial Court:-

(i) Whether the 1st Defendant needed the Plaintiff's consent to sell the Business.

(ii) Whether the Agreement of 3rd August 2007 was subsisting at the time of the sale of the business by the 1st Defendant and was therefore part of business transferred by the Sale Agreement.

(iii) Whether the 1st Defendant assigned the 2nd and 3rd Defendants obligation which the 2nd and 3rd Defendants invoiced/billed but failed to perform?

It is clear to the Court the first two issues are connected and can be dealt with together.

20. It is not now in dispute that by a Sale Agreement of 16th October 2014 the Defendant and Swiftech Group Ltd sold its Health Information Management Systems under the brand name CARE 5000 to the 3rd Defendant. Through the sale, the Transferor sold, transferred and assigned all the rights, title and Interest in the Management System to the Transferee. Relying on Clause 26 of HMIS Agreement, the Plaintiff asserts that the aforesaid sale breached the terms of the Agreement. Clause 26 reads:-

**"Vendor shall not cede, delegate or assign this agreement or any of its rights or obligations herein without the prior written consent of client, which consent shall not be unreasonably withheld.**

**Client shall be entitled to cede, delegate or assign this agreement or any of its rights or obligations herein to any subsidiary or holding company of client, within the meaning of the Companies Act".**

21. The Defendants on the other hand take the position that the HMIS had been fully implemented and was not subsisting at the time of Sale. The Court understood the Defendants to be arguing that what did not exist could not be breached.

22. This Court agrees with the Submission by the 1st Defendant's Counsel that so as to arrive a true

interpretation of a document, it must be considered in the context of the whole Document. Reading Clauses in isolation can lead to a distorted construction of a Document.

23. Clause 3.13. of the HMIS Agreement provides:-

> **"This Agreement shall commence on the commencement date and shall endure for the implementation period as outlined in the Project Plan".**

The word endure is not defined in the Agreement but is given the following meaning (as for as is relevant) in the 12th Edition of the Concise Oxford English Dictionary,

> "**remain in existence**".

From Clause 3.13, the contract was to commence on the commencement date and remain in existence during the implementation period as outlined in the Project Plan.

24. Under the Definition Clause of the Agreement the commencement date was defined to mean,

> **"The Project start date ie. 15 working days from date of signing of the Agreement and the receipt of mutually agreed advance payment for this Agreement received by Vendor from Client".**

25. From the Clause on the project implementation Plan the end date of the Project Implementation was set to be 17th May 2009. The argument made by the 1st Defendant is that it successfully installed the Software System and the Agreement was completed. On the other hand the Plaintiff maintains that the installation and implementation was troubled and unsatisfactory. The following are cited:-

> a) Failure to provide User and Technical manuals.
>
> b) Failure of some of the installed Modules.

26. Yet in paragraph 15 of the Affidavit of Hallwachs Shikuku Shituma the Plaintiff makes this statement:-

> **"THAT I am aware that whilst the project was being executed as regards to installation of the various deliverable modules, the 1st Defendant miserably failed to install functional and workable executable modules of the care 2000 software system as represented to the Plaintiff's representatives and as agreed, notwithstanding the 1st Defendants failure to implement the project fully as agreed the Plaintiff does not claim a refund of the funds for failure of consideration."**

27. At a glance, and this is really an Interim view, the Plaintiff is not making a Claim on the Installation and Implementation of the Project upto the End date of the Project Implementation (ie. 17th May 2009) However the 1st Defendant had obligations beyond the End date. Under Clause 14 of the Agreement, the 1st Defendant was to provide Support and Maintenance Services for a period of twelve (12) months commencing from the end of the Warranty period.

28. The Warranty period was defined to mean,

> **"a period of 6 (six) months commencing immediately after completion of Go-live of all four phases, such warranty shall be provided on a 24 hour X 7 days basis".**

While 'Go-live Date' meant the date on which users started using the Care 2000 Software (specified modules and scope as per the Agreement) to enter and/or retrieve Information.

29. The Plaintiff attempts to persuade the Court that some modules could not be retrieved and so the 'Go-live' date was not achieved. For that reason, it was argued, the Agreement was still subsisting. If that was true, then there would be some force to the Plaintiffs arguments that the HMIS has not come to end because the Warranty period would not have commenced or run. However by virtue of paragraph 14 of the Plaint and paragraph 15 of the Affidavit of Mr. Shituma (see paragraph 26 above), the Plaintiff does not seem to press that the HMIS System was not installed and implemented. And it would be surprising that the Plaintiff would take 7 years to complain that the 'Go-Live' had not been achieved given that implementation ought to have happened in 2009.

30. It is for this reason that the argument by the 1st Defendant that the HMIS Agreement had come to an end by virtue of full performance is not a trifle. Not to be underrated as well would be the 1st Defendant's assertion that it could not have breached an Agreement that did not exist. It is for this reason that the Court finds itself in doubt as to the viability of the Plaintiffs submissions that the Sale Agreement of 17th October 2014 breached the HMIS Agreement for lack of consent of the Plaintiff.

31. In doubting the viability of that argument, the Court has also considered that on 29th October 2014, the 3rd Defendant informed the Plaintiff that he had acquired the Global Operation of Symphony Healthcare Technologies and the evidence availed by the Plaintiff itself was that it was thereafter happy to work with the 2nd and 3rd Defendants in respect to annual maintenance of the HMIS. Indeed there is evidence that there were discussions between the Plaintiff and the 3rd Defendants about the Plaintiff and the 2nd Defendant formalizing their relationship. In that regard a support and maintenance Agreement was drafted by the 2nd Defendant but never executed. The Plaintiff will be confronted with an argument that it acquiesced to the entry of the 2nd and 3rd Defendants into the picture and cannot now resile on it.

32. The impression one gets is that the more formidable case by the Plaintiff is that the 2nd and 3rd Defendants have failed to provide Support and Maintenance Services notwithstanding that the Plaintiff had paid for those Services. There was discussion that, for purposes of resuming a normal relationship, the 2nd Defendant was willing to give a credit note for the period not serviced. In addition, and separately, the Plaintiff complains of the failure of the Defendants to deliver some customizations of the systems for which the Plaintiff had paid the 1st Defendant in 2014. In respect to these grievances the Plaintiff has now sought the following reimbursements:-

> **"e. Reimbursement by the 1st Defendant the sum of US Dollars 57,500 (being equivalent of Kshs.5,750,000/=) paid to and received by the 1st Defendant as stated in paragraph 23 above and with interest at18% per annum from date of filing suit.**
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> **f. Reimbursement by the 2nd Defendant of the sum of US Dollars 225,000 (being equivalent of Kshs.22,500/=) paid to and received by the 2nd Defendant as stated in paragraph 25 above with interest at 18% per annum from date of filing suit".**

By seeking these reimbursements the Plaintiff is telling Court that for these grievances, payment of money is a sufficient remedy.

33. What this Court must now decide is whether the Defendants should be directed to avail and deliver functional Computer programmes, Source Code, Object Code and other Software documentation of Care 2000 HMIS pending the hearing and determination of the suit.

34. The 3rd Defendant responded by first stating that it neither has an obligation to provide nor is it in possession of the so called functional Computer Programmes, Source code, Object Code, files and other Software enhancement documentation of Care 2000 Software System. The 3rd Defendant submits that the Plaintiffs plea is a short cut to using the Software without paying for Maintenance Services.

35. The Court has had some difficulty connecting the sought programmes, codes and documentation to

the support and maintenance that was to be provided by the 2nd and 3rd Defendants and wonders whether it is explained in paragraph 27 of the Plaint as follows:-

> **"The Defendants collective action of withholding the support and maintenance and customization of the software system, despite having being paid, has greatly affected the Plaintiffs operations and the Plaintiff is unable to run its core operational systems for reasons that the Plaintiff does not have the functional computer programmes, source code, object code and other software documentation of care 2000 software system and cannot access the software system to carry out support and maintenance".**

36. The Pleading does suggest that the bespoken programmes, code and documentation would be unnecessary if the 2nd and 3rd Defendants were providing the necessary support and maintenance. Yet support and maintenance can only be provided by the 2nd and 3rd Defendants if contracted to do so. And the Contract would be separate and apart from the HMIS Agreement which may have long lapsed.

37. For now the 2nd and 3rd Defendants do not have a Service and Maintenance Contract with the Plaintiff and this Court is reluctant to grant an Order whose effect will be to indirectly impose obligations on the 2nd and 3rd Defendants which they could only have if a Service and Maintenance Contract subsisted. That being my understanding of the request by the Plaintiff I decline to grant it and I must, as I now do, dismiss the Notice of Motion of 25th July 2016 with costs.

**Dated, Signed and Delivered in Court at Nairobi this 16th day of February, 2017**.

**F. TUIYOTT**

**JUDGE**

***PRESENT;***

……. for Plaintiff

…….for Defendant/Applicant

Alex - Court Clerk