

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL SUIT NO. 13 OF 2019**

**TANDEM SOLUTIONS LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT .....**  
**DEFENDANT**

**JUDGMENT**

1. By way of a plaint dated 28<sup>th</sup> March 2019, the Plaintiff sued the Defendant for breach of contract for the supply, delivery and installation of a prefabricated rubber running track. Consequently, the Plaintiff prays for judgment against the Defendant for:
  - a.) The sum of Kshs 14,239,275/= being the outstanding balance of sixty percent of the contract sum.
  - b.) The sum of Kshs 8,249,101/= being the costs of carrying further additional works;
  - c.)The sum of Kshs 1,500,000/= being additional costs incurred in re-engaging the foreign engineers, procuring their work permits, transport and accommodation costs.
  - d.) Costs of the suit; and
  - e.) Any other relief that this Honourable court may deem fit and just to grant.

2. The Plaintiff alleges that vide a letter dated 7<sup>th</sup> September 2016, the Defendant duly notified the Plaintiff of the award for tender for the supply, delivery and installation of a prefabricated rubber running track of Ref No. GMC/TSCMC/01/2016-2017 and subsequently a contract was executed between the parties herein on 8<sup>th</sup> September 2016. The Plaintiff further avers that it was a term of the contract that the Plaintiff would supply, deliver and install a prefabricated rubber running track and in return the Defendant would pay the contract sum of Ksh.37,946,172/= in the terms that 20% of the contract sum to be paid upon the Plaintiff's submission of a performance/insurance guarantee bond from an institution recognized by the Central Bank of Kenya; a further 20% of the contract sum to be paid upon submission of an original Bill of Lading and that lastly, the balance of 60 % of the contract, sum payable upon delivery, inspection and acceptance provided that it is understood that such inspection, acceptance and payment shall be within fourteen (14) days from delivery.
3. The Plaintiff states that it was an obligation under the contract that the Defendant would have the grounds prepared for the laying of the prefabricated rubber track. That accordingly, the Plaintiff states that it diligently and satisfactorily performed its obligations by *inter alia* promptly procuring and delivering the prefabricated running track and all other requisite materials for the same which was

delivered on 6<sup>th</sup> December 2016 and receipt was acknowledged by the Defendant; procuring and submitting the requisite insurance guarantee and engaging the services of competent and qualified engineers from China for the purposes of installation of the rubber track. That the engineers from China were on the grounds from 5<sup>th</sup> December 2016 for the purposes of installation of the rubber track.

4. Subsequently, that vide a letter dated 14<sup>th</sup> December 2016, the Plaintiff reminded the Defendant of its obligations to prepare the ground before the installation of the running track. Further, that vide the same letter, it informed the Defendant that the engineers permits were due to expire on 25<sup>th</sup> December 2016 and were scheduled to travel back on 30<sup>th</sup> December 2019 and as such demanded that the grounds be prepared to enable the installation of the rubber track. As a result of the Defendant's failure and or refusal to prepare the ground in consonance with its contract obligations, the Plaintiff avers that the engineers travelled back to China without carrying out the works exposing the Plaintiff to loss and damage.
5. The Plaintiff avers that despite numerous reminders and assurances by the Defendant that the ground would be ready, the Defendant failed and neglected to perform its

obligations. It states that vide a letter dated 18<sup>th</sup> August 2017 and supplementary to the initial contract dated 8<sup>th</sup> September 2016, the Defendant instructed it to prepare the ground, apply the asphalt concrete; lay the rubber track and mark the tracks which offer it accepted and subsequently furnished the Defendant with an estimate cost of undertaking the task as captured vide the letter dated 13<sup>th</sup> September 2017.

6. The Plaintiff avers that it proceeded to prepare the grounds and installed the running track and notified the Defendant of the completion vide the letter dated 31<sup>st</sup> October 2017. That despite numerous reminders to settle the outstanding amounts, the defendant has neglected to settle the balance as per the original contract dated 8<sup>th</sup> September 2016 and further failed to settle and or offset the costs incurred in carrying out the additional works as instructed vide letter dated 18<sup>th</sup> August 2017.
7. In the Defendant's Defence dated 8<sup>th</sup> May 2019, it denies the existence of a valid contractual relationship between the parties, specifically disputing that any tender was awarded to the Plaintiff or that a contract was executed on 8<sup>th</sup> September 2016 for the supply, delivery, and installation of a prefabricated rubber running track at the stated contract sum. The Defendant further denies that it bore any contractual obligation to prepare the grounds for installation

and puts the Plaintiff to strict proof of all alleged contractual terms and performance. The Defendant disclaims knowledge of and challenges the Plaintiff's assertion that it duly performed its obligations, including the engagement of foreign engineers to undertake the works. In the alternative, the Defendant contends that even if such engagement occurred, there was no contractual provision permitting the hiring of foreign nationals, nor could the associated costs be passed on to the Defendant. Further, that any purported subcontracting or assignment to third parties was allegedly undertaken without the Defendant's prior written consent, in breach of express contractual provisions.

8. The Defendant also denies receiving or being bound by the correspondence relied upon by the Plaintiff, including alleged reminders to prepare the site and communications regarding the engineers' permits and timelines. It maintains that it was under no obligation to prepare the grounds and that any failure of the Plaintiff to perform cannot be attributed to the Defendant. In respect of the alleged supplementary agreement, the Defendant denies issuing any such instructions and avers that, if any additional works were undertaken, they constituted new works that ought to have complied with the requirements of the Public Procurement and Asset Disposal Act. Consequently, the Defendant contends that any such arrangement would be illegal and unenforceable.

9. The Defendant further disputes that the Plaintiff completed the works as alleged and asserts that, in any event, the works carried out were defective, substandard, and unfit for purpose. It avers that the running track was not functional, failed to adhere properly to the ground, and was rejected by the Ministry of Public Works, which declined to issue the requisite certification. As a result, the Defendant claims to have suffered loss and damage and reserves the right to pursue recovery of any sums paid to the Plaintiff.
10. The suit proceeded to hearing on 10<sup>th</sup> March 2025 and 21<sup>st</sup> May 2025 during which each party herein had witnesses testifying.
11. At the trial, **PW1, Anthony Benjamin Mwangi** adopted his witness statement dated 30<sup>th</sup> February 2019. He also produced the Plaintiff's documents in the Bundle of documents dated 28<sup>th</sup> March 2019 and a further List and Bundle of documents dated 11<sup>th</sup> February 2021 and the documents were marked as Plaintiff's Exhibits No 1-19. He testified that as the Operations Director at the Plaintiff, he is responsible for overall smooth running of the company and he executes business goals. He testified that in August 2016, there was an advertisement by Machakos County Government for supply and installation of pre-fabricated rubber track and that the Plaintiff tendered and was awarded the contract. He stated that the Plaintiff seeks the court to

authorize Machakos County Government to pay the Plaintiff for work done.

12. On cross examination, he testified that he signed all correspondences. He stated that he did not provide any document to court to confirm that he is a Director in the Plaintiff's company. He stated that the Plaintiff claims a balance of Kshs 14,239,275/= as per the LPO issued. He testified that he is aware that the Defendant did not conduct inspection as there is no inspection report. He stated that he has seen the defence and list of documents filed. When he was referred to page 13 of the Defendant's trial bundle, he confirmed that it was the inspection report done five months after they had requested for a variation under the plaintiff's letter dated 31<sup>st</sup> October 2020. That the defect liability defect period is six months and that the report was prepared during or within the defect liability period. He stated that he does not agree with the report but there were issues. He stated that he did not rectify the issues that were raised. He further stated that he could not confirm whether he will be paid after rectification.
13. That the Plaintiff sought Kshs 8,249,101/= for additional works and when the plaintiff was awarded the tender, it was to take 20 days. That ground preparations were to be done by the county which it did not do. He testified that additional works was costs of engineers who were going and coming back to the site. He testified that the Plaintiff was authorized

to do the ground work on triple chase track as per the letter dated 18<sup>th</sup> August 2017. That through the letter, he stated, the plaintiff gave their costings and proceeded to finalise the works. He states that he did not tender for ground works as the contract was for installation laying of rubber track. He testified that he charged Kshs 1.5 million and there was no provision for engaging foreign engineers, procuring work permit and accommodation. That the contract did not provide for engaging engineers but that they engaged engineers because of the ground preparation. He stated that they transferred the loss to the Defendant because they did not prepare the grounds on time. That there was no additional tender for works and the county did not engage foreign engineers.

14. On re-examination, he testified that all correspondences were signed by him and that the Defendant has never rejected the correspondences. He testified further that after he was done with work, he wrote to the Defendant as he was required to do fourteen (14) days after works had been done. That the defendant took five and a half (5 ½) months and that once the plaintiff received the defects, they visited the ground and noted heavy machine ran through the rubber leading to separation of rubber from the ground. He stated that parties went for mediation but they did not agree. When he was referred to the letter dated 18<sup>th</sup> August 2017, he stated that it had instructions on the works to be done and

that the letter dated 13<sup>th</sup> September 2017 was a response to the letter to prepare the grounds giving costings. That the Defendant did not reject the letter meaning they agreed with the terms.

15. The above marked the close of the Plaintiff's case.
16. **DW1, Charles Mutuku**, testified that he is an engineer with the County Government of Machakos having served in that capacity since the inception of devolution. He stated that he was appointed as a member of the inspection and acceptance committee. He adopted his witness statement dated 22<sup>nd</sup> November 2019 and produced the Defendant's documents as contained in the List and Bundle of Documents dated 13<sup>th</sup> March 2018. He testified that he prepared the inspection report dated 13<sup>th</sup> March 2018. According to him, the tartan strips had failed at the joints, prompting a lane-by-lane inspection. The team concluded that before the contractor could be paid, the works had to be completed to the satisfaction of the client. He further stated that the contractor did not comply with the recommendations made in the report.
17. On cross-examination, he testified that he is an engineer employed by the County Government of Machakos, although he did not have documentary proof of his employment before the Court. He stated that he works in the Department of Transport and Roads and was part of the inspection and acceptance team. He further testified that he was not aware

of the specific terms of the contract. When referred to the letter dated 14<sup>th</sup> December 2016, he explained that ground works entail preparing the surface upon which the tartan would be laid. Upon being referred to the letter dated 5<sup>th</sup> June 2017 (at page 32 of the Plaintiff's bundle), he stated that the glue referenced therein was due to expire on 31<sup>st</sup> August 2017. He confirmed that the letter at page 33 of the Plaintiff's bundle was a response from the Defendant. He further testified that ground preparation was not included in the contract and, in his view, ought to be paid for separately. He added that valuation and inspection of the works were undertaken. When referred to the letter dated 31<sup>st</sup> October 2017, he stated that it was the responsibility of the Chief Officer to organize an inspection, but he was not aware whether such inspection was conducted and therefore could not comment on it.

- 18.** He was then referred to his statement at Paragraph 5 where he stated that, "on or about 13<sup>th</sup> March 2018 about four (4) months after the installation of the said tartan, we inspected and prepared a report on the defects observed on the said tartan." He testified that once works were done the Chief Officer was to form a team to inspect and his task was specific to identifying gaps. When referred to the contract agreement between the parties, he testified that he was not part of the preparation of the documents and did not know the details of contract document. He stated that he was not

aware of any events held on the grounds and was also not aware of the recommendation made. He testified that the contract document provided specification. When asked about the Tartan Installation report remarks in the document which stated, *“Before we started to cover the first layer, we had communicated with the authorities and engineers who were in charge of the construction of the asphalt pavement. That the base pavement was added too much oil, it would affect the connective of the covering glue and somewhere was bumpy, the water on the surface cannot flow away when it rains. We suggested they add another layer of (asphalt concrete, thickness around 30-50mm) on the surface but they refused at last. We had no other solution or choice but started to cover and pave the rubber ahead”*

DW1 testified that he disagrees with the contents of the report and added that if there was too much oil, it would have bled. He testified that he is seeing the report for the first time in court.

19. On re-examination, DW1 testified that the report did not bear a date and that he could not ascertain when it was prepared. He further stated that the report did not have a stamp to indicate that it had been formally received. He testified that, in the remarks section of the report, the Plaintiff appeared to admit fault by stating that “they had no other solution or choice.” He further stated that the defect liability period is provided for in the contract document and varies from one

contract to another. He added that the Plaintiff used expired glue, which was unsuitable for the works. He concluded by stating that in light of the defects identified, a completion certificate could not be issued.

20. The defendant proceeded to close its case.

21. After hearing the evidence of the parties, this court directed parties to file their respective submissions. The submissions are summarized here under.

### **Plaintiff's submissions**

22. The Plaintiff commenced its submissions with a brief introduction and background, stating that the suit arises from a tender process initiated by the Defendant in 2016 for the installation of a prefabricated rubber running track. The Plaintiff contends that it successfully bid for the tender and was duly awarded the same vide a Notification of Award dated 7<sup>th</sup> September 2016, following which the parties executed a formal written contract on 8<sup>th</sup> September 2016. The Plaintiff outlined the respective obligations under the contract, asserting that it undertook to supply, deliver, and install the running track, while the Defendant was obligated to make staged payments and prepare the site. It was the Plaintiff's case that it mobilized materials and skilled personnel, including Chinese engineers but was unable to proceed due to the Defendant's failure to prepare the grounds. The Plaintiff detailed a series of correspondences

evidencing delays, the expiry of key materials, and eventual instructions by the Defendant requiring the Plaintiff to undertake additional works outside the original contract. The Plaintiff maintained that it completed the works despite these challenges, but that the Defendant delayed inspection, utilized the facility prematurely, and caused damage to the track, ultimately leading to the present dispute.

23. The Plaintiff identified four issues for determination, that is, (i) whether there existed a valid and binding contract between the parties for the supply, delivery and installation of a prefabricated rubber running track; (ii) whether the Plaintiff duly performed its contractual obligations under the contract dated 8<sup>th</sup> September 2016 and the subsequent instructions issued by the Defendant; (iii) whether the Plaintiff is entitled to the reliefs sought; and (iv) who should bear the costs of the suit.
24. On the first issue, the Plaintiff submitted that a valid and binding contract existed between the parties arising from the tender process and subsequent execution of a written agreement. Reliance was placed on ***Mathu & 3 others v Stuart (Environmental and Land Originating Summons E009 of 2023) [2024] KEELC 5629 (KLR)***, where the court, citing ***Garvey v Richards [2011] JMCA 16***, outlined the essential elements of a contract as including agreement, intention to create legal relations, and consideration. Further reliance was placed on ***William Muthee Muthami v Bank***

**of Baroda [2014] eKLR**, for the proposition that a valid contract must demonstrate offer, acceptance, and consideration and on **Rose and Frank Co. v JR Crompton & Bros Ltd (1923) 2 KB 293**, where it was held that parties must have a common intention to create legal obligations. The Plaintiff also invoked Section 135(4) of the Public Procurement and Asset Disposal Act, emphasizing that a contract is only formed upon execution of a written agreement. It was submitted that the Notification of Award dated 7<sup>th</sup> September 2016 and the executed contract of 8<sup>th</sup> September 2016 satisfied all the legal requirements, including consideration in the agreed contract sum of Kshs. 37,946,172/=, thereby establishing a valid and enforceable contract.

25. On the second issue, the Plaintiff submitted that it fully performed its contractual obligations and that any challenges encountered were attributable to the Defendant's breach. The Plaintiff detailed how it procured materials, including adhesive glue imported from China and engaged qualified engineers whose work permits were valid and communicated the same to the Defendant without objection. It was contended that despite being ready to proceed, installation was delayed due to the Defendant's failure to prepare the site, which obligation lay with the Defendant. The Plaintiff relied on various correspondences demonstrating repeated

reminders and the Defendant's assurances which were not fulfilled.

26. It was further submitted that the Defendant eventually instructed the Plaintiff to undertake additional works, including ground preparation and application of asphalt concrete, which were outside the original contract. The Plaintiff argued that it undertook these works under constrained timelines, leading to the expiry of imported materials and the need to procure inferior local alternatives. Despite these difficulties, the Plaintiff maintained that it completed the works and requested inspection, which the Defendant delayed for over four months. The Plaintiff further argued that the Defendant's premature use of the facility, including allowing heavy vehicles onto the track, caused the defects later cited. Reliance was placed on the case of ***John Richard Okuku Oloo v South Nyanza Sugar Co Ltd*** [2013] KECA 73 (KLR) where the court held that a party who fails to act within the contractual timeline cannot shift blame where such failure leads to loss. The Plaintiff therefore maintained that it duly performed its obligations and that any defects were a direct consequence of the Defendant's conduct.
27. On the third issue, the Plaintiff submitted that it is entitled to the reliefs sought, principally, orders of specific performance compelling the Defendant to pay outstanding sums under the contract and for additional works. The Plaintiff cited

***Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR** and ***Sahkar Limited & another v African Hotels and Adventures (East Africa) Limited* [2020] eKLR** for the proposition that a claimant must prove breach of contract. It was submitted that the Plaintiff had discharged this burden by demonstrating that the Defendant failed to meet its contractual obligations. The Plaintiff further relied on ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR** and ***Francis H. Shiaba v Morris M. Isiye* [2020] KEELC 3008 (KLR)**, citing ***Shah v Guilders International Bank Ltd* (2003) KLR**, to emphasize that parties are bound by the terms of their contract.

28. It was argued that the Defendant, having paid only 40% of the contract sum, remains liable for the outstanding balance of 60%, additional costs for supplementary works and expenses incurred in mobilizing foreign engineers. On the remedy of specific performance, the Plaintiff relied on ***Caltex Oil (Kenya) Limited v Rono Limited* [2016] KECA 457 (KLR)** which cited ***Gharib Suleman Gharib v Abdulrahman Mohamed Agil***, for the principle that specific performance is granted where damages are inadequate. Further reliance was placed on ***Thrift Homes Limited v Kays Investment Limited* [2015] KEHC 5591 (KLR)** and ***Gurdev Singh Birdi & another v Abubakar Madhbuti* [1997] KECA 400 (KLR)**, which underscore that

a party seeking specific performance must demonstrate readiness and full performance of its obligations. The Plaintiff also cited ***Skov Estate Limited & 6 others v Agricultural Development Corporation & 21 others*** [2023] KEELC 224 (KLR) to argue that specific performance is appropriate where damages are not an adequate remedy. It was submitted that only specific performance would achieve complete justice in the circumstances.

29. On the issue of costs, the Plaintiff relied on Section 27 of the Civil Procedure Act and the decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** [2014] eKLR submitting that costs should follow the event.
30. In conclusion, the Plaintiff maintained that it fully performed its contractual obligations and that any defects in the works were caused by the Defendant's premature and improper use of the facility. It urged the court to find that the Defendant was in breach of contract and to grant the orders of specific performance as sought together with costs of the suit.

### **Defendant's submissions**

31. The Defendant's submissions begin by setting out the background of the dispute. The Defendant states that in 2016, it advertised a tender for the supply, delivery, and installation of a prefabricated rubber running track at Machakos Kenyatta Stadium under Tender Reference No.

GMC/TSCMC/01/2016-2017 at a fixed contract sum of Kshs.37,946,172/= . The Plaintiff participated in the tender process and represented that it possessed the requisite technical capacity and experience. Upon evaluation, the Defendant awarded the tender to the Plaintiff and a contract was executed. Pursuant to the contract, the Plaintiff imported and installed the rubber running track. However, shortly after installation, the works failed, with the running track beginning to disconnect within about seven days.

32. The Defendant contends that the installation was substandard, defective, and incapable of certification. An inspection by the Ministry of Public Works, documented in a report dated 13<sup>th</sup> March 2018, confirmed substantial defects, including 74 end joints requiring repair (approximately 90 metres) and 705 metres of joints between running lanes requiring repair. These findings were communicated through official correspondence dated 26<sup>th</sup> March 2018, which reiterated that significant remedial work was required before certification could be issued. The Defendant emphasizes that under the Public Procurement and Asset Disposal Act, 2015, payment for public works is conditional upon issuance of a completion certificate following inspection and approval. In the absence of such certification, no payment can lawfully be made. The Defendant maintains that despite being given the opportunity to remedy the defects, the Plaintiff refused and/or failed to carry out the required repairs, and as a

result, the works remain uncertified. The Defendant further relies on audit findings by the Auditor-General, which raised queries and concluded that the works were substandard and did not provide value for money.

33. The Defendant identified four issues for determination (i) whether there existed a contract between the Plaintiff and the Defendant for the supply, delivery and installation of a prefabricated rubber running track and what were the respective obligations of the parties; (ii) whether there were additional works procured by the Defendant; (iii) whether the Plaintiff has proved its case against the Defendant and (iv) who should bear the costs.
34. In response to the issues for determination, the Defendant concedes that a contract existed between the parties. It reiterates that the Plaintiff was contracted to supply, deliver and install the running track, and that payment was to be made upon satisfactory completion and certification. The Defendant asserts that it met its obligations but that payment was contingent upon certification, which was never issued due to the Plaintiff's defective performance.
35. On the issue of whether the Plaintiff fulfilled its obligations, the Defendant submits that the Plaintiff failed to meet the required contractual standards. It relies on inspection findings and internal correspondence including letters dated 12<sup>th</sup> October 2017 and 26<sup>th</sup> February 2018 which identified defects in workmanship, including ripples, poor adhesion and

safety concerns. The Defendant further disputes the Plaintiff's allegation that it was responsible for preparing the ground, stating that the contract contained no such obligation on the Defendant. Instead, the Defendant argues that it was the Plaintiff's responsibility to ensure the surface was suitable for installation.

36. The Defendant also contends that the Plaintiff admitted to defective workmanship in its own evidence, acknowledging that the installation was carried out on an uneven, unfinished and unsuitable surface with conditions such as oil contamination that prevented proper adhesion. Additionally, the Defendant rejects the Plaintiff's assertion that damage occurred after handover, stating that evidence shows the defects existed prior to use.
37. The Defendant maintains that inspection and acceptance under section 48 of the Public Procurement and Asset Disposal Act, 2015 is mandatory, requiring that works meet contractual specifications before certification. In this case, the inspection committee did not issue a completion certificate due to the defects and therefore payment of the outstanding balance is not permissible. The Defendant argues that the Plaintiff's failure to remedy the defects is the reason certification has not been issued and consequently, the Plaintiff cannot benefit from its own failure.
38. On the issue of additional works, the Defendant rejects the Plaintiff's claim for Kshs. 8,249,101/= allegedly incurred for

extra works. It argues that no additional works were procured and that the correspondence relied upon by the Plaintiff, particularly a letter dated 18<sup>th</sup> August 2017, merely reiterated the Plaintiff's existing contractual obligations. The Defendant submits that the preparation of the site, including laying asphalt and preparing the surface, was part of the Plaintiff's core contractual duty and not a variation or additional work.

39. The Defendant further argues that even if any additional works were contemplated, they would be unlawful and unenforceable as they were not approved in accordance with the Public Procurement and Asset Disposal Act, 2015. It cites the statutory requirements under sections 47 and 139, which mandate written approval of variations by the relevant procurement authorities, adherence to prescribed limits, and compliance with procurement procedures. The Defendant emphasizes that no such approvals were obtained and therefore the alleged variation is invalid.
40. While relying on ***Mugoye & Associates v Kiambu County Assembly Speaker [2018] eKLR*** and ***Narok County Government v Prime Tech Engineering Ltd [2017] eKLR***, the Defendant submits that instructions and variations in public procurement must be expressly authorized in writing and cannot be implied from conduct. Accordingly, any claim based on alleged additional works is legally unsustainable. The Defendant also argues that the

Plaintiff has failed to strictly prove the special damages claimed which is a legal requirement.

41. On the overall burden of proof, the Defendant submits that the Plaintiff has failed to prove its case as required under sections 107, 108, and 109 of the Evidence Act. It argues that the Plaintiff has neither demonstrated that it completed the works to the required standard nor that it is entitled to the sums claimed. The Defendant further contends that the Plaintiff has incorrectly calculated the balance due as it claims a figure inconsistent with the contract and the amount already paid, which stands at Kshs. 25,000,000/=, leaving a balance of Kshs. 12,946,172 as opposed to the amount pleaded. The Defendant also opposes the Plaintiff's claim for Kshs. 1,500,000/= allegedly incurred in engaging foreign engineers. It submits that the contract did not provide for such engagement and that any subcontracting or assignment required prior written approval, which was not obtained. Consequently, the Plaintiff acted in breach of the contract, and the Defendant cannot be held liable for such costs. Further, the claim is unproven and unsupported by evidence.
42. In conclusion, the Defendant submits that the Plaintiff failed to perform its contractual obligations, delivered substandard works, and refused to undertake necessary remedial measures despite being given the opportunity. The absence of a completion certificate, as required by law, precludes any lawful payment of the balance claimed. The Defendant

therefore prays that the Plaintiff's suit be dismissed in its entirety as it is unmerited, premature and unsupported by both law and evidence. The Defendant further prays that costs be awarded to it, on the basis that the Plaintiff's own failure to comply with contractual and statutory obligations necessitated the institution of the suit.

### **Analysis and Determination**

43. I have carefully considered the pleadings, the oral and documentary evidence presented by both parties, as well as their respective submissions. From the totality of the material placed before this Court, the dispute revolves around the performance of a public procurement contract, the quality of works delivered, the legality of alleged variations, and the entitlement to payment under such a contract. The key issues for determination are therefore:

- a.) Whether there existed a valid and binding contract between the parties and what the respective obligations of the parties were**
- b.) Whether the Plaintiff duly performed its contractual obligations or was in breach of the contract**
- c.) Whether there were any validly procured additional works and whether the Plaintiff is entitled to the sums claimed thereunder; and**

**d.) Whether the Plaintiff is entitled to the reliefs sought.**

**Whether there existed a valid and binding contract between the parties and what the respective obligations of the parties were**

44. The existence of a contract between the parties is largely not in dispute. The evidence on record shows that the Defendant advertised a tender in 2016 for the supply, delivery and installation of a prefabricated rubber running track at Machakos Kenyatta Stadium. The Plaintiff submitted a bid, was awarded the tender vide a notification dated 7<sup>th</sup> September 2016, and a formal contract was executed on 8<sup>th</sup> September 2016 at a contract sum of Kshs. 37,946,172/=.
45. The terms of payment, as pleaded and supported by evidence, were structured in tranches: 20% upon submission of a performance bond, a further 20% upon submission of shipping documents, and the balance of 60% upon delivery, inspection, acceptance, and certification.
46. While the Defendant in its defence initially denied the existence of a contract, its submissions and evidence clearly acknowledge that a contractual relationship existed. Accordingly, this Court finds that there was a valid and binding contract between the parties.
47. The central dispute, however, lies in the respective obligations of the parties. The Plaintiff contends that its

obligation was limited to supply, delivery and installation of the running track while the Defendant bore the responsibility of preparing the ground. The Defendant, on the other hand, denies any obligation to prepare the site and maintains that the entire process of installation, including site preparation, fell within the Plaintiff's scope.

48. Upon reviewing the contract and the evidence, no express provision has been pointed out placing the obligation of ground preparation upon the Defendant. Indeed, even the Plaintiff's own witness conceded that the contract did not expressly provide for the ground preparation works. Had such a provision existed, the Plaintiff would have had no difficulty reproducing it before this court. Similarly, the engagement of foreign engineers or the adoption of particular preparatory methods was purely discretionary based on the Plaintiff's own operational choices. It was not a contractual requirement that foreign engineers would be engaged and any such engagement was therefore at the Plaintiff's own expense.
49. In contractual interpretation, parties are bound by the express terms of their agreement. Obligations cannot be implied lightly, particularly in public procurement contracts where precision, transparency and compliance with statutory requirements are paramount. In the absence of an express clause placing the burden of site preparation on the Defendant and given the nature of the works (installation of a

specialized running track), it is more probable than not that the responsibility for ensuring suitability of the surface lay with the Plaintiff as the contractor with the requisite expertise.

50. Accordingly, this court finds that while a valid contract existed, the Plaintiff bore the primary obligation to deliver a functional and properly installed running track meeting the required standards, subject to inspection and certification.

**Whether the Plaintiff duly performed its contractual obligations or was in breach of the contract**

51. This is the crux of the dispute. The Plaintiff maintains that it fully performed its obligations and that any defects arose from the Defendant's failure to prepare the ground and from premature use of the facility. Conversely, the Defendant contends that the works were fundamentally defective, substandard, and incapable of certification, and that the Plaintiff failed to remedy the defects despite being notified.

52. The evidence before court strongly supports the Defendant's position. The inspection report dated 13<sup>th</sup> March 2018 prepared by a team including the Acting Chief County Engineer (DW1) documents substantial defects in the installed running track. The report was prepared approximately four months after installation, squarely within the defect liability period, as acknowledged by the Plaintiff's own witness. This timing is significant, as it demonstrates

that the defects manifested shortly after installation and during a period when the contractor remained responsible for rectification.

53. The Plaintiff's attempt to attribute the defects to the Defendant's use of the facility is unconvincing not persuasive. Documentary evidence, including correspondence dated 12<sup>th</sup> October 2017 shows that defects were already apparent even before the facility was put to use. More critically, the Plaintiff's own admissions undermine its case. In both documentary evidence and oral testimony, the Plaintiff acknowledged that installation was carried out on an uneven and unsuitable surface and that conditions such as oil contamination affected adhesion. The Plaintiff's witness further admitted that delays in ground preparation led to the expiry of imported material, forcing the plaintiff to source cheaper, lower quality substitutes locally. The Plaintiff also conceded that it did not rectify the defects identified in the inspection report.
54. Under a contract of this nature, performance is not merely the act of installation but the delivery of works that meet contractual specifications and are fit for purpose. The issuance of a completion certificate is the definitive milestone confirming such performance. Section 48 of the Public Procurement and Asset Disposal Act, 2015 mandates inspection and acceptance before certification. In this case, no completion certificate was issued precisely because of the

defects that were identified. The Plaintiff's failure to remedy those defects, despite being notified, constitutes a clear breach of its contractual obligations as buttressed by statutory provisions. A party cannot claim the benefits of a contract while failing to perform its essential obligations under it.

55. Consequently, I find that the Plaintiff did not duly perform its contractual obligations and was in breach of the contract.

**Whether there were any validly procured additional works and whether the Plaintiff is entitled to the sums claimed**

56. The Plaintiff claims Kshs.8,249,101/= for additional works allegedly undertaken pursuant to a letter dated 18<sup>th</sup> August 2017 and a further Kshs.1,500,000/= for costs related to foreign engineers. The Defendant disputes both the existence and legality of any such additional works. From the evidence, the letter relied upon by the Plaintiff does not amount to a formal and valid variation of the contract. It neither expressly amends the contract nor demonstrates compliance with the statutory framework governing public procurement.
57. The law governing variation of public procurement contracts is explicit and strict. Section 139 of the Public Procurement and Asset Disposal Act provides that any variation or amendment to a contract is only effective if it is approved in writing by the appropriate authority within the procuring

entity and complies with prescribed conditions. This statutory position reinforced by Regulation 132 of the Public Procurement and Asset Disposal Regulations which provides that contract variations may arise either from the procuring entity or the contractor due to unforeseen circumstances but must undergo a structured approval process. Specifically, any variation request must be reviewed by the relevant contract implementation team or evaluation committee and submitted through the procurement function to the accounting officer for formal approval. Regulation 132 further clarifies that a “contract variation” entails changes to the price, completion date, or scope of works, while a “contract amendment” involves changes to the terms and conditions of the contract. Importantly, any such variation must be preceded by proper justification, review, and approval, and where additional funding is required, such funding must be secured prior to the variation.

58. In the present case, no evidence has been placed before this Court to demonstrate that the alleged additional works were subjected to the statutory process contemplated under both Section 139 of the Act and Regulation 132 of the Regulations. There is no proof of review by a contract implementation team or evaluation committee, no written approval by the accounting officer and no evidence of compliance with the prescribed procurement procedures. The safeguards provided in the Act are not merely

procedural but are substantive aimed at ensuring transparency, accountability and prudent use of public funds. Therefore, any purported variation that does not comply with the statutory requirements is unenforceable.

59. Even if this Court were to accept that the Plaintiff undertook additional works, such works would fall outside the scope of a lawful procurement process and cannot found a valid claim for payment against a public entity. This conclusion is fortified by the earlier finding that the obligation to undertake the ground preparatory works remained solely with the Plaintiff as part of the contractual duty to delivery and install a prefabricated rubber running track. Accordingly, I find that there were no validly procured or approved additional works under the contract and the Plaintiff is not entitled to the sums claimed under this head.

**Whether the plaintiff is entitled to the relief sought?**

60. From the above, it is clear that the relief sought by the Plaintiff that is, payment of the outstanding balance of the contract sum, additional costs and related reliefs cannot be granted. Payment of the balance under the contract was expressly conditional upon delivery, inspection, acceptance and certification. The evidence clearly demonstrates that certification was not issued due to unremedied defective works noted. The Plaintiff's claim for the balance is therefore premature and untenable in the absence of proper

performance and certification. Similarly, the claims for additional works and costs related to foreign engineers fail on grounds of legality. In the circumstances, the Plaintiff has not established its entitlement to any of the reliefs sought.

61. Consequently, the Plaintiff's suit is dismissed. Given the existing relationship between the plaintiff and the respondent each party will bear its own costs.
62. Orders accordingly.

Dated, signed and delivered at Machakos this 9<sup>th</sup> day of April, 2026

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....for Plaintiff

.....Respondent

Selina Court Assistant