Bollore Transport & Logistics Kenya Limited v LC Waikiki Retail KE Limited (Commercial Case E460 of 2022) [2026] KEHC 1060 (KLR) (Commercial and Tax) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 1060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E460 OF 2022

MN MWANGI, J

JANUARY 30, 2026

BETWEEN

BOLLORE TRANSPORT & LOGISTICS KENYA LIMITED ..... PLAINTIFF

AND

LC WAIKIKI RETAIL KE LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 16th November 2022 instituted this suit against the defendant seeking judgment against it for Kshs.15,534,784.69 and interest thereon at Court rates from 15th June 2021 until payment in full, costs of this suit and interest thereon at Court rates.

2. The plaintiff's case is that at the time its services were procured by the defendant, it was engaged in the business of supply chain management, warehousing, transportation, and distribution of goods within Kenya and the East African region. It averred that in July 2020, the defendant issued a Request for Quotation (RFQ) seeking to outsource its logistics operations, including warehousing, transportation, and customs clearance, at specified particular storage ratios and service capabilities which formed the basis of the plaintiff's quotation and pricing. That relying on the RFQ ratios and subsequent confirmation during the tender process, the plaintiff submitted a technical and commercial proposal, which was accepted by the defendant, and by a letter dated 28th January 2021, the plaintiff was nominated as the defendant's logistics partner in Nairobi, without any disclosure of changes to volumes or ratios.

3. The plaintiff stated that following the award, the parties jointly undertook implementation planning, agreed on a Go-live date of 15th June 2021 and with the defendant's knowledge and participation, it proceeded to make substantial investments including securing warehouse space, purchasing racking, shelving, equipment, IT infrastructure, and hiring labour in preparation for commencement of

services. The plaintiff further stated that during the implementation phase, the defendant repeatedly and materially revised the forecasted storage volumes and ratios, culminating in drastic last-minute changes that significantly altered the nature and value of the contract, despite assurances that such changes were temporary and that the original RFQ ratios would be restored.

4. The plaintiff claimed that in an effort to accommodate these changes and meet the agreed Go-live date, it incurred further costs, including identifying alternative warehouse facilities. That on 15th June 2021, the defendant unilaterally decided not to proceed with the Logistics Services Agreement, thereby disengaging from the arrangement to the plaintiff's detriment. The plaintiff asserted that by that time, it had expended a total of Kshs.15,534,784.69 on equipment, infrastructure, labour, and warehouse rental, specifically for the defendant's benefit. It averred that despite demand and notice of intention to sue, the defendant has failed or refused to reimburse the plaintiff the said amount, giving rise to this suit.

5. In opposition to the plaintiff's suit, the defendant filed a statement of defence dated 3rd February 2023. It denied all the averments in the plaintiff's plaint and averred that this suit was filed before a Court lacking jurisdiction. The defendant stated that it is a textile retail company operating in Kenya and that the RFQ issued in 2020 was merely a prequalification and evaluation tool which did not guarantee volumes, business, or contract award, as any engagement was expressly subject to execution of a formal contract. The defendant admitted having nominated the plaintiff as a prospective service provider but averred that such nomination did not amount to an award or creation of a binding contract.

6. The defendant denied that any agreement was reached on implementation costs, volumes, ratios, or timelines and asserted that any indicative volumes shared were estimates provided solely for evaluation and transition purposes. It further denied knowledge of, or responsibility for any costs incurred by the plaintiff, contending that any expenditure was premature, undertaken at the plaintiff's own volition, and without express or implied authorization. The defendant attributed delays and failure to proceed with the logistics agreement to the plaintiff's inability to complete system integration, lack of consistency, insufficient capacity, and insistence on unacceptable contractual clauses. It maintained that adjustments in volumes were necessitated by transition needs and the plaintiff's integration challenges, but were never firm commitments.

7. This case proceeded to full hearing, where the plaintiff and the defendant each called one witness in support of their cases.

Plaintiff's Case.

8. Mr. Haim Konforti, the Head of Operations-Kenya at the plaintiff's company testified as PW1. He adopted his witness statement dated 31st July 2023 as his evidence-in-chief and produced the documents in the plaintiff's list and bundle of documents dated 16th November 2022 as plaintiff exhibits No. 1 to 144 and those in the supplementary list and bundle of documents dated 17th July 2023 as plaintiff exhibits Nos. 145 & 146. He testified that the plaintiff is a logistics company engaged in warehousing, transportation, and distribution services across Kenya and the East African region. He stated that in July 2020, the defendant issued a Request for Quotation (RFQ) seeking warehousing and distribution services, providing specific storage ratios and volumes which the plaintiff relied upon to compute warehouse space, equipment, labour, and pricing, with the understanding that no separate implementation costs would be charged as these were built into the quoted rates.

9. He stated that following submission of a technical and commercial proposal, the plaintiff was nominated as the defendant's logistics partner by a letter dated 28th January 2021, without any indication of changes to the RFQ ratios or volumes. He indicated that thereafter, the parties formed

an implementation committee in software that was to discuss the integration of two software systems and agreed on a Go-live date of 15th June 2021, during which period the plaintiff proceeded to invest substantially in warehouse leasing, equipment procurement, and labour in readiness to commence services. Mr. Konforti further stated that during this period, they had bi-weekly or weekly meetings in preparation for the D-day, and no concerns were raised by the defendant. PW1 testified that during the implementation phase, the defendant introduced drastic and late changes to the projected volumes and storage ratios, significantly reducing the anticipated contract value and fundamentally altering the operational assumptions upon which the plaintiff had relied.

10. Mr. Konforti testified that in preparation for the engagement they had to purchase what was required and the defendant was updated when they purchased equipment. He further testified that although there was a committee looking into the agreement, the contract could not be signed when there were no key performance indicators and agreements as to volumes. PW1 confirmed that they did not sign the contract since in the logistics industry, contracts are usually signed after going live, so as not to keep changing the terms therein. He asserted that although the defendant initially assured the plaintiff that the revised ratios were temporary and would revert to those contained in the RFQ after a transition period, further revisions were subsequently communicated, culminating in ratios that were materially inconsistent with the original RFQ.

11. It was stated by Mr. Konforti that despite the plaintiff's efforts to accommodate these changes, including identifying and securing an alternative warehouse site at additional cost, the defendant unilaterally terminated the logistics engagement by email on 15th June 2021, shortly before the agreed Go-live date. He contended that by that time, the plaintiff had incurred investments amounting to Kshs.15,534,784.69 in equipment purchases and warehouse rental commitments made for the defendant's benefit. PW1 testified that they attempted to seek clarification from the defendant on why their engagement was terminated and the defendant informed them that they had realized that their expectations did not align with the plaintiff's operations capability. He stated that since the defendant wanted more integration which was not part of the RFQ, it had been informed that it would have to pay more.

12. In cross-examination, PW1 stated that the plaintiff's logistics services include warehousing, freight forwarding, customs clearance, distribution, and transport, and that the plaintiff owns and provides warehouses to its clients. He further stated that under the RFQ, bidders were required to demonstrate their capacity to provide warehousing, with the RFQ defining the categories and volumes of goods, which in turn determined the warehouse layout, dedicated space, and distribution to shops. He confirmed, however, that a RFQ is not a contract, as it is based on information supplied by the defendant, upon which the plaintiff prepared and submitted a comprehensive technical proposal detailing the technical solution, workforce structure, warehouse layout, equipment to be deployed, ethical considerations, and each line of activity requested by the defendant. He maintained that the defendant reviewed and accepted the plaintiff's proposal and quotation.

13. PW1 further explained that the plaintiff's and defendant's systems were to be integrated, noting that although the RFQ required six integration lines, the defendant later requested an additional three. The plaintiff agreed to provide the initial six integrations before the go-live date, with the remaining three to be implemented after commencement of operations, and it duly communicated the associated costs and timelines to the defendant. He asserted that the defendant could not lawfully abandon the engagement four months into implementation, since once the defendant accepted the plaintiff's proposal and rates, it could not subsequently change providers. He acknowledged that a meeting was held at which integration challenges were discussed, despite an earlier email of 28th December 2020, indicating that successful system integration was a requirement.

14. PW1 also testified that although formal nomination occurred on 15th June 2021, the plaintiff had already incurred and paid implementation costs arising from contracts entered into with third parties. PW1 emphasized that the plaintiff took all reasonable steps to accommodate the defendant and therefore seeks reimbursement of the costs incurred for equipment, shelving, and labour. He further stated that payment was made to Kenroid Limited on 10th August 2021 for the lease of Chamber No. 4 of its warehouse, a fact known to the defendant through the shared warehouse layout. He referred to a debit note at page 225 covering rent from June 2021 to 14th September 2021, and confirmed that Kenroid subsequently agreed to release the plaintiff from the lease after three months.

15. In re-examination, PW1 testified that payment was being made past the go live date as they had agreed to work suppliers after 45, 60 or 90 days but some service providers had to be paid in advance. He further testified that the plaintiff sent communication to go to Kenroid at Imara Daima to go and see the space provided to it in the warehouse.

Defendant's Case.

16. Mr. Syprose Odera, the defendant's Logistics Supervisor testified as DW1. He adopted his witness statement dated 17th June 2023 as his evidence-in-chief and produced the documents in the defendant's list and bundle of documents dated 27th June 2023 as plaintiff exhibits No. 1 to 5 and those in the supplementary list and bundle of documents dated 17th June 2023 as plaintiff exhibits No. 6. He testified that the defendant operates a retail clothing business with branches across Kenya. He explained that in June 2020, the defendant issued a RFQ for logistics and warehousing services, which merely set out evaluation criteria and operational requirements, including customs clearance, warehousing, transportation, and reverse logistics, but did not guarantee or commit the defendant to any specific volumes of business.

17. Mr. Odera stated that the indicative volumes provided during the evaluation stage were solely for bid assessment purposes and were expressly stated not to constitute a commitment, nor did the defendant at any time authorize or invite the plaintiff to incur costs prior to execution of a formal contract. He further stated that although the plaintiff was nominated as a service provider in January 2021, such nomination was expressly subject to successful implementation and system integration and did not amount to an award or execution of a contract. According to DW1, execution of any logistics and warehousing agreement was conditional upon successful completion of system integration, which was a critical requirement of the RFQ.

18. He contended that the plaintiff's nomination was cancelled since it was having a lot of problems during the implementation period. He explained that for instance, the plaintiff's system was not capable of integrating its data to that of the defendant's, the plaintiff did not seem to understand the defendant's procedures and that when they sent the draft contract the plaintiff sent it back with unfavorable clauses. DW1 further stated that the plaintiff persistently failed to meet agreed implementation timelines despite repeated revisions made to accommodate it, and that discussions between the parties remained pre-contractual in nature, focused solely on integration and alignment rather than commencement of services. DW1 denied any knowledge or approval of the plaintiff's alleged negotiations for warehouse space, issuance of purchase orders, or hiring of staff, and asserted that any such costs were incurred unilaterally and prematurely at the plaintiff's own discretion without the defendant's express or implied authorization.

19. Mr. Odera maintained that the defendant made it clear that volumes shared during discussions were estimates only, subject to change, and intended to facilitate a smooth transition and onboarding process, particularly in light of the plaintiff's integration challenges. He stated that volume reductions

were necessary to mitigate operational risk to the defendant. He testified that the plaintiff was issued with the nomination letter on 28th January 2021, which required it to finish everything by 28th May 2021 for the IT implementation and trials for shipment which the plaintiff was to transfer to its warehouse. He asserted that the cancellation of the nomination was on 25th June 2021, by which time the plaintiff had not met any of the set targets. DW1 denied that the defendant ever instructed or requested the plaintiff to procure warehouse space, noting that warehousing is part of the plaintiff's ordinary business and that the plaintiff inconsistently identified different warehouses during the discussions without clear explanation.

20. It was DW1's testimony that he visited the plaintiff's warehouse before it was nominated and was satisfied with its state, but after nomination, the plaintiff informed the defendant that it had decided to change the location where it would store the defendant's goods. He then asked via email whether he could visit the new location but he was not able to visit the place. He maintained that the decision not to proceed with integration, and consequently not to formalize the logistics agreement, was justified by the plaintiff's delays, lack of consistency, unacceptable contractual clauses, and failure to demonstrate capacity. He concluded that any costs incurred by the plaintiff were not caused by any act or representation of the defendant and that no contract was ever executed between the parties.

21. In cross-examination, DW1 referred to the nomination letter dated 22nd January 2021 and testified that although the plaintiff was nominated as the defendant's logistics partner, the nomination expressly contemplated a further step, namely the implementation phase, which was to precede commencement of operations. He stated that any costs incurred by the plaintiff during the implementation phase were not costs the plaintiff was entitled to incur. He confirmed that several meetings were held between the parties and that the plaintiff had been issued with an implementation plan. According to DW1, the logistics services contract was to be executed before the Go-live date of 28th May 2021, which was when the plaintiff would begin rendering services, although he also indicated that the anticipated start date had earlier been set for 8th May 2021. He explained that the Go-live date was intended to confirm that system testing had been completed and the systems were operational, but maintained that such testing was never finalized.

22. DW1 referred to an email from the defendant's IT Manager dated 10th May 2021, in which it was informed that IT and EDI integration ought to have been completed the previous week. He testified that the plaintiff responded by indicating that its EDI system was still under development and could not commence integration testing until between 24th & 25th May 2021, notwithstanding that the agreed integration window was between 8th & 28th May 2021. He stated that the defendant expected the plaintiff to already have a warehouse and sufficient staff to support implementation. Although the defendant was invited to visit the plaintiff's warehouse, DW1 testified that no such visit took place because in his view, the plaintiff was not ready. He acknowledged an email suggesting a warehouse visit but could not recall whether he responded to it.

23. Mr. Odera further referred to meeting notes dated 25th May 2021, which indicated that the plaintiff was still in the process of sourcing qualified staff and had proposed the use of personnel from Kuehne Nagel, the defendant's then warehousing service provider. DW1 confirmed that there was no email showing that the plaintiff was to receive 31,000 boxes before 7th June 2021, although he acknowledged that documents indicated an expected volume of 20,268 boxes, which he nonetheless maintained formed part of an overall expectation that the plaintiff should have been prepared to handle up to 31,000 boxes of stock. He also referred to an email dated 29th May 2021 in which the plaintiff undertook to provide additional space and resources for the transition period, while acknowledging that it could not fully reconfigure the warehouse layout or increase the defendant's box-picking storage

capacity at that time, and indicated that it was awaiting an updated transition plan and volumes for sign-off, despite there being no confirmed Go-live date for that project.

24. DW1 asserted that the plaintiff's postponement of the Go-live date from 28th May 2021, delayed other related processes. He denied having knowledge of any counterproposals by the defendant to the draft contract. While he confirmed that he was aware that the plaintiff incurred costs during implementation, he stated that the defendant expected the plaintiff, as a logistics provider, to bear the normal costs associated with warehousing. He further testified that the nomination letter did not expressly provide for cancellation of the nomination if certain conditions were unmet, and that he had not produced minutes evidencing a decision to cancel the nomination. He concluded by stating that although the defendant raised concerns with the plaintiff through email correspondence, as at 29th May 2021, there was still no confirmation from the plaintiff that implementation or system integration had been successfully completed.

25. In re-examination, DW1 testified that page 4 of the defendant's RFQ required any proposed warehouse to have adequate capacity and room for expansion to accommodate the defendant's increasing volumes. He stated that although the plaintiff had indicated in its email correspondence that it was willing and able to provide warehousing for increased volumes, this position was not borne out during the implementation phase. Mr. Odera explained that the volume figures shared with the plaintiff were provided solely to facilitate summary testing, and that upon successful implementation and Go-live, a formal transition plan would be issued based on the defendant's actual stock levels. He maintained that as at 15th June 2021, the Go-live had not occurred. He further testified that the defendant proposed the engagement of staff from Kuehne Nagel, its existing service provider, as this would reduce training time and ease the transition process.

26. On being examined by the Court, DW1 stated that at the time the RFQ was issued, the defendant did not expressly communicate in the document that it would not be responsible for any costs incurred in setting up a warehouse. He asserted that upon nominating the plaintiff in January 2021, the defendant made it clear to the plaintiff that it would not take up or be liable for any costs incurred.

27. At the close of the defendant's case, the Court gave directions for the filing of written submissions. The plaintiff's submissions were filed on 20th May 2025 by the law firm of Muthaura Mugambi Ayugi & Njonjo Advocates, while the defendant's submissions were filed on 22nd July 2025 by the law firm of Munyaka Advocates LLP.

28. Mr. Okeyo, learned Counsel for the plaintiff submitted that a legally binding commercial relationship arose between the parties through their conduct, correspondence, mutual representations, and performance, notwithstanding the absence of a formally executed Logistics Services Agreement. He argued that in commercial dealings, a contract may be inferred from conduct where there is offer, acceptance, consideration, and intention to create legal relations. He submitted that the defendant's RFQ constituted an invitation to treat, the plaintiff's technical and commercial proposal amounted to an offer, and the defendant's nomination letter of 28th January 2021 amounted to acceptance, creating a valid contract. To buttress these submissions, Counsel relied on the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010] UKSC 14 and the Court of Appeal case of Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed [2013] KECA 59 (KLR).

29. Mr. Okeyo further submitted that the defendant is estopped from denying about the existence of a binding relationship under the doctrine of promissory estoppel as codified in Section 120 of the *Evidence Act*. He contended that the defendant, through its representations, assurances, nomination, implementation planning, agreed Go-live date, and continued engagement, induced the plaintiff to act to its detriment by leasing warehouses, procuring equipment, integrating systems, and hiring staff.

He cited the cases of Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 and Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR, and argued that all elements of estoppel, that is, representation, reasonableness, reliance, detriment and unconscionability, have been satisfied.

30. In the alternative to the foregoing, the plaintiff submitted that the defendant is liable under principles of pre-contractual liability and the duty of good faith. He maintained that the defendant's conduct including issuing and revising volumes, setting timelines, holding repeated meetings, forming an implementation committee, sharing execution plans, and issuing a final draft agreement, created a legitimate expectation that the contract would proceed. Counsel contended that in commercial relationships involving significant preparatory investment, parties owe a duty not to induce wasteful reliance and then withdraw without justification. He referred to the case of Verhoef v Hass Consult Limited; Brookside Pearl Limited (Third Party) [2024] KEHC 3374 (KLR) and asserted that the defendant's last-minute withdrawal on the agreed Go-live date of 15th June 2021 amounted to repudiation and breach.

31. Mr. Okeyo argued that the defendant fundamentally breached the contract or commercial understanding by unilaterally and repeatedly altering agreed storage volume ratios, despite knowing that the plaintiff's warehouse layout, equipment procurement, and staffing were based on the original RFQ ratios. He stated that such unilateral variation, followed by abrupt termination without notice or compensation, amounts to repudiation. Counsel maintained that a contract cannot be varied unilaterally, thus the defendant's conduct frustrated performance and made future performance impossible, entitling the plaintiff to an award in damages. Counsel submitted that the plaintiff suffered foreseeable, quantifiable, and directly attributable losses amounting to Kshs.15,534,784.69, being special damages incurred by relying on the defendant's representations.

32. He further submitted that the plaintiff has proved the special damages sought by producing invoices, purchase orders, receipts, and payment records. He argued that the investments racking systems, IT infrastructure, warehouse rent, and staffing were specifically tailored to the defendant's requirements and could not be repurposed without loss, rendering the damage neither speculative nor remote. Mr. Okeyo maintained that the defendant's conduct resulted in unjust enrichment, having benefited from the plaintiff's planning, readiness, and operational preparation without compensation. He relied on the case of Benjamin Ayiro Shiraku v Fozia Mohammed [2012] KEHC 3065 (KLR), to support the position that restitutionary relief can be granted for pre-contractual expenditure incurred in reliance on assurances.

33. Mr. Wamae, learned Counsel for the defendant relied on the Court of Appeal case of William Muthee Muthami v Bank of Baroda [2014] KECA 591 (KLR), and submitted that no valid or enforceable contract ever came into existence between the parties, as the essential elements of a binding contract namely offer, acceptance, consideration, certainty, and intention to create legal relations, were absent. He further submitted that the nomination of the plaintiff was merely a preliminary and conditional step within a procurement process and did not amount to contractual acceptance. He argued that the nomination letter dated 28th January 2021 was expressly subject to the execution of a formal contract, thereby negating any intention to be legally bound prior to such execution. Counsel stated that the parties' subsequent conduct, including ongoing negotiations and failed system integration, demonstrated that discussions never progressed beyond pre-contractual stages and that material terms remained unsettled, rendering the alleged agreement void for uncertainty.

34. Citing the Court of Appeal case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), Mr. Wamae submitted that the Court cannot rewrite a contract for the parties and maintained that the draft logistics agreement was never executed due to the plaintiff's

introduction of unacceptable and extraneous terms at an advanced stage, including liability limitations. He argued that the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co. KG (supra), cited by the plaintiff is distinguishable from this case, noting that unlike in RTS, the RFQ and nomination letter here consistently imposed express conditions precedent requiring a formal written contract before any binding obligations could arise. In submitting that while contracts may be inferred from conduct, such inference cannot override explicit contractual preconditions, Counsel referred to the case of Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed [2013] KECA 59 (KLR).

35. On the issue of promissory estoppel, Counsel contended that the doctrine is inapplicable, as there was no clear or unequivocal promise capable of inducing reasonable reliance, as required under Section 120 of the *Evidence Act*. He maintained that all communication clearly disclaimed liability and warned against pre-contractual expenditure, rendering the plaintiff's incurred costs a voluntary commercial risk rather than a detriment induced by the defendant. He argued that the defendant acted lawfully and in good faith throughout negotiations, hence it was entitled to terminate discussions when integration failed and unacceptable counter-offers were introduced. It was submitted by Counsel that all volume estimates provided during the RFQ process were purely indicative and for evaluation purposes only, and that the plaintiff's attempt to treat them as binding commitments is inconsistent with standard procurement practice.

36. In view of the above, Counsel maintained that no obligation existed for the plaintiff to incur costs during the RFQ or implementation phases prior to contract execution, and any such costs were incurred unilaterally without authorization. He asserted that the plaintiff failed to prove that the alleged costs constituted total loss or that reasonable mitigation efforts were undertaken, contrary to settled principles of mitigation. Mr. Wamae emphasized that commercial reality dictates that implementation costs should only be incurred after contract execution and that the plaintiff's failure to achieve successful system integration entitled the defendant to withdraw the nomination. In conclusion, Counsel submitted that there was no concluded contract, no promissory estoppel, no basis for pre-contractual liability, and no justification for the plaintiff's claimed losses.

Analysis And Determination.

37. I have considered and analyzed the evidence adduced in line with the pleadings filed, as well as the written submissions made by Counsel for the parties. The issues that arise for determination are: -

    i. Whether a binding contract existed between the parties herein;

    ii. Whether the plaintiff had a legitimate expectation;

    iii. Whether the doctrine of promissory estoppel applies to the facts of this case;

    iv. Whether there were delays and failures in system integration attributable to the plaintiff and whether such failures entitled the defendant to terminate the nomination and discontinue negotiations; and

    v. Whether the plaintiff is entitled to the damages sought.

    Whether there was a binding contract existed between the parties herein.

38. It is not disputed that the RFQ issued by the defendant constituted an invitation to treat and that the plaintiff responded with a detailed technical and commercial proposal. The evidence shows that the defendant evaluated the proposal, accepted the pricing and technical solution, and by its letter dated 28th January 2021, the defendant nominated the plaintiff as its logistics partner in Nairobi. From

the evidence adduced, the said nomination was not merely an expression of interest but was followed by extensive implementation and customization activities, joint planning, system integration efforts, agreed timelines, and the fixing of a Go-live date.

39. A contract may arise from the conduct of parties even where they contemplate the execution of a formal written agreement at a later stage. In the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14 cited with authority by the Court of Appeal in Ali Abdi Mohamed v Kenya Shell & Company Limited [2017] KECA 590 (KLR), Lord Clarke held as follows–

> The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.

40. Within our local jurisdiction, the Court of Appeal in the case of Abdulkadir Shariff Abdirahim & Abdinarsir Abdirahim Mohammed T/A. S. Abdirahim Enterprises v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2013] KECA 59 (KLR), affirmed that intention to create legal relations may be discerned from conduct. The Court held that–

> There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum.

41. In this case, it is not in dispute that after the plaintiff was issued with the nomination letter as the defendant's logistics partner, the next step was the implementation stage. From the evidence adduced it is clear that at the said stage, the parties herein agreed on the scope of services, pricing, implementation framework, and timelines. PW1 testified, and this was not controverted by the defendant, that the industry practice is for logistics contracts to be executed post the Go-live date so as to avoid constant amendments during implementation. I am therefore persuaded that the defendant's participation in weekly meetings, provision of implementation plans, engagement of its IT team, and fixing of a Go-live date objectively demonstrated an intention to be bound.

42. In view of the foregoing, this Court is satisfied that there was a binding commercial contract between the parties herein by conduct and correspondence.

Whether the plaintiff had a legitimate expectation.

43. The plaintiff's case is that the defendant's conduct created a legitimate expectation that the logistics engagement would proceed to commencement. It is trite law that the doctrine of legitimate expectation must operate within the law, not contrary to it. On the reliance of the doctrine of legitimate

expectation, the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) held as follows -

> Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council,[1986] A.C 668 at 692(Lord Bridge):
>
> > "...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".
>
> An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, South African Veterinary Council v Szymanski 2003(4) S.A 42 (SCA) at [paragraph 28]: the court held as follows:
>
> > "The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:
> >
> > i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
> >
> > ii. The expectation must be reasonable: Administrator, Transvaal v Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).
> >
> > iii. The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.
> >
> > iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G."
>
> This was also referred to with approval in Walele v City of Cape Townand Others; 2008 (6) S.A 129 (C.C.) paragraph 41.
>
> The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

De Smith, Woolf & Jowell, in "Judicial Review of Administrative Action cited in Republic v Kenya Revenue Authority Ex Parte M- Kopa Kenya Limited thus:

> "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

44. The import of the foregoing authorities is that a party cannot successfully invoke the doctrine of legitimate expectation where statute explicitly provides otherwise. Legitimate expectation arises where a party by representation or consistent conduct, induces another to reasonably expect that a certain state of affairs will continue or that a benefit will be conferred.

45. From the evidence adduced, it is manifest that both parties agree that after nomination of the plaintiff as the defendant's logistics partner, the defendant actively encouraged the plaintiff to prepare for commencement of services, participated in implementation and customization planning, set timelines, and fixed a firm Go-live date. The defendant did not at any material time caution the plaintiff against incurring preparatory costs, nor did it communicate that the nomination was liable to be withdrawn without consequence. This evidence was expressly brought out by DW1 on examination by the Court. To the contrary, the plaintiff was encouraged to align its operations to the defendant's requirements and meet the agreed timelines at the implementation stage.

46. This Court is therefore persuaded that a reasonable and legitimate expectation arose from the conduct of the parties herein that the engagement would proceed, and the defendant could not, without justification, withdraw at the final stage after inducing substantial reliance.

Whether the doctrine of promissory estoppel applies to the facts of this case.

47. Closely related to legitimate expectation is the doctrine of promissory estoppel as codified under Section 120 of the *Evidence Act*, which states that–

> 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.

48. In order for estoppel to apply, there must be a clear representation, reliance, and detriment. The Court of Appeal in the case of Mjengo Limited v Menengai Oil Refineries Limited [2025] KECA 85 (KLR), in addressing what constitutes promissory estoppel held as follows-

> Promissory estoppel as we understand it is the legal principle that a promise is enforceable by law, even if made without formal consideration when a promisor has made a promise to a promisee who then relies on that promise to his subsequent detriment. In order to seek damages based on promissory estoppel, a plaintiff must show that: (a) the promisor made

a promise, with the intention that a reasonable person would act on it; (b) the promisee believed the promisor, and acted on that promise in good faith; (c) the promisor later reneged on that promise causing financial harm to the promisee; and (d) the nature of the promise is such that the only way to avoid injustice is by enforcing the promise. (See Hughes vs. Metropolitan Railway Co. 1877 2 AC 439).

In 1947 Justice Denning (as he then was) in Central London Property Trust Ltd vs High Trees House Ltd [1947] KB 130 summed up the applicable principles in cases of promissory estoppel in the following words:

> "... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on."

Therefore, where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any preexisting relationship between the parties or not. The foregoing statement sums up the true legal position. The Court must have regard to the dealings which have taken place between the parties.

49. In this case, the defendant's nomination of the plaintiff, representations regarding anticipated volumes, implementation and customization planning, regular meetings on status updates and progress of the implementation phase and fixing of a Go-live date amounted to clear representations that the logistics relationship would proceed. In the circumstances, this Court is persuaded that the plaintiff relied on these representations by leasing warehouse space, procuring equipment, integrating systems and hiring staff. It is not disputed that the plaintiff incurred costs at the implementation stage which the defendant has not reimbursed. No evidence was however adduced of a clear and express disclaimer by the defendant was communicated to the plaintiff that such costs would be borne exclusively at its own risk, notwithstanding the defendant's continuing representations.

50. This Court therefore finds that it would be unconscionable to permit the defendant to deny liability after inducing such reliance. Equity will not permit a party to act unconscionably by encouraging expenditure and thereafter disowning the relationship when it suits its commercial interests. It is my finding that the doctrine of promissory estoppel applies and bars the defendant from denying responsibility to the extent of the loss occasioned by the plaintiff's reliance on its representations.

Whether there were delays and failures in system integration attributable to the plaintiff and whether such failures entitled the defendant to terminate the nomination and discontinue negotiations.

51. The defendant argued that system integration failures and the plaintiff's failure to meet set timelines for the implementation process justified termination of the plaintiff's nomination. This Court however notes that while the evidence shows that challenges arose during integration of the plaintiff's and the defendant's system, it is equally clear that such challenges were part of the implementation process and were being addressed jointly by both parties.

52. PW1 testified that additional integration requirements beyond the RFQ were introduced by the defendant and that timelines were adjusted accordingly. From the email correspondence produced by

both parties herein, that the defendant continued to engage the plaintiff, attended meetings, express its expectations from the plaintiff and refine implementation plans even as at late as May 2021. It is therefore my finding that this conduct is inconsistent with an assertion that the plaintiff was in fundamental breach to warrant termination of the plaintiff's nomination.

53. In addition to the foregoing, there is no evidence adduced by the parties herein of a formal notice of default, termination, or cure period that was issued to the plaintiff by the defendant before the abrupt termination of the plaintiff's nomination on the morning of 15th June 2021, the expected Go-live date and/or minutes of meetings by the defendant where it was resolved to terminate the plaintiff's nomination for one reason or another. This Court finds that the alleged integration delays did not amount to repudiatory breach and did not entitle the defendant to unilaterally terminate the plaintiff's engagement at the eleventh hour.

Whether the plaintiff is entitled to the damages sought.

54. Upon perusal of the plaintiff's plaint, it is evident that the plaintiff seeks Kshs. 15,534,784.69 being special damages incurred in preparation for the logistics engagement. It is now well settled that special damages must be specifically pleaded and strictly proved.

55. The defendant stated that after nomination, there was the implementation stage, which both parties have demonstrated involved extensive implementation and customization activities, joint planning, system integration efforts, agreed timelines, and the fixing of a Go-live date.

56. The plaintiff pleaded the sum claimed and produced invoices, receipts, debit notes, and payment records evidencing expenditure on warehouse rent, racking systems, equipment, IT infrastructure, and labour. The defendant did not challenge and/or question the authenticity or accuracy of the aforesaid documents. In addition, on examination of the produced email correspondence, it is evident that there had been discussions of costs prior to the issue of additional costs arising.

57. In the premise, this Court is persuaded that the claimed expenses were reasonably incurred in reliance on the defendant's representations and were directly attributable to the terminated nomination. The investments were specifically tailored to the defendant's operational requirements and could not be fully mitigated or repurposed without loss.

58. Accordingly, I am satisfied that the plaintiff is entitled to recover the damages sought. The upshot is that the plaintiff's suit against the defendant is merited.

59. Section 27 of the *Civil Procedure Act* provides that costs follow the event. The plaintiff having succeeded in this suit is awarded costs of the suit.

60. In the end, I make the following orders -

    i. Judgment is hereby entered for the plaintiff as against the defendant in the sum of Kshs.15,534,784.69;

    ii. The aforesaid sum shall accrue interest at Court rates from 15th June 2021 until payment in full; and

    iii. Costs of the suit are hereby awarded to the plaintiff to be borne by the defendant.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JANUARY 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Okeyo for the plaintiff

Mr. Wamae with Ms Githire h/b for Mrs Munyaka for the defendant

Ms B. Wokabi – Court Assistant.