REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL SUIT NO. E844 OF 2021

BETWEEN

CONSULTING ENGINEERING SERVICES (INDIA) PRIVATE LIMITED ..... PLAINTIFF

VERSUS

THE HON ATTORNEY GENERAL ..... 1ST DEFENDANT

THE PRINCIPAL SECRETARY,

MINISTRY OF EAST AFRICAN COMMUNITY &

REGIONAL DEVELOPMENT ..... 2ND DEFENDANT

JUDGMENT

Background and Introduction

The Plaintiff's Case:

1. The Plaintiff instituted this suit by way of a Plaint dated 26th August 2021, arising from a Tender under Contract Reference No. MRD/19/2009-10 for consulting services relating to the Mwache Multi-

purpose Dam Development Project (hereinafter 'the Project').

2. The Plaintiff contends that by a letter dated 31st May 2010, the 2nd Defendant awarded the Tender to the Plaintiff at a contract sum of USD 4,313,610. Pursuant thereto, the parties executed a Contract on the same date, stipulating that payments would be made in accordance with a schedule tied to two phases. The Contract was subsequently amended by two Addendums. Addendum No. 1 dated November 2012 was to accommodate additional irrigation works at USD 431,346. Addendum No. 2 of 15th March 2013 was to include the World Bank as Project Sponsor and provide additional services at USD 1,240,707. Collectively, the Contract and Addenda formed the governing agreements between the parties.

3. The Plaintiff contends that in September 2011, it submitted the Feasibility Report and related documents, which the 2nd Defendant acknowledged in the Addenda. On 1st February 2017, the Plaintiff submitted the Tender Documents and Final Study Report together with Invoice No. 19, signifying full

completion of the works. The Plaintiff avers that it raised nineteen (19) invoices in line with the agreed milestones. The 2nd Defendant paid eight (8) invoices, amounting to 50% of the contract price, the last payment being on 17th December 2012. The Plaintiff confirms having issued several reminders to the 2nd Defendant. In response, the 2nd Defendant, through various communications, acknowledged the outstanding debt but to date, eleven (11) invoices remain unpaid culminating in the present suit.

4. The Plaintiff therefore claims the sum of USD 3,017,908 plus interest from the date of the respective invoices until payment in full, costs of the suit and interest at court rates.

The Defendants' Case:

5. Through their Statement of Defence dated 30th November 2020, the Defendants categorically denied the Plaintiff's claim. They contended that the 2nd Defendant neither initiated nor undertook any procurement or tendering process for consulting services in respect of the Mwache Dam Project, and therefore no tender was ever awarded

to the Plaintiff. On that basis, they asserted that any alleged contract was void ab initio under the provisions of the Public Procurement and Asset Disposal Act, 2015.

6. The Defendants further denied that the Plaintiff submitted any feasibility study or detailed design report. They maintained that no Local Service Order was ever issued for the services claimed. In relation to the invoices and payments pleaded, the Defendants denied the same and equally denied the particulars of breach alleged, reiterating that no valid contract existed. The Defendants also denied the subsequent averments concerning correspondence and acknowledgments of debt. Accordingly, the Defendants prayed that the Plaintiff's suit be dismissed with costs.

7. At the hearing of the suit, the Plaintiff called one witness, **Mr. Shital Chinchwade**, its Managing Director, who testified on its behalf. The Defendants did not call any witness nor did they file any documents in support of their Statement of Defence. The parties filed their respective written submissions, which I have equally considered.

Analysis and Determination

8. From the pleadings and submissions made by the parties, the following issues arise for determination:

i. *Whether there was a valid contract between the Plaintiff and the 2nd Defendant;*

ii. *Whether the Plaintiff submitted the Reports as per the contract milestones;*

iii. *Whether the correspondence exchanged with the 2nd Defendant's officials is binding;*

iv. *Whether the portion of the Plaintiff's claim relating to the joint venture partners is valid; and*

v. *Whether the Plaintiff is entitled to award of interest at the Contractual rates.*

(i) Whether there was a valid contract between the Plaintiff and the 2nd Defendant:

9. Jurisprudence is well settled that parties are bound by the bargains into which they freely enter, and it is not the province of the Court to rewrite or interfere with contractual arrangements duly executed between them. This principle was

affirmed in ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] eKLR***, where the Court of Appeal emphasized that the role of the court was to enforce contracts as made, save where vitiating factors were established.

10. Against this backdrop, the first issue that falls for determination is whether a valid contract was concluded between the Plaintiff and the 2nd Defendant. The Plaintiff asserted that the governing framework for the creation of public procurement contracts is found in ***section 135(5) of the Public Procurement and Asset Disposal Act***, which stipulates in express terms that a contract is formed upon the execution of a written contract document following the award of a tender. It was the Plaintiff's case that the statutory requirement was satisfied, in that a tender was duly awarded and a written contract executed, thereby giving rise to a binding agreement within the meaning of the Act.

11. The 2nd Defendant, for its part, contended that although the Plaintiff placed before the Court a

copy of the contract together with the letter of award, no corresponding letter of acceptance was produced. It was their position that in the absence of such acceptance, there was no consensus ad idem between the parties. Accordingly, they argued that without evidence of acceptance, no binding contract could have arisen, as the essential element of a meeting of minds was lacking.

12. It is indeed true that the contract between the parties was governed by the provisions of the Public Procurement and Asset Disposal Act, the 2nd Defendant being a public entity. ***Section 135(4) of the Act*** is explicit in its terms and provides that:

> ***"No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties."***

13. The Plaintiff produced documentary evidence comprising of the Request for Proposals issued by the 2nd Defendant, the Plaintiff's Proposal, the

letter of Award dated 31st May 2010, and the executed contract of even date together with subsequent Addenda to the Contract. Taken together, these documents are evidence that the tender was duly awarded and that a written contract was executed by the parties in compliance with ***section 135(4) of the Act***.

14. While it is true that no letter of acceptance was produced by the Plaintiff, the argument advanced by the 2nd Defendant that the absence of such a letter vitiated the contract is untenable. The Act does not predicate contract formation on the existence of an acceptance letter. The determinative act under the Act is the signing of the written contract, which was duly done. Besides the formal contract, the parties also engaged in performance under that contract. This is borne out by the correspondence exchanged between the parties, as well as the execution of Addenda to the contract.

15. The act of entering into Addenda is particularly telling, as it reflected a mutual acknowledgment by the parties of their obligations and a shared

understanding that adjustments to the original agreement were necessary and binding. Such conduct is wholly inconsistent with the position taken by the 2nd Defendant that no consensus *ad idem* existed.

16. On the contrary, the evidence confirmed that the parties recognized the validity of the contract and continued to operate within its framework. I therefore find that a valid contract was formed between the Plaintiff and the 2nd Defendant within the meaning of the Act.

(ii) Whether the Plaintiff submitted the Reports as per the contract milestones:

17. The 2nd Defendant contended that the Plaintiff did not prove that it had submitted all the reports which formed a critical part of the consulting work and determined the percentages of the total fees payable. In support of this contention, the 2nd Defendant relied on the testimony of PW1, who admitted that they could not produce proof that the reports had been submitted.

18. The Plaintiff, however, maintained that all reports required under the Contract were duly prepared, submitted, and acknowledged by the 2nd Defendant. The Plaintiff pointed to correspondence on record, as well as the conduct of the parties, to demonstrate that the reports were even acted upon. In particular, the Plaintiff argued that the execution of Addenda and the assurances of payment by senior officials of the 2nd Defendant were consistent only with the acknowledgment of deliverables.

19. I have reviewed the Contract between the parties. **Clause 6.3** of the Contract required the Plaintiff to produce, present, and submit a total of ten (10) reports during the consultancy. From its submissions at paragraph 4.4, the 2nd Defendant specifically took issue with two reports: The Detailed Design Report and the Final Report, which it contended were not submitted.

20. While it is true that the Plaintiff did not attach copies of the actual reports submitted to the Defendants in its bundle of documents, which would have been the ideal course, the evidence

sufficiently demonstrated that the reports were indeed sent, received and acknowledged by the 2nd Defendant. Otherwise, on what basis were invoices 1 to 9 processed and paid by the Defendants?

21. Further, I note, as rightly pointed out by the Plaintiff, that at no point prior to the filing of this suit did the 2nd Defendant raise the issue of unsubmitted reports. On the contrary, the record shows that the 2nd Defendant expressly admitted in writing to having received various reports at different stages of the consultancy.

22. In particular, the recital to Addendum 1 and Addendum 2 at **pages 230 and 242** of the Plaintiff's documents confirmed receipt of the feasibility report and the preliminary design report in September 2011. This acknowledgment was further reiterated at **page 245**. Additionally, at **page 252** of the Plaintiff's documents, there is a letter dated 1st February 2017 addressed to the Director, Directorate of Regional Development Authorities, in which the Plaintiff confirmed having sent the final study reports and enclosed an invoice of even date for payment.

23. I find these contemporaneous records to be compelling evidence that the reports were indeed submitted and acknowledged. The Defendants' silence on the alleged non-submission of reports until the institution of these proceedings undermines the credibility of their contention.

24. Furthermore, the 2nd Defendant, through a letter dated 30th November 2018 from the Acting Principal Secretary, expressly confirmed to the Plaintiff that:

> ***"the Ministry is in the process of getting interdepartmental clearance for your payment but otherwise advancing well towards the 1st tranche payment… once we are sure that all the procedures are done, we will inform you of a tentative date when you can expect the payment."***

25. This communication was a clear acknowledgment of the Plaintiff's performance and the existence of

an obligation to pay. It would be manifestly unjust for the Defendants to have received the benefit of a completed project, without ever raising the issue of unsubmitted reports during the subsistence of the contract, only to now seek to disown a project from which they derived benefit. Such conduct is inconsistent with the principles of good faith and fair dealing in contractual performance.

26. My overall impression is that the Plaintiff's evidence is credible, consistent with the contemporaneous record, and sufficiently demonstrates compliance with its contractual obligations. This ground of defence therefore fails.

(iii) Whether the correspondence exchanged with the 2nd Defendant's officials is binding:

27. It was the 2nd Defendant's case that the emails relied upon by the Plaintiff to prove its admission of liability were not official communications. Rather, the mails emanated from personal accounts such as Gmail or Yahoo accounts of technical officers, as evinced at **page 280** of the Plaintiff's bundle. It further argued that the emails were addressed to individuals who were neither the accounting

officers of the 2nd Defendant nor persons expressly authorized under the Contract to transact on its behalf.

28. The Plaintiff's position was that the communications relied upon were issued by Mr. William Ogola, who at the material time was the 2nd Defendant's Deputy Director of Regional Development. Although the emails were transmitted through his personal Gmail account, they were contemporaneously copied to senior Ministry officials, including the then Principal Secretary, Dr. Margaret Mwakima, and Mr. Maina Kiondo, Director of Resource Mobilisation and Investment, among others. None of these officials denied receipt of the correspondence, nor did the 2nd Defendant take any disciplinary or corrective action against them for using personal email accounts in the course of official business.

29. The Plaintiff submitted that it relied on these communications in good faith, and treated the officials as being duly authorized to issue instructions and confirmations on behalf of the 2nd Defendant. The actions of the officials were further

reinforced by the official letter from the Principal Secretary confirming that payments were being processed, consistent with the assurances contained in Mr. Ogola's emails. As far as the Plaintiff was concerned, the conduct of the 2nd Defendant and its officers amounted to a clear representation that the officials in question had authority to bind the 2nd Defendant.

30. In the premises, the Plaintiff argued that the Defendants were estopped from disowning the authority of their officers or repudiating the communications issued. The answer as to whether these communications were binding upon the 2nd Defendant is indeed to be found in the contract itself. **Clause 1.4.1** of the Contract expressly provided that:

> ***"Any notice, request or consent required or permitted to be given or made pursuant to this contract shall be in writing. Any such notice, request or consent shall be deemed to have been given or made when delivered in person to an authorized representative***

of the party to whom the communication is addressed, or sent to such party at the address specified in the SC."

31. In line with this provision, **Clause 1.4** of the Special Conditions designated the Permanent Secretary, Ministry of Regional Development Authorities, as the contact person for the 2nd Defendant. The Authorized Representative on behalf of the 2nd Defendant was expressly stated to be Mr. Charles Mwanda, Director of Regional Development in the Ministry of Regional Development Authorities.

32. The contract therefore did not provide for the Deputy Director of Regional Development as an authorized representative, quite apart from the fact that the email communication used by him to communicate with the Plaintiff was an unofficial and personal email.

33. Finally, the Plaintiff relied on ***section 120 of the Evidence Act*** which provides 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."

34. This provision embodies the doctrine of estoppel. It is my considered view, however, that while estoppel may operate to prevent a party from reneging on representations made and acted upon to another person's detriment, general estoppel cannot override or defeat the express terms of a written contract. This view would be consistent with the spirit of the Court of Appeal's decision in ***Willy Kimutai Kitilit V Michael Kibet, [2018] KECA 573 (KLR)*****.** The authority of the 2nd Defendant's officials must therefore be construed strictly within the framework of the Contract.

35. Be that as it may, and for the avoidance of doubt, I reiterate that the letter of 30th November 2018

from the Acting Principal Secretary remains binding. Unlike the informal email exchanges, the letter emanated from the accounting officer of the Ministry and expressly acknowledged the Plaintiff's entitlement to payment, subject only to interdepartmental clearance.

(iv) Whether the portion of the Plaintiff's claim relating to the joint venture partners is valid:

36. The 2nd Defendant contended that the Plaintiff had not demonstrated authority to sue or to receive payments on behalf of its joint venture partners. In response, the Plaintiff argued that this contention disregarded the express provisions of the contractual documents executed between the parties, as well as the consistent conduct exhibited throughout the project.

37. A close review of the Contract shows that the parties expressly designated the Plaintiff as the lead consultant and contracting party, with authority to represent the joint venture in all dealings with the 2nd Defendant. In this regard, **Clause 1.6** of the General Conditions of Contract expressly provided that:

> ***"In case the Consultant consists of a joint venture/consortium/association of more than one entity, the Member hereby authorizes the entity specified in the SC to act on their behalf in exercising all the Consultant's rights and obligations towards the Client under this Contract including without limitation to receiving of instructions and payments."***

38. Further, **Clause 6.4** of the General Conditions provided that:

> ***"Payments will be made to the account of the Consultant and according to the payment schedule stated in the SC."***

39. In tandem with the main contract, the Plaintiff produced as evidence, the Associate Consultancy Agreement, executed between itself and two of its consortium members, Apec Consortium Limited and Runji & Partners Consulting Engineers Ltd, at

page 145 of its documents. **Clause 4.3** of that agreement expressly provided that the associate consultants would be paid by the Plaintiff in accordance with the payment provisions of the main Contract.

40. It is therefore evident that, in accordance with the general terms and conditions governing the contract between the Plaintiff and the 2nd Defendant, the joint venture partners, as principals, conferred actual authority upon the Plaintiff, as the lead member of the consortium, to represent them in all dealings under the Contract. That authority expressly encompassed the receipt of instructions and payments.

41. In light of this, the Defendants' contention disregards the express terms of the Contract. The Defendants did not refute the Plaintiff's averments that Invoices 1 to 8 were in fact paid in a similar manner, through the Plaintiff, as evidenced by the breakdown provided in the invoices running from **page 252** of the Plaintiff's documents. The 2nd Defendant also did not indicate that the payments sought by the Plaintiff deviated from the agreed schedule or payment provisions under the

Contract. Accordingly, I find that the portion of the Plaintiff's claim relating to the joint venture partners is valid.

(v) Whether the Plaintiff is entitled to award of interest at the Contractual rates:

42. The Plaintiff claimed interest at the prevailing commercial rates on the sum of USD 3,017,908 from the date of the respective invoices until payment in full. It relied on **Clause 6.5** of the Special Conditions of the Contract, which stipulated that interest on foreign currency amounts was to be calculated at LIBOR plus 2%, while interest on amounts payable in Kenya Shillings was to be at the prevailing mean interest rate as published by the Central Bank of Kenya.

43. The 2nd Defendant, in opposition, submitted that the Plaint did not specifically plead for interest at the LIBOR rate, but rather at general commercial rates. It further contended that pursuant to directives issued by the Central Bank of Kenya in December 2021, LIBOR ceased to be applicable in Kenya, as financial institutions were directed to discontinue offering new LIBOR-linked products in

all settings and to adopt alternative reference rates for new business.

44. The 2nd Defendant additionally argued that the invoices produced in court were unsupported, as there was no evidence that the said invoices were accompanied by the requisite reports under the payment schedule, nor proof that they were received and approved by the Defendants.

45. On the first issue, it is indeed the case that the Plaintiff pleaded interest at the current commercial rates. On the other hand, jurisprudence has consistently held that where parties have expressly provided for interest in their contract, such contractual stipulation must govern the applicable rate chargeable in the event of default. This position was reiterated by the Court of Appeal in ***Delilah Kerubo Otiso V Ramesh Chander Ndingra, [2018] KECA 376 (KLR)***.

46. In this case, **Clause 6.5** of the General Conditions of the Contract at **page 13** of the Plaintiff's documents provided that:

> ***"If the Client has delayed payments beyond fifteen (15) days after the due date stated in clause SC 6.4, interest shall be paid to the Consultant for each day of delay at the rate stated in the SC."***

47. The contractual rate is explicitly defined in **Clause 6.5** of the Special Conditions as LIBOR plus 2% for payments denominated in foreign currency, and the prevailing Central Bank of Kenya mean interest rate for payments denominated in Kenya Shillings.

48. As to whether LIBOR rates ought to apply, **Clause 6.2(a)** of the Special Conditions, at **page 18** of the Plaintiff's documents, designated the contract price for the tender in USD as USD 4,313,610. The invoices issued by the Plaintiff were likewise denominated in USD, in conformity with the contractual provisions. I further note that the invoices already settled by the Defendants were also issued in USD. It follows therefore that the applicable interest rate is that expressly provided

for in the Contract, namely LIBOR plus 2% for the foreign currency obligations in issue.

49. The 2nd Defendant referred to the CBK Guidelines on LIBOR Transition issued in December 2021. A review of the guidelines confirms that they were issued under ***section 33(4) of the Banking Act***. **Clause 1.3** thereof makes clear that the Guidelines were directed to commercial banks, microfinance banks and mortgage finance companies. In the absence of any justification to extend their application beyond the financial institutions expressly identified, I find that the Guidelines do not alter the contractual obligations between the Plaintiff and the Defendants. Accordingly, it is my finding that the Plaintiff is entitled to interest at the contractual rate of LIBOR plus 2% as stipulated in the Contract.

50. In response to the 2nd Defendant's submission that the invoices relied upon by the Plaintiff are unsupported, what is discernible from the record is that the unpaid invoices were issued between December 2012 and February 2018. The letter from the Accounting Officer of the 2nd Defendant

was addressed to the Plaintiff in November 2018, way after the date on the invoices.

51. It would be a grave misdirection for this Court to disregard the contents of that letter merely on the ground that the invoices do not bear stamps confirming receipt by the 2nd Defendant. The contemporaneous correspondence, including repeated letters from the Plaintiff that went unanswered, further demonstrates that the Defendants were fully apprised of the claims. Moreover, at no point did the Defendants, including the Accounting Officer himself, raise any objection to the invoices or dispute their validity.

52. Silence in the face of repeated demands, coupled with the express acknowledgment of the debt by an official correspondence, in my view, amounts to acquiescence. The Defendants cannot now be heard to deny receipt or knowledge of the invoices when their own conduct throughout the period reflected recognition of the Plaintiff's entitlement. Accordingly, I do find the Defendants' contention that the invoices are unsupported is wholly unmeritorious.

53. As to the date from which interest is payable, **Clause 6.4** of the Special Conditions expressly provided that payments were to be made within fifty-six (56) days of receipt of the invoices. In the absence of any other evidence, the record shows that the invoices bear different dates of issuance. It follows that the contractual grace period must be observed in determining the commencement of interest.

54. It would be inequitable to calculate interest from the date of issuance of the invoices, as urged by the Plaintiff, rather than from the expiry of the agreed grace period. The parties themselves contemplated a window within which the Defendant could process and settle payments without incurring liability for interest. To disregard this provision would amount to rewriting the contract and imposing a burden not envisaged by the parties.

55. Accordingly, I find that the fair and proper approach is to calculate interest from the date

immediately following the lapse of the fifty-six (56) day grace period stipulated in **Clause 6.4**.

Disposition

56. Accordingly, and for the reasons stated, the Plaintiff's suit is successful.

a) Judgment is hereby entered in favour of the Plaintiff against the Defendants for the sum of USD 3,017,908, together with interest at the contractual rate of LIBOR plus 2%, which interest shall accrue from the fifty-sixth (56th) day following the date of each respective invoice until payment in full.

a) The Plaintiff shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *11TH* DAY OF *MAY* *2026*.

F. MUGAMBI

JUDGE

Delivered in presence of:
Ms Weru for the plaintiff
Ms Murugi for the defendant
Court Assistant: Lillian