



Nation Media Group v Ezemak Refrigeration & Contractors Ltd (Civil Appeal 95 of 2019) [2025] KECA 271 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 271 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 95 OF 2019
DK MUSINGA, MSA MAKHANDIA & A ALI-ARONI, JJA
FEBRUARY 21, 2025**

BETWEEN

NATION MEDIA GROUP APPELLANT

AND

EZEMAK REFRIGERATION & CONTRACTORS LTD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Nairobi (Makau, J.) delivered on 4th October 2018 in HCCC No. 468 of 2009)

JUDGMENT

1. The appeal arises from the judgment and decree of the High Court (Makau, J.) delivered on October 4, 2018, in HCCC No. 468 of 2009. In the plaint dated July 1, 2009, the respondent sought orders of specific performance of a contract between the parties and, in the alternative, damages for breach of the said contract, the sum of Kshs.3,272,313.81; interest and costs of the suit.
2. The respondent is a company that deals with kitchen, medical equipment, air conditioning, chiller supply, and mechanical ventilation. It described itself as a general contractor in Kenya and elsewhere. It contended that in April 2007, it agreed to install an air conditioning system and chillers in the appellant's premises at a consideration of Kshs.12,927,269.51. The scope of the work to be undertaken was contained in the contract specifications, while the materials to be used were contained in the Bill of Quantities.
3. It asserted that the contract specification was for installing Carrier Chillers Equipment. However, on or around April 2008, it sought the appellant's permission to use Dric Chiller Equipment instead of the agreed Carrier Chiller Equipment, for which permission was duly granted.
4. The respondent further claimed that on or around the 14th of April 2008, the appellant, in a bid to review the performance and efficacy of the Air Conditioning System, appointed Professional Consultants (Consultants) to evaluate the works. The consultants' mandate included assessing the



performance of the Dric Equipment compared to Carrier Equipment. Further, the parties discussed and agreed that the consultants' findings would be binding between them.

5. The respondent pleaded that upon concluding its evaluation, the consultants made the following observations; -
 - a. The system, though changed in specification, should perform satisfactorily.
 - b. The total value of the contract was Kshs.12,927,269.50.
 - c. The stage of works on the ground at the time of evaluation was Kshs.9,653,955.69.
6. In advancing its claim, the respondent asserted further that the total works had been carried out save for pre-existing pipe insulation, which was not included in the original Bill of Quantities. It had tendered a quotation for Kshs.560,000, but the appellant failed to approve of the same to enable the respondent to complete the pipe insulation, despite the respondent's willingness to complete the work and proceed with testing, commissioning, and handing over.
7. In its defence, the appellant posited that sometime in 2006, it decided to install an air conditioning and chiller system on its premises and advertised for bids. The respondent emerged as the successful bidder, having represented to the appellant that it could supply the appellant with the Carrier Model Chillers with a cooling capacity of 10TR, and a binding agreement was signed between the parties at an agreed price of Kshs.14,898,700.00.
8. The appellant contended further that on or about the 19th of September 2007, the respondent delivered various goods to the appellant's premises and requested a representative of the appellant to confirm that the goods supplied were in good physical condition, which the representative did. The goods supplied were chillers described as Chiller Model DWAC400. The representative was not requested to ascertain the model of the goods delivered. Sometime in October 2007, as the appellant's officers carried out routine inspection, it was discovered that the respondent was installing a mixture of Dric, Daikin, and Trane Model Chillers instead of the 'Carrier' model as agreed.
9. The appellant, having noted the change in the model installed, made inquiries from the respondent as to why there was a deviation in the model of the installed chillers, and the respondent alleged to have received prior written authorization from the appellant. The appellant sought to be provided with the authorization, but the respondent failed to avail the same. It was the appellant's case that it only came to learn of the change in the specification of chillers after the respondent had made a unilateral decision to make the changes. It contended that the mere fact that the chillers were delivered to its premises cannot, without more, be deemed to be an acceptance. The appellant denied the respondent's assertion that it permitted the respondent to deviate from the agreed-upon model in writing or otherwise.
10. According to the appellant, it engaged the consultants to evaluate the extent of the variation of the technical specifications and compare the installed system's functionality against the previously agreed upon system. It admitted that the parties agreed to be bound by the consultants' findings. The appellant's position was that upon evaluation, the consultants concluded that; -
 - a. The change in specification from Carrier to Dric and the cooling capacity from 10TR to 30TR per chiller was not properly documented.
 - b. Material delivery to the site did not imply acceptance until installation, testing, and commissioning were carried out.
 - c. Dric chillers will be banned by Neema by the year 2030.



- d. The contract between the parties was not fully executed.
11. The appellant further contended that the consultants, based on its findings, recommended that; -
 - a. The respondent be paid based on the value of the work on the ground, which was evaluated at Kshs. 9,653,955.69 excluding VAT;
 - b. Any payment made against the above sum should be less sums already paid;
 - c. Given the inferior quality of the chillers, the full value of Kshs. 12,927,269.50 excluding VAT, less retention during warranty, will be applied upon testing and proper commissioning of the installed system.
 - d. The respondent is to issue a minimum warranty period of 15 years to give full comfort to the defendant.
 12. Based on the consultants' report, the appellant stated further that the respondent issued an invoice of Kshs.4,149,517.00, the balance of the amount due based on the works on the ground inclusive of VAT, and that by a letter dated 20th August 2008, the appellant forwarded a cheque for the said amount in full and final settlement. Therefore, the respondent is estopped from making any further claims.
 13. The appellant denied owing the respondent the sum of Kshs.3,273,313.81 claimed. In addition, the appellant stated that the claim for specific performance does not lie since it lawfully terminated the contract upon being dissatisfied with the services rendered by the respondent due to the unilateral change in the specification of the installed chillers.
 14. Having heard both sides, the trial court was of the view that in the various meetings held between the parties, culminating in the appointment of the consultants, the appellant authorized the model of the chiller installed from the Carrier to Dric Model and was therefore, estopped from denying its approval. The court further found that although the respondent was ready and willing to finalize its part of the contract by commissioning the project and handing it over, which was to go along with the issuance of warranty, it was frustrated by the appellant, thus concluding that the appellant had breached the terms of the consultants' recommendations which both parties had agreed to be bound by. In the end, the court entered judgment in favour of the respondent in the sum of Kshs.3,273,374, together with costs and interest.
 15. The above judgment and decree triggered the appeal now before us. The appellant, aggrieved by the judgment, filed a memorandum of appeal dated 12th March 2019. In summary, the grounds of appeal are that the learned judge erred in law and fact; -
 - a. In finding that the appellant had approved the change in the model of chillers installed from Carrier to Dric;
 - b. By wrongly interpreting and applying section 120 of the *Evidence Act* in that the appellant was estopped from denying that it approved the change in the model of chillers;
 - c. In re-writing the recommendations contained in the report by the consultants despite the parties having agreed to be bound by the said report;
 - d. In misinterpreting the evidence and finding the appellant breached the recommendations in the report;
 - e. In misapplying the evidence adduced and finding that the respondent was prevented from commissioning and testing the system;



- f. In finding that the respondent retained ownership of the equipment installed in the appellant's premises contrary to the agreement between the parties and the findings in the report and in making findings on unpleaded issues;
 - g. In awarding the respondent the sum of Kshs.3,272,314 for services not rendered and contrary to the recommendation contained in the report by professional consultants.
16. This appeal proceeded through written submissions with brief highlights at the plenary hearing. The appellant's submissions are dated 24th June 2020. Learned counsel Miss Wahinya, appearing alongside Miss Odari for the appellant, rehashed the case for the appellant set above and further argued that due to the installed chillers' shortcomings and the respondent's failure to offer the warranty as recommended, the appellant removed the chillers and installed a new system.
 17. Learned counsel further contended that the trial court's finding that the appellant had, by a verbal agreement, approved the change of model of the chillers from Carrier to Dric was factually and legally erroneous. Counsel submitted that this finding ignored the evidence produced by the appellant to show that the respondent had initially stated that the approval was in writing, yet it failed to produce the said written approval. Further, the allegation of verbal authorization by the appellant was first made during cross-examination of the respondent's witness, which was a departure from the position taken in its pleadings and contrary to the documentary evidence in court. Further, the evidence of oral authorization amounted to hearsay as the witness was not privy to the discussions or meetings where the approval was allegedly given.
 18. Learned counsel submitted further that the learned judge was wrong in finding that the appellant was estopped from denying the approval of the change of model as the respondent had not pleaded estoppel. The circumstances giving rise to estoppel must be specifically pleaded. In support of this contention, learned counsel relied on the cases of Joram Achuku Oyoo vs. Kenya Fisheries & Research Institute Board of Trustees, Kenya Marine Fisheries Research Institute [2013] eKLR and Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR.
 19. Further learned counsel submitted that the finding on estoppel had the effect of permitting the respondent to find its cause of action on estoppel, thus permitting the use of estoppel as a sword contrary to the well-settled principle of law that estoppel can only be used as a shield as held in Mulji Jetha Ltd vs. Commissioner of Income Tax Nairobi [1967] E.A.
 20. Further, counsel argued that the respondent did not provide any evidence to show a change in the position or circumstances to its detriment to allow the judge to invoke the principle of estoppel. In support of this proposition, learned counsel relied on the case of Benson Ngugi Muiruri vs. Kenya National Capital Corporation Limited [2005] eKLR, where the court held that estoppel could never found a cause of action. However, it may enable a cause of action, which would otherwise fail to succeed.
 21. Learned counsel submitted that the trial court's finding that the appellant did not halt the works was similarly erroneous. She argued that the court failed to consider that the appellant couldn't ascertain the model of the chillers to be installed when the goods were received and that the appellant discovered the change in the model after installation and immediately objected.
 22. On the value of work done, learned counsel submitted that the learned judge erred in awarding the respondent Kshs. 3,272,314 that would have been payable to the respondent had it undertaken testing and commissioning of the equipment, based on the consultants' report.



23. On the finding that the appellant denied the respondent an opportunity to commission and test the system and was thus in breach of the consultants' recommendation, learned counsel submitted that this was an error of fact and not supported by any evidence. Further, there was evidence that the appellant removed the system and invited bids to install a new one when it failed to receive a warranty as recommended, and having received a letter of discharge from the respondent dated 20th August 2008.
24. Learned counsel further contended that the learned judge disregarded the breach by the respondent and instead rewrote or amended the consultants' report by introducing matters that were not contemplated.
25. On the finding by the trial court that the appellant had utilized the equipment for 9 months without commissioning and handing over, having chased the respondent from the site, thus resulting in unjust enrichment, learned counsel submitted that the respondent did not prove the principles of unjust enrichment. In support of this contention, learned counsel relied on the case of Chase International Investment Corporation & Another vs. Laxman Keshra & 3 Others [1978] eKLR. Further, learned counsel contended that the finding of unjust enrichment was erroneous since the equipment, once paid for, became the appellant's property. The appellant paid the respondent the sum of Kshs.9,653,955.69, excluding VAT, is the value of the equipment and work done as assessed by the consultants and cannot amount to unjust enrichment.
26. On the part of the respondent, learned counsel filed written submissions and a list of authorities dated 9th December 2020. Learned counsel submitted that the appellant stationed its resident engineer, Tom Onduso, to work and consult with the respondent till the completion of the installation. Further, since the appellant's old system had failed, it was incumbent upon the respondent to conclude the works within the shortest time possible. In consultation with the engineer, it imported the Dric Model Equipment from Egypt. It questioned why the appellant failed to call the engineer to verify the fact despite various mentions and hearings.
27. On the approval issue, learned counsel submitted that the appellant's resident engineer verbally agreed to the model change due to the assembling and import duration. That the appellant complained of the model change vide a letter dated 11th October 2007, leading to a meeting between the parties on 28th May 2008, and that the meeting culminated in the approval of the model as seen in Minute 1/03-1 and 1/03-10 of the said meeting.
28. On estoppel, learned counsel submitted that the appellant's sentiments that estoppel must be pleaded lacks basis in law as this was a contractual agreement and that parties' conduct in any transaction can be relied on to argue estoppel. In support of this proposition, learned counsel relied on the case of John Mburu vs. Consolidated Bank of Kenya [2018] eKLR, where the court noted, inter alia, that estoppel could also give rise to a cause of action. Learned counsel admitted that it was upon the respondent to prove that the model change had been sanctioned and for the appellant to disapprove this by evidence. It is contended that the respondent, through the evidence of Dr. Kiama, proved that there was verbal approval of a change in the model to be installed, and it was incumbent upon the appellant to call the engineer to rebut that allegation. In this regard, learned counsel relied on the cases of North End Trading Company Limited vs. City Council of Nairobi [2019] eKLR and Edward Muriga through Stanley Muriga vs. Nathaniel D. Schuler, Civil Appeal No. 23 of 1997, where this Court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as allegations in the defence do not amount to evidence.
29. On the award of Kshs.3,272,314, learned counsel submitted that the learned judge erred as the award was contrary to the recommendations of the consultants; that there was a letter dated 1st February



2008 regarding complaints of usage of chillers pending commissioning and testing and the respondent complied with the findings and was ready to test and commission the installed chillers. However, the appellant denied the respondent a chance to do so as they started to use the installed chillers long before commissioning and testing, which continued for 9 months.

30. As regards the appellant's ground that the court re-wrote the recommendations and was wrong in finding that the appellant had breached the recommendations, learned counsel submitted that the argument is not supported by evidence and is a general statement which this Court ought to disregard. The respondent wrote to the appellant on 27th November 2007 indicating its willingness to commission, test and handover the chillers. A reminder was sent on 1st February 2008, but there was no response from the appellant; that failure to respond was in blatant disregard of the consultants' recommendations on the part of the appellant, despite the recommendations being binding on the parties; hence, the trial court was correct in its findings.
31. On unjust enrichment, the respondent submitted that it was always ready and willing to test, commission, and give warranty but was frustrated by the appellant without reason, despite the appellant using the chillers for over 9 months. This action amounted to unfair enrichment at the respondent's expense and breached the consultants' recommendations.
32. This is a first appeal, and we must consider, evaluate, and analyze the evidence afresh and reach our independent conclusion as we warn ourselves that we did not have the advantage of seeing or hearing the witnesses, as was stated in the celebrated case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123, where this Court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A 270.”

33. Having considered the pleadings, submissions by the rival parties, cases cited, and the law, we are of the view that the issues that render themselves for our consideration are; -
 - i. Whether the appellant approved the change of model of the chillers to be installed from 'Carrier' to 'Dric'.
 - ii. Whether the doctrine of estoppel was applicable in the circumstances of this case.
 - iii. Whether the appellant owes the respondent any monies.
34. From the record, the appellant placed an advertisement inviting bids for VRF/VRV air conditioning system installation in its radio and television studios. In response to the above advert, and having inspected the appellant's premises, the respondent, vide its letters of 26th September 2006 and 31st October 2021, gave a quotation for the works. The quotation stated as follows:

“We shall install 3 No. smaller chillers which shall be taken into the plant room through the window. The existing pipes will be re-used, but additional rooms that require air conditioning will be piped afresh.”



The letter went further to give details of the specifications for what was to be supplied. Of interest to this case is the specification for the “3 Chiller Carrier single packed plant with a capacity of 10TR (120,00-/h) cooling capacity at the rate of Kshs2,720,000 each”.

35. From the correspondence between the parties, the respondent changed the specification from Carrier to Dric chillers, claiming to have received authorization to do so from the appellant initially and later from the appellant’s resident engineer. In a letter dated 28th May 2008, by S. Owino, a Legal Officer with the appellant, addressed to Dr. E.M. Kiama, Managing Director of the respondent, he referred to an earlier meeting of the parties where it had been agreed that the appellant would engage the consultants to conduct an audit of the Air Conditioning Equipment (of Dric make). Further, the letter stated that the consultants would consider the performance and efficacy of the air conditioning system and the materials installed to ascertain their compliance with the tender terms of reference and quality guidelines. Further, the letter sought to confirm that the findings and recommendations of the consultants would be binding on the parties and reminded the respondent to forward a copy of the written authority that allowed the substitution of the initially ordered chillers.
36. In its letters of 28th March 2008, the respondent claimed that the appellant had used the equipment since November 2007 without encountering any problems, and they were ready to offer a 10-year guarantee and one year of free service. In their letter of 12th June 2008, the respondent confirmed the consultants’ engagement and that the assessment outcome would bind them.
37. The consultants conducted their investigations and made a report dated August 2008. In their report, they gave their terms of reference as follows:
 - a. Check and compare the complete function of the supplied Dric chiller to the one supposed to have been installed, the Carrier chiller.
 - b. Check on all importation documentation to enable conformance to standards.
 - c. Check all the fan coils supplied and confirm that they are as specified in the contract and functioning well.
 - d. Check all the work, piping, and installation and confirm they are specified in the contract and functioning well.
 - e. Evaluate contract price in light of contractual and technical findings.
 - f. Offer conclusive recommendations.
38. In analyzing the contract, the consultants made findings that:

“1. ...

Based on the accepted quotation, Ezmark supplied and installed units of 30TR each. There were no documents to confirm this change of capacity. The make of the chiller units supplied were not as per the contract. The two parameters of the contract were not fulfilled, instead as per the documents marked 4, NMG pointed out supply of DRIC chiller in lieu of CARRIER, without authority. Document marked 3 from Ezmark indicates delivery note of items but chiller make is not indicated, though the model number DWAC 400 is shown implies DRIC. This and the chiller cooling capacity appears to be the major variation from the contract.



Further it is normal for the chiller as a complete plant to have pumps supplied. In this case this was not indicated in the contract and it can be assumed the existing pumps were to be used. Water pumps form a very important part of the system. The use of the old pumps on the new equipment was not advisable.

2. Ezemark was supposed to supply and install a new control panel for the chillers, pump, and fan coils. This was not done, and the old panel was repaired and fitted with new parts. No instructions to authorize this variation was available, though Ezemark accepted contract price on this element is lower than the original quote. The existing panel cannot achieve close control, whereby a fan coil unit cannot independently isolate in case of any fire or maintenance.
2. New water pipes where required to be installed was done but partially insulated. Further the old pipes used were not insulated as required in the contract. No instructions to authorize only partial insulation was available.
4. ...
5. The make for the fan coils were not specified although it can be assumed that since the brochure for the chiller was Carrier the fan coils ought to have been Carrier so that a complete conditioning system was installed. No instructions to clarify or otherwise was available, however technically, good quality fan coils other than Carrier would work well with Carrier chiller...” (emphasis added)

39. In their initial investigations, the consultants, inter alia, made the further findings that:

- a. DRIC model of chillers and fan coils are non- listed products and not ISO 9001 approved, particularly for the chiller as indicated in the KBS document.
- b. Intertek, who inspected the Chiller, could only rely on the manufacturer's specification because of the no conformity to ISO 9001, EN29001, and UNE66901.
- c. We could not prove beyond doubt whether the Chiller was new or not because the Dric models are not ISO approved and hence no guidance was available from the inspecting body in this case Intertek. A request was made to the manufacturers to confirm dates of manufacture of the components.
- d. The Chillers use R22 refrigerant, which is not ozone-friendly and will be banned by NEEMA in 2030.

40. The consultants had the following recommendations:

1. All the pipe work has to be insulated to proper specification using Amouflex 3/8” thickness as quoted for in the contract
2. The contractor should be called to do one preventive measure maintenance on the chiller as it has been running for the past 9 months without service. It is our opinion that as the plant was never commissioned and handed over, it should not have technically been running. Therefore, NMG may need to negotiate payment for this work with Ezemark. Take note that the manufacturer in document marked 22 clearly states that equipment not properly maintained will cause void of warranty.



3. The setting points of the outlet water temperatures on the chillers have to be reduced to achieve the recommended 6-7C to commission the system to ensure its performance as required.
 4. The contractor to be paid on the basis of the evaluation detailed by the investigation. The stage at which we value the works on the ground is Kshs.9,653,955.69 excluding VAT. Any payments made against this should be less whatever has already been paid. Upon testing and proper commissioning of the system the full value less retention during warranty be applied. Our opinion on the value of the contract based on the investigations is Kshs.12, 927,268.50 excluding VAT.
 5. The contractor is to issue a minimum warranty period of 15 years to give NMG full comfort.
 6. Noted from the earlier investigations the air cooling demand at Nation Centre is in the region of 180TR and this chilled water system of 90TR capacity on its own cannot support the demand and other alternatives need to be investigated to supplement this as the existing York package units are old and unreliable and frequently breakdown.
41. In a letter dated 20th August 2008 from the appellant addressed to the respondent, the appellant enclosed its cheque number 054902 for Kshs.4,149,517 in full and final settlement of the sums due for work up to that date. The letter required receipt and confirmation that the matter had been finalized and the respondent had no further claim against the appellant. The letter was signed by Geoffrey Wainaina, a duly authorized person for and on behalf of the respondent.
 42. The consultants' report was damning on the part of the respondent and made it clear that the changes made required much more work done to mitigate the effect of the less effective model installed in order to meet the appellant's needs. In their meetings, correspondences, and the plaint, the respondent maintained that written authorization had been received for the change in the model installed. Dr. Kiama, the Managing Director of the respondent, in the meeting between the parties on the 28th of May 2018, as seen in the minutes (page 140 of the bundle), confirmed that the approval was in writing and that he had given Mr. Mucheke of the appellant a copy. He also undertook to make a copy available that afternoon. The authorization letter was never sent to the appellant as promised nor made available to the consultants or at the hearing before the court. One would expect that such a serious variation to the contract would be discussed between the principals and reduced into writing. The only reasonable inference that could be drawn from the circumstances was that there was no such authorization in writing as had been alleged by the respondent.
 43. Notable is that when the respondent could not hide behind the falsehood of a written authorization to effect change to the model to be installed, the narrative changed, and it claimed to have obtained verbal authorization from an engineer assigned to it. In our view, the changed narrative smacks of dishonesty, and we do not think that the respondent can get away with a defence that the contract between the parties was varied in such a casual manner with the staff of the appellant. The ramifications of the change required serious thought and firm decisions as the change went to the core of the contract between the parties, as seen from the report.
 44. The consultants recommended various steps. Apart from raising an invoice for the intended insulation of the pipes, the respondent offered a warranty of 10 years short of the recommended 15 years and sought to commission and hand over the project. We have not seen any other steps proposed or undertaken by the respondent towards the various other recommendations of the consultants towards mitigating on the shortcomings. The respondent also accepted a cheque for Kshs.4,149,517 through the appellant's letter of 20th August 2024 and signed that the same signified a full and final settlement and that it would have no further claim against the appellant.



45. This appears to be a case of the wrongdoer feeling more aggrieved than the aggrieved party. The initial breach of the contract was caused by the respondent's installation of chillers contrary to the contract, without authorization and charging the price of the agreed chillers, necessitating the engagement of the consultants, whose report exposed the bad job done by the respondent and recommendations made that would have mitigated the shortcomings. Notable is that a substantial amount of the contract price had been paid when the appellant noticed that the wrong chillers had been installed.
46. In an attempt to defend its action, as seen in the minutes, Dr. Kiama raised the issue of the alleged written authority in the meeting on 28th May 2008, where he was categorical that the appellant had issued written approval. The meeting agreed that Dr. Kiama would provide the letter authorizing the change. Indeed, he indicated that a copy had earlier been availed to Mr. Mucheke of the appellant. This assertion was repeated in the plaint. In paragraphs 9 and 10 of the plaint, the respondent stated; -
- “9. On or about the month of April 2008, the plaintiff sought the defendant's permission to use Dric equipment on the installation of a chiller instead of the recommended Carrier equipment, which permission was granted by the defendant.
10. With the express permission of the defendant aforesaid the plaintiff proceeded to install the air conditioning system at the defendant's premises using the Dric equipment.”
47. The consultants lamented that the authorization letter was unavailable. Is it open to the respondent to change the narrative in its witness statement before the court? In her statement, Irene Muthoni (the respondent's 2nd witness) stated:
- “We supplied the chillers; we explained to the relevant engineer that it was to take a long period to import the carrier type of chillers (8 months) and that in our experience the Dric type, which could still do a similar job was to be imported much faster (5 months) from Egypt.
- Being the experts within East Africa region, and in our experience, we imported the Drill Chiller and proceeded to install.”
48. The 2nd witness for the respondent alluded to some consultations they had with the appellant's resident engineer before installing the Dric equipment. A close look at the averments by the respondent's witnesses reveals that no permission was sought from any quarter, not even from the engineer, as the respondent purported. What comes out is that the engineer was merely informed of the respondent's decision, if at all. No permission, oral or written, was acquired.
49. Therefore, the trial court erred by holding that permission was obtained from the meetings held between the parties. No such evidence was brought forth. The available evidence is that no written permission was obtained, nor evidence of oral authorization was proved. The breach of contract was on the respondent, as it opted, without reference to the appellant, to vary the specification of the chillers.
50. As to whether the appellant owed the respondent any contract sum, the answer lies in the earlier finding. Despite a substantial amount having been paid to the respondent, it unilaterally made changes to the specification of chillers it installed, and the appellant's officers only became aware of the breach while on a routine inspection. Further, in the consultants' report, which the respondent did not challenge, the work done by the respondent was below par, posing several challenges. For example, it is normal for a chiller plant to be supplied with a pump. It appeared that the old pumps were to be



used, yet a water pump is an important part of the system; a new control panel ought to have been supplied, but this was not done, and the old pipes used were not insulated as required. Further, the drive model of the chiller and fan coils were non-listed and not ISO 9001 approved; the chiller was not ozone-friendly and will be banned by NEMA in 2030. Further, without consideration of the job carried out, the variation to the chiller model was not authorized.

51. We are of the view that the balance paid to the respondent, which they acknowledged to have been the final payment, was sufficient for work done, and it ought not to claim further payments. Both parties alluded to the fact that the appellant commissioned another cooling system. The appellant explained that this was necessitated by the fact that the system installed by the respondent did not meet its requirements. The respondent is lucky that it was not slapped with a counterclaim and ought to be content with the sums paid despite the breach.
52. Further, the consultants assessed work done at Kshs.9,653,955.69, excluding VAT against any sums previously paid. Further it advised that upon testing and proper system commissioning, the full value payable would be Kshs.12,927,269.50. The respondent was to issue a minimum of 15 years' warranty. There was a rider that the installed chillers of 90TR capacity could not sustain the appellant's need for 180TR, and a supplement would be required.
53. Against the above advice the respondent offered a 10-year warranty instead of the recommended 15-year warranty and went further to accepted a cheque for Kshs.4,149,517, the balance from the Kshs.12,927,269 assessed by the consultants as full and final settlement although the equipment had not been tested or commissioned.
54. On the doctrine of estoppel, we do not think the doctrine was applicable herein against the appellant. The appellant's position was constant. It was not consulted, neither did it authorize the change in the chiller model and was surprised by the unilateral decision of the respondent. The works were in doubt; hence the appellant engaged the consultants to investigate the works. The appellant did not appear to acquiesce to the respondent's actions. Upon noticing the variation, they queried, and the respondent fraudulently held out that authority was granted. All this happened at the point of installation.
55. We also fault the trial court for having formed the view that the appellant's failure to stop the works and its use of the chillers for 9 months amounted to unjustified enrichment. The contract sum, according to the respondent, was Kshs.12,927,269.50. This entire sum was paid however the respondent did not perform as expected. Even if the plant was used for 9 months, the appellant had paid for the chillers and the work done by the respondent up to the point of assessment. Both parties allude to the fact that the appellant commissioned a new system, as noted earlier. Indeed, the appellant was the loser in the deal.
56. In the end, we find the appeal merited. We allow it, with the consequence that the judgment and decree of the High Court are set aside; the respondent's suit in the High Court is dismissed with costs to the appellant. The appellant, too, shall have the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

ASIKE–MAKHANDIA

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JUDGE OF APPEAL



ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

