



Mwenda & another (t/a Quicksmart Supplies) v Telkom Kenya Limited (Civil Case 58 of 2020) [2025] KEHC 15076 (KLR) (Commercial and Tax) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 58 OF 2020
BK NJOROGE, J
OCTOBER 23, 2025**

BETWEEN

**PAUL MWENDA 1ST PLAINTIFF
CHARITY NYAMBURA MAINA 2ND PLAINTIFF
T/A QUICKSMART SUPPLIES**

AND

TELKOM KENYA LIMITED DEFENDANT

JUDGMENT

1. This is a judgement in this case where the Plaintiffs claim against the Defendant who has Counter-claimed against very same Plaintiffs.

Background Facts

2. The Plaintiffs filed the Amended Plaint dated 7th February 2020 and averred that through a contract dated 27th August 2015 the Defendant asked the Plaintiffs to supply Juniper NAC Solution for its systems at a sum of Kshs.13, 731, 318.76. The contract was effective from 11th September 2015.
3. However, on 19th September 2016 the Defendant unlawfully terminated the contract on grounds of unreasonable delay and incompetence on the part of the Plaintiffs.
4. The Plaintiffs argued that the delay in performance of the contract was partly caused by the Defendant's actions and circumstances beyond the Plaintiffs' control. After receiving the purchase order, the Plaintiffs obtained evaluation licenses from Juniper on 29th September 2015, but could not immediately place orders as the NAC portfolio had been sold to Pulse Secure. The Defendant was



informed of this and extended the completion date to 24th December 2015, but later imposed a network freeze from 18th December to early January, preventing timely completion.

5. By 8th January 2016, the Plaintiffs had delivered all required hardware and licenses, and the solution was successfully deployed on 4th February and 24th August 2016. Claims of unreasonable delay against the Plaintiffs are therefore unfounded, especially since the Defendant further caused delays by insisting on an agentless NAC solution not contemplated in the contract or bid documents. This forced the Plaintiff to escalate concerns to the procurement department due to the ICT department's unresponsiveness.
6. Following the 11th February 2016 meeting, the Defendant halted the project over disagreements on varying the contract terms, only resuming it on 16th May 2016. Although the Defendant had promised to provide Microsoft-affiliated technical support, the expert scheduled for 31st August failed to attend without explanation, and no replacement was provided.
7. In July 2016, the Defendant changed ownership after acquisition by HELIOS, and the new ICT head initially indicated that the Pulse NAC solution was no longer needed, halting the project on 25th July. However, the Defendant later agreed to continue after partial deployment in August. Despite the Plaintiffs' request for acceptance tests on 31st August, the Defendant failed to respond and again halted the project on 2nd September. At a subsequent meeting on 9th September 2016, the Defendant's ICT head insisted on an agentless NAC solution, contrary to the agreed contract terms.
8. The Plaintiffs prayed for judgment against the Defendant for;
 - a. The sum of Kshs.41, 047, 114.61 being the amount due under the contract.
 - b. Interest on (a) above at commercial rates prevailing from time to time from the respective due dates until payment in full.
 - c. Costs of this suit and interest thereon at court rates.
 - d. Such other or further relief as the court may deem just to grant.
9. In response to the Plaintiffs' the Defendant filed the Amended Statement of Defence and Counter-claim in which the Defendant averred that the Plaintiffs failed to observe and adhere to its obligations under the Agreement and also failed to adhere to the industry best practices in terms of supply of technology, thereby breaching the Agreement and necessitating its termination.
10. The Defendant argued that under the Agreement, the project was to be completed within sixty days from 11th September 2015, making the due date 11th November 2015. The Plaintiffs allegedly failed to meet this timeline because they could not secure the necessary hardware from their suppliers. In November 2015, the Plaintiffs requested more time, and the Defendant granted a six-week extension up to 24th December 2015, warning that penalties would apply if delivery was not made within the new deadline. The Defendant claims the Plaintiffs still failed to deliver on time. That the hardware was only supplied in February 2016, nearly two months after the extension period had expired, and therefore denies the Plaintiffs' assertion that they had complied.
11. In addition, the Defendant stated that after the Plaintiffs delivered the hardware, they attempted to deploy the NAC Solution, but serious functionality issues arose, including users being repeatedly disconnected from the domain, computers slowing down, and the Plaintiffs deploying an agent-based solution instead of the required agentless one as per the technical specifications. This led to a meeting on 11th February 2016, where it was agreed that an agentless NAC Solution would be implemented to align with the Defendant's security policy. The Defendant therefore denied the Plaintiffs' claims



- that the agreement was varied and emphasized that the Plaintiffs themselves confirmed in an email dated 17th February 2016 that they were still testing the agentless feature, consistent with the original requirements.
12. Further to the above and by way of Counter-claim, the Defendant averred that the failure by the Plaintiffs to implement the NAC Solution in accordance with the terms of the Agreement constituted a breach for which the Defendant has suffered losses.
 13. The Defendant contended that under the Agreement, specifically paragraph 7(b), the Plaintiffs were liable to pay 1% of the total project cost for each day of delay beyond the agreed delivery period. This penalty period commenced on 24th November 2015, after the extension granted for implementation, and continued until 9th September 2016, when the Agreement was terminated.
 14. The Defendant prayed that the Plaintiffs' suit be dismissed with costs and the Judgment be entered in favour of the Defendant as follows;
 - i. General Damages;
 - ii. Kshs.37,074,560.65/= being the amount of Penalties calculated as 1% of the total cost for every day delayed from 24th December 2015 to 19th September 2016 when the Contract was terminated.
 - iii. Interests on (a) and (b) above at Court rates.

Evidence

15. The Plaintiffs' case was presented through two witnesses. Paul Mwenda (PW-1) confirmed the Agreement dated 27th August 2015 for the implementation of the Juniper NAC Solution, including provision of one year's free technical support. He admitted the project suffered delays attributable to the Plaintiffs, citing reasons such as shipping issues, dollar fluctuations, and a change in hardware vendor. He acknowledged that by 11th November 2015 the hardware had not been delivered, that the Defendant granted a six-week extension to 24th December 2015 with a penalty warning, and that the Plaintiffs still failed to meet this deadline. He further admitted the Plaintiffs did not competently deliver the project, though at one point they were briefly kept out of site.
16. The second witness, Duncan Ngacha Gitau (PW-2), confirmed the Plaintiffs knew the project was urgent but still delayed, with technical issues arising from the Plaintiffs' side, as noted in several meetings including on 18th March 2016. He acknowledged that an agentless solution was agreed to suit the Defendant's needs, that the Plaintiffs received and accepted the Defendant's response letter of 10th October 2016. That the only unresolved test was deployment via active directory, as the other acceptance parameters had been met.
17. The Defendant's witness, Kevin Chore (DW-1), confirmed the Agreement of 27th August 2015 for implementing the Juniper NAC Solution. He stated that both parties had agreed on an agentless solution, which was best suited for the Defendant's systems. He testified that the project began with delays caused by the Plaintiffs, who despite receiving an extension to 24th December 2015, failed to deliver. The Plaintiffs were only kept out of site briefly due to a scheduled network freeze, after which they were allowed back in January 2016.
18. DW-1 explained that the project was plagued by persistent challenges, including user access issues and switch problems, which the Plaintiffs could not resolve despite multiple visits. Even after the Defendant's ownership restructuring in July 2016, the Plaintiffs were given more time in good faith, but the solution remained ineffective. The Defendant eventually terminated the Agreement because



the delivered system was inconsistent with the agreed agentless solution, did not function properly, and was full of challenges.

19. He confirmed that penalties applied under the Agreement, that the Plaintiffs were aware of the acceptance criteria, and that testing showed the agentless solution was not working. Although the Plaintiffs were allowed to switch to an agent-based solution, it still failed to meet requirements, leading to termination. DW-1 further clarified that the restructuring did not influence the cancellation and that he personally interacted with the Plaintiffs' representatives, including Duncan Ngacha and Francis Desai, with team lead Edmond Okumu handling correspondence.

Issues For Determination

20. The Court frames the following issues for determination;
 - i. Whether there was a breach of contract by either party and who is liable.
 - ii. Whether the Defendant terminated the contract lawfully.

Analysis

21. It is common ground that the Plaintiffs and the Defendant concluded an Agreement dated 27th August. This Agreement specifically provided inter alia that:
 - a) The Plaintiff shall implement a JUNIPER NAC Solution (Clause 3.1 of the Agreement);
 - b) Supply and implement the Solution in accordance with instructions relayed by the Defendant. (Clause 5.1.2 of the Agreement);
 - c) The project shall run for a period of sixty (60) days from the effective date unless terminated by either of the parties. (Clause 4 of the Agreement);
 - d) The Supplier (Plaintiff) shall be charged 1% on total cost for every day delayed in completing the project, if the project is not completed within the agreed delivery period of sixty days from, date of issuance of the Purchase Order; (Clause 12 of the Agreement).
22. It is also not controverted that the NAC Solution agreement was terminated by the Defendant. The Plaintiffs submitted that the Defendant unlawfully terminated the contract. Was the termination unlawful?
23. It was the Defendant's submission that the Plaintiffs breached the Agreement by not only delaying the implementation of the project but also failing to implement the NAC Solution as agreed.
24. Breach of Contract is defined by the Black's Law Dictionary 9th Ed. at page 213 as: -

“Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance.”
25. The Plaintiffs submitted that the Defendant's conduct of constantly halting the project implementation and sending the Plaintiffs out of site unilaterally, proposing new technical specifications that were not previously agreed upon, was not only unfair but also distracting. Further that the Defendant lost interest as soon as the hardware and software were delivered, and the new management taking over the Defendant was not interested in the project. Therefore, the Defendant contributed to the delay, and their deliberate acts or omissions affected the project implementation negatively.



26. In contrast, the Defendant explained that the project faced delays immediately after the contract was executed. This is because the Plaintiffs failed to deliver the required hardware on time. By 11th November 2015, the hardware had not reached the Defendant's premises. This prompted a meeting on 13th November where the Defendant granted a six-week extension to 24th December 2015 but warned that penalties would apply if the new deadline was missed. Despite this extension, the Plaintiffs still failed to meet the deadline and only delivered the hardware in February 2016, more than two months late.
27. The Court does confirm that Clause 4 of the Agreement provided that the Agreement was to run for a period of sixty days. However, pursuant to a meeting held on 13th November 2015 the Defendant granted a six-week extension to 24th December 2015.
28. As seen from the email dated 16th November 2015 from the Defendant to the Plaintiffs, "upon expiry of the 6 weeks period (13.11.2015 – 24.11.2015) we shall apply the penalty of 1% of total contract price for every day delayed." Notably, the Plaintiffs did not dispute this fact. Clause 12 of the contract provide for this penalty clause that was sought to be enforced.
29. Consequently, the Plaintiffs supplied and delivered the hardware on 8th January 2016. Deployment of the NAC Solution began on 1st February 2016, which, according to the Plaintiffs, showed successful implementation. The Defendant acknowledged the system's functionality and progress. Technical issues were later raised regarding system compatibility; however, the Defendant did not dispute receiving the hardware.
30. Going by the above narrative, the Plaintiffs eventually fulfilled their obligation by delivering the hardware and software as specified. However, this was outside the agreed timeline of 24th December 2015.
31. Indeed, the Defendant acknowledged that the Plaintiffs delivered the hardware, but noted that the Plaintiffs' attempt to deploy the NAC Solution gave rise to serious functionality issues, including users being repeatedly disconnected from the domain and computers slowing down. Plaintiffs themselves confirmed in an email dated 17th February 2016 that they were still testing the agentless feature, consistent with the original requirements.
32. The main issue regards whether there was breach of the Agreement by the Plaintiffs or the Defendant. With reference to the Black's Law Dictionary definition of breach of contract, the Court finds as below.
33. The project experienced delays immediately after the contract was executed, as the Plaintiffs failed to deliver the required hardware on time. By 11th November 2015, the hardware had not been delivered, and the Plaintiffs informed the Defendant that a change in Juniper's portfolio had affected sourcing in accordance with Clause 5.1.3 and 5.4 of the Juniper NAC Supply and Implementation Agreement.
34. Even after the extension of the period by six weeks, the Plaintiffs were not able to complete the project by 24th December 2015. The Plaintiffs were only able to deliver the hardware in February, 2016 which was more than 2 months after the lapse of the extended period on the implementation of the project.
35. Based on the above, the Court does conclude that the Plaintiffs breached the terms of the contract even after the variation of the said contract.
36. On the issue of termination notice, it is undisputed that Clause 9 allowed either party to terminate the agreement upon giving 14 days' notice in writing. It provided;

Termination



9.1 This Agreement may be terminated by either party giving fourteen (14) days' notice in writing

9.2 Either party shall be entitled to immediately terminate this agreement if the other party shall become bankrupt or be wound up or make any arrangement or composition with its creditors.

37. Was the termination notice issued as required above? While the Plaintiffs maintained that there was no notice of termination issued, the evidence points out otherwise. Notably, there is a Notice of Termination dated 19th September 2016 which provided a 14-days' notice in line with the provisions of Clause 4. It read;

“The effective date for the commencement of the project was 11th September, 2015 and you ought to have performed your obligations within 60 days of the said date; in accordance with the provisions of Clause 4 of our Agreement. Various indulgences have been accorded to enable you achieve implementation of the solution but these have failed at the expense of Telkom Kenya.

This letter is therefore to serve you with a fourteen (14) days' notice of termination of the Agreement from the date hereof in line with the provisions of Clause 4 as read together with Clause 9.1. This Agreement shall stand terminated at the expiry of the notice period with or without your confirmation and any transaction subsequently undertaken by yourselves on the basis of the Agreement shall be at your own peril as to incidental costs arising therefrom.

Kindly make arrangements to collect any equipment belonging to you that you had set up within our premises and hand over any effects belonging to Telkom Kenya within the fourteen (14) days herein afore mentioned. You shall be accorded any assistance necessary in this regard.”

38. The Plaintiffs were issued the 14-day notice as evidenced by the excerpt of the letter above. Therefore, the Plaintiffs cannot argue that there was no valid basis to terminate the agreement. Further, the Plaintiffs cannot claim that the Defendant breached this condition by unilaterally terminating the agreement without notice and summarily expelling the Plaintiffs from the site.
39. Accordingly, the Defendant lawfully terminated the Agreement in accordance with Clause 9 of the Agreement by issuing a Notice of Termination dated 19th September 2016.
40. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court stated that:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

41. Having determined that the Plaintiffs were in breach of the contract, the Court finds that the Defendant is entitled to impose the penalty as stipulated in Clause 12 of the Agreement. However, the same should apply from when the delay persisted from 24th December 2015 until 8th January 2016 when the Plaintiffs supplied and delivered the hardware. Schedule III of the agreement between the parties provided for a total cost of the contract at Kshs.13,731,318.70. The Court works out the penalty interest at 1% of Kshs.13,731,318.70 for 16 days which translates to Kshs.2,197,010.99.
42. As a general rule, general damages do not arise from a breach of contract. As the contract had a provision for penalty interest which is in form of a special damages, the Court is of the view that this form of damages will suffice. The claim for general damages is dismissed.



43. The import is that the Plaintiffs' claim fails and the Counter-claim is allowed to the extent that it applies to the penalties that accrued from 24th December 2015 until 8th January 2016 when the Plaintiffs supplied and delivered the hardware.
44. As to costs, the general rule is that costs follow the event unless otherwise stated. There is no good reason to deny the Defendant costs as a successful party in both the Plaintiff and the Counter-claim. The costs shall be borne by the Plaintiff.

Determination

45. The Court proceeds to enter Judgement in favour of the Defendant against the Plaintiffs as follows;
- a. The Plaintiffs' suit as against the Defendant is dismissed with costs to the Defendant.
 - b. Judgement is entered in favour of the Defendant as against the Plaintiffs on the Counter-claim for Kshs.2,197,010.99 being the amount of penalties calculated as 1% of the total cost for every day delayed from 24th December 2015 to 8th January, 2016.
 - c. The Costs of the Counter-claim are awarded to the Defendant.
 - d. Interests on (a) (b) and (c) above at Court rates.
46. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 23RD DAY OF OCTOBER, 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Chatia holding brief for Mr. Njoroge for the Plaintiffs.

Mr. Kitala holding brief for Mr. Ochola for the Defendant.

Mr. Peter Wabwire - Court Assistant.

