

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E293 OF 2022

NISA HOLDINGS LIMITED **PLAINTIFF**

VERSUS

DYNAMICNAV SYSTEMS LIMITED **1ST DEFENDANT**

DAVID OMANGA ALIAS DAVID DIANGA **2ND DEFENDANT**

JUDGEMENT

1. By a Complaint dated 28 July 2022, the Plaintiff sued the Defendants for damages arising out of a breach of contract seeking judgment against the Defendants, jointly and severally, in the following terms:
 - a) KShs.95, 400, 000/= being the contractual damages owed;
 - b) Interest on (a) above from the date of default until payment in full;
 - c) Costs of the suit, and any other relief the court deems fit to grant.

2. On the 22 April 2020, the Plaintiff and 1st Defendant entered into a Consultancy Fee Agreement (hereinafter 'the Agreement'). The 2nd Defendant acted as the 1st Defendant's authorized agent in executing the Agreement. The said Agreement was in respect of consultancy services by the Plaintiff in which it undertook to work with the 1st Defendant in order to secure a business relationship with a third party such that the 1st Defendant would have capacity to provide project management services and supervision of the implementation of

the Integrated Security Management System (hereinafter "ISMS") and infrastructure for the Parliamentary Service Commission.

3. The Defendants entered appearance and filed their respective Statements of Defence on 10 February 2023, vehemently denying liability. The defence is multi-pronged, alleging, *inter alia*: that the agreement was essentially a Non-Disclosure Agreement rather than a fee agreement; that the 2nd Defendant lacked the requisite authority to bind the 1st Defendant to such a colossal sum; that there was a lack of consideration; and that the Plaintiff played a negligible role which has been fully compensated by the payment of Kshs 4.6 million.
4. The matter proceeded to a full hearing where the Court had the benefit of oral testimony from witnesses for both sides, alongside voluminous documentary exhibits including disputed agreements, correspondence and financial reports.

Brief Background

5. Sometime in early 2020, the 1st Defendant, a technology firm, identified a business opportunity advertised by the Parliamentary Service Commission (PSC). The opportunity concerned the Provision of Project Management Services and Supervision of the Implementation of the Proposed Integrated Security Management System (ISMS) and Infrastructure. The 1st Defendant, seemingly aware that it might lack the requisite capacity or strategic positioning to secure this tender on its own, engaged with the Plaintiff. The Plaintiff, through its Director Mr. Herbert Ojwang (PW1), represented itself as a consultancy firm with expertise in putting together tender documents and procurement and leveraging professional networks to secure business.
6. On 22 April 2020, the parties executed a document titled CONSULTANCY FEE AGREEMENT. The document was signed by Herbert Ojwang on behalf of the Plaintiff and David Dianga, the 2nd Defendant, on behalf of the 1st Defendant. the 1st Defendant's company stamp was affixed to the document.

7. The Agreement contains several clauses that have become the subject of intense litigation. The Preamble states the purpose as "*exploring the possibility of entering into a potential business relationship relating to Integrated Security Management System Project Management for Parliamentary Service Commission*".

8. The Agreement contains a specific clause titled "Payment", which reads:

The payment to the consultant (NISA) representing the Parliamentary Team shall be 50% of the paid amounts upon the completion certificate on the milestones agreeable in the contract and shall happen back-to-back upon DynamicNAV Systems having received the sums from The Parliamentary Service Commission. The total sum payable is Kes 100,000,000.00 (Kenya Shillings one hundred million only) assuming the quoted project amount remains Kes 240,000,000.00... Should this amount vary, then the effect will cascade to all involved as it shall be agreed upon by both parties.

9. Subsequent to this Agreement, the 1st Defendant entered into a Joint Venture Arrangement with the University of Nairobi Enterprise and Services Ltd (UNES). It is the Plaintiff's case that it facilitated this partnership to bolster the 1st Defendant's bid capacity.

10. On 12 June 2020, the 1st Defendant and UNES successfully executed a contract with the Parliamentary Service Commission for the ISMS project. The contract sum was KShs 279,154,283.04, a figure higher than the KShs 240,000,000 anticipated in the Consultancy Fee Agreement.

11. Following the award of the tender and the commencement of the project, the 1st Defendant received payments from the PSC. The Plaintiff, asserting entitlement

under the Consultancy Fee Agreement, sought payment of the agreed Kshs 100 million.

12. The 1st Defendant remitted a total of Kshs 4.6 million to the Plaintiff. No further payments were made. The Plaintiff issued demand letters on 7 July 2022 and 19 July 2022, asserting the outstanding debt of KShs 95.4 million. The Defendants, through their Advocates Isaiah Kandie & Co., responded by requesting indulgence for consultations but ultimately denied the claim, characterizing the KShs 4.6 million as a full and final “finder's fee”.

The Plaintiff's Case

13. The Plaintiff's case was anchored on the testimony of PW1- Herbert Ochola Ojwang, and the documentary evidence produced.
14. PW1 testified that the Plaintiff is a consultancy firm specializing in procurement and tender documentation. He stated that the Defendants sought the Plaintiff's professional services to prepare for the PSC contract. He was emphatic that the Plaintiff fulfilled our scope of work by enabling the 1st Defendant to secure the work with PSC. PW1 produced the Consultancy Fee Agreement (Exhibit 1) and relied on the Payment Clause therein. He stated that the agreed consideration was a fixed sum of KShs 100 million, contingent upon the award of the tender. He confirmed receiving KShs 4,600,000/= but averred that the 1st Defendant subsequently went quiet and refused to honour the balance.
15. In cross examination, PW1 admitted that he was not a signatory to the tripartite contract (PSC – DynamicNav – UNEV) dated 12 June 2020. However, he maintained that the Plaintiff's role was antecedent – to assist the 1st Defendant to put the documents together so that they could win the tender. He clarified that the Plaintiff was not involved in the technical implementation but in the strategic procurement phase only.

16. When challenged on the magnitude of the fee (KShs 100 million versus KShs 279 million project), PW1 observed that in any business, there is a willing buyer and willing seller. The figure quoted was reasonable since it was a consultancy fee, not commission. PW1 further testified that the Plaintiff did not need to be a party to the PSC contract to be entitled to its fee, as its mandate was to secure that very contract for the Defendants.
17. In its submissions, the Plaintiff argues that the Defendants are estopped from denying the validity of the contract having made part payment (KShs 4.6 million), which constitutes ratification of the 2nd Defendant's authority. They rely on the *parole* evidence rule to bar the Defendants from varying the written terms of the agreement regarding the fee quantum.

The Defendants' Case

18. The Defendants' case hinges on the invalidity of the agreement, lack of authority and the nature of the services rendered.
19. DW1, Jotham Wekesa Nyongesa, holds 50% shares in the 1st Defendant. He testified that the company never entered into a valid Consultancy Fee Agreement with the Plaintiff. He asserted that the 1st Defendant only authorised an agency fee or finder's fee of Kshs 4.6million for introduction to the PSC. He was categorical that the 1st Defendant did not know anything about the Kshs 100 million and did not authorise payment of any such sum. He argued that the 2nd Defendant was merely an employee or Project Manager authorised to negotiation but not to bind the company to such significant expenditure without a board resolution.
20. To buttress the defence of unconscionability, the 1st Defendant produced the Audited Financial Statements of the 1st Defendant for the year ended 31 December 2021. These accounts reflect a total turnover of KShs 200,488,606/= from the project and a Net Profit of KShs 45,311,798/=. It was argued that paying the Plaintiff KShs 100 million would not only wipe out the entire profit but

also render the project insolvent, which could not have been the intention of a rational commercial entity.

21. DW2, the 2nd Defendant, who signed the disputed agreement, testified that he did so as an employee without authority to incur such expenditure. He characterized the document as an "ambiguous Non-Disclosure Agreement (NDA)" drafted by the Plaintiff.
22. DW2's testimony was that the Plaintiff's role was strictly introductory. He claimed that at the time of signing, they had not calculated the project costs (salaries, taxes, etc.), and thus the figure in the agreement was not based on commercial reality. He termed the demand for KShs 95.4 million a rip off.
23. The Defendants argue that the Plaintiff, being a stranger to the Tripartite Agreement, cannot claim proceeds from it. Further, they argue that the project is ongoing, and the Plaintiff's demand is premature and excessive given the limited scope of work, which was merely introduction.

Analysis & Determination

24. I have carefully analysed the pleadings, the evidence and submissions. The following issues lend themselves for determination:
 - i. Whether the document dated 22 April 2020 constitutes a valid, binding, and enforceable contract;
 - ii. Whether the 2nd Defendant had the requisite authority to bind the 1st Defendant;
 - iii. Whether the Plaintiff proved its case on a balance of probabilities;

Validity of the Contract

25. The primary defence mounted by the Defendants is that the Consultancy Fee Agreement was merely a Non-Disclosure Agreement or an informal understanding not intended to create the specific financial obligation claimed.
26. Section 97 of the Evidence Act provides that where the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself. Section 98 further prohibits admissions of oral evidence to contradict, vary, add to or subtract from the written terms.
27. In *ODGERS CONSTRUCTION OF DEEDS AND STATUTES* (5th Edition) at p. 106, it states:

"Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.

As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein"

28. This position is also reiterated in *Halsbury's Laws of England (4th edn) vol. 9 (1)* where para 622 partly states that:

"Where the intention of parties has in fact been reduced to writing, under the so-called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or

written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

29. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement.

30. I have scrutinized the Agreement. While it contains confidentiality clauses, it also contains clauses that are unequivocally commercial and transactional in nature. Specifically, the clause titled "Payment" at Page 4 is explicit and mandatory:

"The total sum payable is Kes 100,000,000.00... assuming the quoted project amount remains Kes 240,000,000.00."

31. This is not the language of a vague NDA. It is the language of a fee agreement. The Defendants' attempt to rebrand this document as an NDA via oral testimony is a direct violation of the Parol Evidence Rule. The Court cannot look behind the clear written text to find a different oral agreement for a "finder's fee" of KShs 4.6 million, as alleged by DW1. To do so would undermine commercial certainty.

32. The Defendants rely on the clause at page 3 which states:

"This Agreement... is not intended to be... construed to create a teaming agreement, joint venture association, partnership or other business relationship..."

33. The Defendants submit that this clause nullifies the contract. I disagree. This is a standard "No Partnership" clause, intended to prevent the creation of fiduciary duties or joint liability inherent in partnerships. It does not negate the contractual obligation to pay for services rendered. In contract interpretation,

specific clauses such as the Payment Clause take precedence over general boilerplate clauses. The specific promise to pay KShs 100 million cannot be erased by a general clause disclaiming a partnership. Accordingly, I find that the Consultancy Fee Agreement is a valid contract, creating a binding financial obligation upon the 1st Defendant.

Authority to Bind

34. The 1st Defendant asserts that the 2nd Defendant lacked the authority to sign the contract. DW1 testified that no board resolution was passed to authorise the transaction.
35. Under the Companies Act, 2015 and common law principles of agency, a company is bound by the acts of its agents if they acted within their actual or apparent (ostensible) authority. The rule in ***Royal British Bank v Turquand [1856] 6 E&B*** (Indoor Management Rule) is that third parties dealing with a company in good faith are entitled to assume that internal regulations, such as board resolutions, have been complied with.
36. The 1st Defendant admits in its pleadings and evidence that it authorized the 2nd Defendant to act as its "Consultant/Project Manager" for the PSC tender. By allowing him to negotiate the deal, holding him out as the face of the company, and allowing him to use the company stamp, the 1st Defendant clothed him with apparent authority. The Plaintiff was not required to demand Minutes of the 1st Defendant's board meetings before signing the contract.
37. The authority notwithstanding, the doctrine of ratification applies herein. Section 120 of the Evidence Act provides for estoppel. The 1st Defendant admitted to paying the Plaintiff Kshs 4.6 million. In his testimony, DW1 confirmed that the 1st Defendant authorised an agency fee of Kshs 4.6 million and released the amount partly through the 2nd Defendant and directly to the Plaintiff. This

payment is fatal to the defence of lack of authority. This action by the 1st Defendant ratified the acts of the 2nd Defendant of engaging the consultant. A principal cannot ratify the agent's act of engaging the consultant (by paying them) while simultaneously rejecting the agent's authority to agree on the price. Ratification relates back to the inception of the contract. one cannot approbate and reprobate—accepting the benefit of the Plaintiff's services (the introduction to PSC) while disowning the cost.

38. I find that the 1st Defendant ratified the contract through part performance (payment) and acceptance of the benefit (the PSC tender).

Balance of Probabilities

39. The Defendants argue that the Plaintiff did nothing to deserve Kshs 100 million. DW2 testified that all the Plaintiff did was to introduce the 1st Defendant to Parliament. They argue that the Plaintiff did not participate in the technical execution of the ISMS project.
40. This argument misconceives the nature of the Consultancy Fee Agreement. The purpose of the Agreement, as stated in the Preamble, was to explore the possibility of entering into a potential business relationship. The contract was for business development/origination, not technical implementation. The Plaintiff's role was to open the door. The question that arises is: did the door open? Yes! The 1st Defendant secured the contract with PSC on 12 June 2020. Did the 1st Defendant admit this role? Yes!
41. In commercial consultancy, introduction or origination is a valuable service. It is the consideration provided by the Plaintiff. The fact that the technical work was done by the 1st Defendant and UNES does not diminish the value of the introduction that made the work possible. The Plaintiff was the bridge to the opportunity. Once the 1st Defendant crossed that bridge and signed the PSC

contract, the Plaintiff's primary obligation was discharged. I, therefore, find that the Plaintiff performed its contractual obligation.

42. The Defendants argue that the Kshs 100 million is unconscionable, exorbitant and a rip off, especially when their net profit was only Kshs 45 million.
43. The principle of freedom of contract is paramount in Kenyan commercial law. Parties are free to bargain their own terms. It is not for the Court to rewrite a contract for the parties. As this Court held in ***National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999*** "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."
44. The 1st Defendant is a commercial entity. It had the opportunity to calculate its costs and margins before agreeing to pay Kshs 100 million. If the fee was too high, they should not have signed. The Court cannot act as a guardian for commercial entities that enter into bad bargains. The fact that the 1st Defendant realized later that the fee would eat into its profits is a commercial misjudgement, not a legal ground for rescission.
45. Further, the Agreement stipulates, "*Payment... shall happen back-to-back upon DynamicNAV Systems having received the sums from The Parliamentary Service Commission.*". According to the accounts presented by the 1st Defendant, the income as of December 2021 was Kshs 200,488,606/=. Therefore, since the 1st Defendant has received over Kshs 200 million, the obligation to pay the Plaintiff has crystallized.
46. I also note that the Agreement stated that if the project amount varies from Kshs 240 million, the effect will cascade. As per the evidence, the project amount increased to Kshs 279 million. Theoretically, the Plaintiff's fee should have increased pro-rata. However, the Plaintiff has chosen to act within the conservative bounds of the contract and only claim the fixed Kshs 100 million.

47. Finally, in addressing the issue of liability of the 2nd Defendant, the Agreement identifies the parties as Nisa Holding Limited and DynamicNAV Systems Ltd. The signature block for the 2nd Defendant clearly indicates that he was signing for the company. An agent acting for a disclosed principal is generally not personally liable for the principal's debts unless they personally guaranteed the debt or acted fraudulently
48. There is no evidence of a personal guarantee by the 2nd Defendant. While his actions bind the company via agency, making the company liable, he does not automatically become a co-debtor. The suit against the 2nd Defendant in his personal capacity regarding the contractual debt must fail.
49. Accordingly, judgment is entered in favor of the Plaintiff against the 1st Defendant as follows:
- (i) The sum of Kshs 95,400,000/=, with interest thereon at court rates from the date of filing the suit until payment in full;
 - (ii) Costs of the suit
 - (iii) The suit against the 2nd Defendant is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 5 DAY OF DECEMBER 2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Plaintiff: Mr. Ajwang h/b Olao

For the Defendants: Kandie

Judgement