Moniks Agencies Limited v Kenya Airports Authority (Civil Appeal E280 of 2022) [2025] KECA 471 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 471 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E280 OF 2022

K M'INOTI, FA OCHIENG & WK KORIR, JJA

MARCH 7, 2025

BETWEEN

MONIKS AGENCIES LIMITED ..... APPELLANT

AND

KENYA AIRPORTS AUTHORITY ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (M. W. Muigai, J.) dated 28th February 2022 in HC COMM. 505 of 2017)

JUDGMENT

1. On 7th August 2013, operations at the Jomo Kenyatta International Airport (JKIA) were brought to a near standstill due to an inferno that engulfed Terminal 4. To restore the services in the terminal, the respondent, Kenya Airports Authority, moved swiftly to engage contractors to undertake the restoration works. Some of the machinery required by the contractor given the job of restoration of the terminal were to be sourced from overseas suppliers. The respondent floated Tender No. KAA/ES/JKIA837B seeking the services of a clearing agent to facilitate the entry into the country of specified items sourced overseas. The appellant, Moniks Agencies Limited, was among the bidders seeking to offer clearing services, and in a letter dated 8th May 2014, the respondent notified the appellant that it had been awarded the tender. Thereafter, a business relationship ensued, which, unfortunately, later led to a dispute in the High Court that has given rise to this appeal.

2. Before the trial court, the appellant had, through a plaint dated 21st December 2017, averred that the tender was for the provision of clearing services in respect of the respondent's goods, which were used for the reconstruction of Terminal 4. It was the appellant's case that, as per the tender document, the goods to be cleared were specified. According to the appellant, the tender document indicated that the tender was valid for sixty (60) days only and that the respondent also represented to the appellant that all the requisite documents required for clearing the imported goods were available and in order. The appellant claimed that it was based on this information that it participated in the tender, yet the

respondent only provided the Import Declaration Form (IDF) for one of the items. According to the appellant, the terms of reference upon which the tender was floated were irreversibly breached due to the acts of omission, commission, and mistake of the respondent.

3. The appellant further pleaded that as it was performing the contract for Terminal 4, the respondent began another project of constructing Terminal 2 at JKIA, and the appellant was appointed to clear the goods for this project without a formal agreement on the terms and conditions for delivering the services.

4. It was additionally the appellant's case that the duty to prepare the bonds for the goods for both projects and to have the same retired and cancelled was to be borne by the respondent, which was not to be as the appellant was saddled with this obligation. In doing so, the appellant claimed it saved the respondent an amount of Kshs. 435, 641,139.00.

5. The appellant averred that upon delivering on its mandate, it, on or about 8th June 2016, raised invoices for clearing services at Kshs. 43, 113, 230.00, and for bond processing and cancellation at Kshs. 15,551,818.00, totaling Kshs. 58,665,048. After issuing numerous demand notices, on or about 7th November 2016, the respondent paid Kshs. 1,569,891.00 for the clearing services and Kshs. 6,495,694.00 for the cancellation of bonds, leaving a balance of Kshs. 51, 626,782.00.

6. The appellant also listed the particulars of breach and extra work performed beyond the scope of the contract.

7. Consequently, the appellant sought the following reliefs:

> " A. Judgement be and is herby entered for the Plaintiff as against the Defendant for:
>
> i. A Declaration that a sum equivalent to 2.5% of Kshs. 1,486,663,111.00 being the C.I.F Value of the Defendant's Goods be paid as Commission to the Plaintiff by the Defendant for Clearing Services rendered by the Plaintiff to the Defendant.
>
> ii. A Declaration that a sum equivalent to 3% of Kshs. 1,374,195,330.00 being the C.I.F Value of the Defendant's Goods be paid as Commission payments to the Plaintiff by the Defendant for services rendered by the Plaintiff to the Defendant for the Processing and subsequent Cancellation of the Defendant's Bonds.
>
> iii. A Declaration that a sum equivalent to 3% of Kshs.2,108,134,138.00 being the C.I.F Value of the Defendant's Goods be paid as Commission payments to the Plaintiff by the Defendant for Additional/Extra Work Done by the Plaintiff at the [behest of the] Defendant.
>
> B. Further to (A) above, Judgement be and is hereby entered for the Plaintiff as against the Defendant for the sum of Kshs. 124,989,849/- being;
>
> i. Kshs. 51,626,782.00 - the Balance sum due for the Clearing Services and Bond Processing and Cancellation Services rendered to the Defendant by the Plaintiff; and;

ii. Kshs. 63,244,024.14 + Kshs.10,119,043.84 (16% V.A.T.) = Kshs. 73,363,067/- being the Fees due to the Plaintiff from the Defendant for the Additional/Extra Work Done by the Plaintiff at the Defendant's behest.

B. Interest on (B) (i) above at 3% per month from the 7th November, 2016 until payment in full

C. Interest on (B) (ii) above at Commercial rates from 30th July, 2015 until payment in full.

D. General damages

E. Any other or further relief(s) that the Honourable Court may deem fit and just to so grant."

8. An interlocutory judgment was entered against the respondent on 4th July 2018. However, the same was set aside on 17th June 2019 on condition that the respondent deposited a bank guarantee of Kshs. 10 Million within 60 days. The respondent complied with the condition on 16th August 2019. This paved the way for consideration of the defence filed on 11th July 2018. Therein, the respondent denied all the facts pertaining to the suit, save for the description of the parties. The respondent also asserted that the suit was bad in law and incompetent.

9. When the matter came up for hearing before the trial court, the appellant called one witness in support of its case, while the respondent summoned two witnesses to the stand. In his testimony, the appellant's director, James Wanaina Nganga (PW1), relied on his statement and bundle of documents as filed on 21st December 2017 and 6th December 2019. He reiterated the appellant's case as already outlined and asserted that they undertook clearing services for items for the construction of Terminal 4 and Terminal 2. He testified that in the contract, the agreed rate was 0.1% of the Cost of Insurance and Freight (CIF) value of the goods on condition that all the documents were in order and ready and that the goods had arrived at the port of entry. He stated that during the execution of the assignment, they only had an IDF for one of the items while the other documents were missing, and others were still abroad. He stated that this mistake elongated the contract period beyond the agreed 60 days. He asserted that the cancellation of bonds was not contemplated or included in the original work and that the charges were not agreed upon. According to the witness, the appellant proposed 2.5% of CIF value of goods while the respondent proposed 0.4% to 0.6%. He produced a collation of what he stated was additional work that was done and acknowledged by the respondent. It was his evidence that the appellant raised invoices for the job done totaling Kshs. 58 Million, but the respondent only paid Kshs. 7 Million. The witness conceded that the appellant had not raised invoices for the additional work.

10. On the part of the respondent, David Tumno (DW1), a procurement officer, relied on his statement dated 2nd February 2019. His evidence was that after the fire inferno, the respondent embarked on reconstructing Terminal 4. When a tender was floated for clearing services, the appellant emerged as the lowest bidder, hence clinching the contract as indicated in the letter dated 8th May 2014. He stated that the appellant was to prepare and lodge documents with the Kenya Revenue Authority (KRA) for clearance of the goods. He also testified that the contract for clearing services for goods related to Terminal 2 was issued through direct procurement due to the urgency of the matter since the equipment had already arrived at the port of Mombasa and was attracting demurrage charges. He stated that once the direct tendering process received the green light from the tendering committee, the appellant was instructed to provide the services and the appellant did not dispute the terms of the contract. He confirmed that the appellant successfully delivered on the two projects. According

to DW1, the terms of the contract could only be varied by the tendering committee, and the same remained at 0.1% of the CIF value of the goods. He asserted that the assignment included the bond cancellation process. He also refuted the appellant's assertion that the respondent did not supply all the requisite documents to facilitate the clearing of the goods.

11. Martin Newton Kamau (DW2) equally adopted his written witness statement dated 2nd December 2019. He stated that he was the respondent's Head of Examinations under the Finance Function. According to him, his department would ordinarily receive invoices from the procurement department, after which they would examine and verify them before authorizing payment. He stated that the calculation used was 0.4% of the CIF value of the goods for bond cancellation, as approved by the tender committee, and 0.1% of the CIF value of the goods for clearing services as per the tender award. He stated that some of the invoices were not paid because they were pegged on calculations at the rates of 2.5% for clearing services and 3% for bond cancellation, which rates he asserted were not approved by the tendering committee. He also stated that no invoices were raised for additional work, as alleged by the appellant. He stressed that the respondent was a government institution bound by the established procedure which it could not deviate from when making payments.

12. In its judgment, the High Court held that in respect to Terminal 4, the contract provided for payment at the rate of 0.1% of the CIF value of goods for clearing services. The learned Judge found that the contract for Terminal 2 was in the same terms as the contract for Terminal 4. As for the cancellation of bonds, the learned Judge held that the services were rendered to the respondent by the appellant, and they were entitled to payment at the rate of 0.4% of the CIF as approved by the tender committee. Additionally, the learned Judge held that the respondent, being a statutory body, was bound by the Public Procurement & Disposal Act and *Public Finance Management Act* and could only pay for goods or services rendered to the institution in accordance with the law. The learned Judge also found that the appellant had executed extra work upon instruction by the respondent's officers and was entitled to payment at the rates of 0.1% for clearing services and 0.4% for bond cancellation. On the question of general damages, the learned Judge held that the same was not awardable.

13. The appellant was dissatisfied with the judgment and, in its memorandum of appeal, raised twenty grounds of appeal, which we have condensed to ten as follows:

    i. That the learned Judge erred in failing to award a just rate as per the altered contractual terms;

    ii. That the learned Judge did not give due consideration to the altered terms of payment despite finding that the respondent made payments on those terms;

    iii. That the learned Judge failed to apply the principles of law uniformly by upholding variation of contract only in relation to the scope of work and not as regards payment terms;

    iv. That the learned Judge erred in maintaining the rates of payment at 0.1% and 0.4% of CIF value, yet no such rate was agreed between the parties for the extra work;

    v. That the learned Judge erred in failing to appreciate time as an essential element of the contract, hence arriving at a wrong conclusion on the import of the 60 days;

    vi. That the learned Judge erred in directing the appellant to prepare invoices for payment without appreciating that the dispute between the parties was predicated on the invoices already on record;

    vii. That the learned Judge did not make a finding on the invoices raised and adduced as evidence;

    viii. That the judgment of the trial court offended the doctrine of finality of a judgment as it was incapable of execution, extraction of a decree and ultimate taxation of costs;

ix. That the learned Judge failed to consider all the material facts and, at the same time, considered irrelevant facts and applied wrong principles, arriving at a wrong conclusion not backed by the facts; and

x. That the learned Judge erred in making a finding that the applicable rates of payment were prescribed in the *Public Finance Management Act* and the *Public Procurement and Asset Disposal Act* at 0.1% and 0.4 % of the CIF value;

14. The respondent also expressed its dissatisfaction with parts of the impugned judgment and filed a cross-appeal raising six grounds which we condense into five as hereunder:

i. That the learned Judge erred in finding that the respondent was liable to the appellant for additional work;

ii. That the learned Judge erred in finding that the rate applicable for the extra work was 0.1% and 0.4% for clearing services and bond cancellation, respectively, without evidence to support the extra work;

iii. That the learned Judge did not make a finding on specific amounts payable to the appellant by the respondent despite that being the crux of the dispute;

iv. That the judgment as rendered was indefinite and incapable of being executed;

v. That the learned Judge did not consider the invoices adduced by the appellant despite their relevance in the suit, hence arriving at a conclusion not backed by the evidence on record;

15. This appeal came up for hearing on 30th October 2024. Learned counsel, Mr. Ngugi Kariuki, appeared for the appellant, whereas learned counsel, Ms. Wachanga, represented the respondent. Counsel had filed written submissions. They also briefly highlighted the submissions before the Court.

16. Through the submissions dated 31st August 2022, counsel for the appellant restated the historical background of the dispute and proceeded to submit on two main issues. The first issue was whether or not the contract between the parties was fundamentally altered to warrant payment at the rates sought by the appellant. According to counsel, although the learned Judge properly grasped and appreciated the facts and evidence as tendered, her final disposition was erroneous as it was not based on those facts and evidence. Counsel submitted that the trial Judge erred in her final disposition by awarding 0.1% for clearing services for both projects, 0.4% for cancellation of the bonds and 0.1% for the additional/ extra works. According to counsel, this alleged error by the court was attributed to, first, invoking the Public Procurement & Disposal Act and *Public Finance Management Act* to hold that it could not award a rate higher than 0.1% yet the said statutes do not provide rates for payment of services and, second, by holding that a rate approved by the tender committee could not be impugned and was unimpeachable. Counsel urged that the tender committee's decisions/approvals were neither statutory nor cast in stone and that such approvals needed to conform with the ingredients of a valid contract. The third ground upon which the learned Judge was faulted was her failure to appreciate that the respondent had conceded to arbitrarily paying the appellant a rate higher than 0.1%.

17. Counsel referred to the decision in 748 Air Services Limited vs. Theuri Munyi [2017] eKLR for the submission that the function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement and that parties to a contract are free to determine for themselves what obligations they will accept. Counsel urged that the terms of the original contract were fundamentally altered and thus the contract qualified as a new one. In support of this argument, counsel pointed out that the trial court had found that the contract had been substantially and materially varied by the parties' conduct. According to counsel, the trial court was, therefore, at fault for finding that it

could not interfere with the rate of payment that was agreed to in the original contract. It was counsel's submission that the components of the original contract had been fundamentally altered, and the trial court erred by holding that the rate of payment in the original contract was untouchable and unchangeable. Counsel also urged that it was erroneous for the learned Judge to accept alteration of the terms of the agreement concerning services offered but to decline such alterations in respect to the terms of payment. Counsel pointed to the extension of the contract beyond 60 days and the allocation of new complex tasks as adequate reasons for altering the payment terms.

18. Urging us to dismiss the cross-appeal, counsel argued that new terms of payment were proposed and utilized by the respondent in making payments to the appellant. Counsel invoked and urged the Court to apply the principles of inadequate consideration, unjust enrichment, quantum meruit and quantum valebant and allow the appeal. Counsel referred to Chase International Investment Corporation & Another vs. Laxman Keshra & 3 Others [1978] eKLR to identify the three ingredients of unjust enrichment and urged that the respondent should not be allowed to enrich itself from the services rendered to it by the appellant.

19. Asserting that the invoices issued to the respondent ought to be paid, counsel pointed out that an invoice, once issued, can only be rescinded by cancellation or through the issuance of a credit note. Counsel submitted that the appellant's original invoices were neither expressly cancelled nor credit notes issued to rescind them, and they, therefore remained valid in law.

20. On whether the appellant was entitled to the reliefs sought, counsel submitted that the direction by the trial court to the appellant to issue invoices to the respondent for consideration and payment was erroneous and against the tenets of due process. Counsel additionally submitted that the trial court failed to fully determine all the issues raised by the parties with finality. Ultimately, counsel urged us to allow the appeal and grant the reliefs sought by the appellant in the plaint.

21. In opposition to the appeal, counsel for the respondent relied on the submissions dated 30th September 2022. Counsel submitted that the appellant bid at the rate of 0.1% of CIF value, which earned it the tender. Counsel agreed with the learned Judge's finding that the tender documents contained the applicable rate. According to counsel, this finding is in tandem with section 82 of the *Public Procurement and Asset Disposal Act*, 2015 which provides that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject to correction, adjustment or amendment in any way by any person or entity. Counsel reiterated that this provision barred alteration of pre-agreed rates and those approved by the tender committee. It was also counsel's contention that if at all the appellant was aggrieved with the rates, it ought to have brought the issue to the attention of the respondent but no evidence was adduced to establish whether it pursued that alternative. Additionally, counsel submitted that, from the onset, the appellant knew the rates and cannot now claim different rates.

22. Regarding the cancellation of bonds, the respondent's counsel submitted that the work was part and parcel of clearing services. Counsel, however, conceded that there was an error when it came to payment because the two services were separated and paid at different rates, with payment for bond processing and cancellation being made at the rate of 0.4% of CIF value. Counsel argued that the variation sought by the appellant cannot be upheld since it was not arrived at as a result of mutual agreement by the parties and that the original deal was still valid. Counsel urged us to find that the appellant did not sufficiently demonstrate the variation of the contract to warrant departure from the rates contained in the tender documents.

23. In opposition to the appellant's claim to be paid for additional work, counsel agreed with the learned Judge's finding that if any challenge arose regarding the delay or unavailability of relevant documents

to facilitate clearance, the appellant should have raised the issue with the respondent and adduced evidence to that effect. According to counsel, there was no extra or additional word done by the appellant. Counsel submitted that the appellant never proved this aspect of the claim, and there was no communication by the appellant to the respondent about the alleged additional work, nor did the respondent authorize such extra work.

24. Turning to the question of the tender period, counsel argued that the tender was not to be performed within 60 days because the 60 days period was in relation to the preservation of the quoted price for the tender.

25. The respondent, however, joined issue with the appellant and submitted that the learned Judge erred in failing to consider the annexed invoices, thereby arriving at a judgment that cannot be executed. According to counsel, the invoices were at the centre of the dispute, and there being no decision on those invoices, it cannot be said that the dispute had been resolved. Consequently, counsel urged us to dismiss the appeal and allow his client's cross-appeal with costs.

26. This being a first appeal, our mandate is akin to a retrial. As was elaborated in Selle v Associated Motor Boat Co. [1968] EA 123, we will reconsider the evidence, evaluate it, and draw our own conclusions. In doing so, we are also guided by the holding in Makube v Nyamuro [1983] eKLR (Hancox, Ag J.A) that:

> "However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. I therefore now turn to the criticisms made in the memorandum of appeal that he so misdirected himself in material respects that the decision ought not to stand."

27. We have keenly reviewed the record of appeal and the submissions of counsel. In our view, four issues fall for our determination in this appeal. First, we need to establish the number of contracts entered between the parties and the terms of each of those contracts; secondly, whether there was an alteration of any of the contracts; thirdly, whether the appellant did additional work; and finally, the reliefs, if any, that the appellant is entitled to.

28. For a claim based on a contract to succeed, it is important that the plaintiff establishes the existence of the elements of a valid contract, namely, offer, acceptance, consideration, capacity, and legality. The Supreme Court of the United Kingdom, while explaining the duty of the courts in the interpretation of contracts in RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG [2010] UKSC 14 stated that:

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

29. Similarly, this Court (differently empaneled) in William Muthee Muthami v Bank of Baroda [2014] KECA 591 (KLR) adopted the same views and held as follows:

> " The nature of our civil process is that only a person who has incurred loss as a result of another's action can bring a claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract."

30. Having briefly highlighted the principles governing the interpretation of a contract, it is important to state from the outset that the evidence on record leaves no doubt that two contracts existed between the appellant and the respondent. The letter dated 8th May 2014 by the respondent's Mr. John Thumbi awarded Tender No. KAA/ES/JKIA/837B to the appellant. This tender involved the clearing services in respect of specified items. The agreed consideration for the provision of the clearing services was at the rate of 0.1% of the CIF value of the goods. These were the items for use in the reconstruction of Terminal 4.

31. The other contract was for the provision of clearing services for the goods for the construction of Terminal 2. On this, there was no clear and precise contract reduced into writing. The letter dated 21st September 2016 by Mrs. Margaret Muraya confirmed that the respondent had engaged the appellant to provide clearing services for two projects, one of them being Terminal 2. This second contract was also confirmed by witnesses from both sides, who all testified that there was a direct award of the tender for this contract to the appellant by the respondent. According to the respondent, the contract was for the provision of clearing services at the rate agreed upon in the contract for Terminal 4.

32. The pertinent issue that requires our determination is what the terms of the contracts were and whether the appellant acceded to those terms. According to the appellant, they were notified of the contract for Terminal 2 but did not negotiate or discuss the terms of service thereunder. On the other hand, the respondent contends that the contract was awarded in the terms approved by the tendering committee. This Court in Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A. S.Mohammed Investments [2014] eKLR has previously appreciated that the law permits unwritten contracts.

33. In Ali Abdi Mohamed v Kenya Shell & Company Limited [2017] KECA 590 (KLR), this Court (differently constituted) held as follows:

> "It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct."

34. The Court went ahead and referred to the opinion of Bingham, LJ in The Aramis [1989] 1 Lloyd's Rep 213, which we also find relevant, that:

> " As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no

such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist"

35. In Canada, the Court of Appeal for British Columbia in Langley Lo-Cost Builders Ltd. v 474835 B.C. Ltd., 2000 BCCA 365 had the following to say:

> " [20] ...In A.G. Guest, ed., Chitty on Contracts, 27th ed. (London: Sweet and Maxwell, 1994), it is noted at 152 that in normal commercial transactions, where the intention to be contractually bound is at issue, the onus of proving that such an intention did not exist "is on the party who asserts that no legal effect is intended, and the onus is a heavy one": Edwards vs. Skyways Ltd., [1964] 1 W.L.R. 349. Those, however, were cases where the form of the documentation was clearly contractual. The circumstances in the instant case were far more informal.
>
> (21) Most authorities suggest that the Court is not confined to the four corners of the alleged agreement, but may look at all the circumstances. In Osorio v. Cardona (supra) McLachlin J. considered evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties. The investigation is to determine whether a reasonable observer would think that Terry Johnson on behalf of Langley, in signing the faxed document in these circumstances, intended to be contractually bound when he signed and delivered the faxed documents."

36. The foregoing authorities succinctly elaborate the legal principles concerning the contract for Terminal 2. In our view, when no final document exists that outlines the terms of a contract between the parties, the Court is not prevented from considering the surrounding circumstances, including the prior contracts between the parties. Furthermore, factual evidence regarding the background of the dispute, both before and during the engagement, is valuable in determining the objectives and intentions of the parties involved. The ultimate intentions and terms of the contract are usually assessed from the perspective of a reasonable person who has access to the relevant factual background information available to the parties.

37. Regarding the existence of the contract for Terminal 2, the trial Court held as follows:

> " This Court finds that the extra work of Procurement of Plant design, supply and installation of interim Passenger Terminal Building JKIA, Nairobi is subject to payment by the Defendant to the Plaintiff as there is uncontroverted evidence as outlined above of referral of more services to the Plaintiff and confirmation of satisfactory service of the Plaintiff by the Defendant."

38. We find no misapprehension of the facts on the part of the learned Judge in reaching this conclusion. Indeed, the respondent, through a letter from Mrs. Margaret Muraya, confirmed that the appellant also provided clearing services for Terminal 2, which was not part of the earlier contract. The same is also supported by the emails from Mr. John Thumbi confirming that they had procured the appellant's services for clearing goods for Terminal 2.

39. There is no dispute that the respondent sought to onboard the appellant for clearing the goods in respect of Terminal 2 on similar terms as those for Terminal 4. Even though no letter was adduced that specifically communicated this intention by the respondent, the oral evidence adduced during the hearing of the matter was concurrent that such an agreement was reached. The appellant contends that it did not expressly accept the terms. However, the appellant did not communicate its dissatisfaction to the appellant in respect to the proposed terms. Instead, the appellant discharged its part of the contract under the respondent's terms. These were the terms which, according to the respondent, had been approved by the tender committee and which the appellant had accepted in performing the contract for clearing goods for Terminal 4.

40. From the foregoing, we find that the parties herein were aware that the contract for Terminal 2 was to be performed under the same terms as those for Terminal 4. We, therefore, decline the appellant's invitation to incorporate new terms after the fact. Had the appellant not been comfortable with the said terms, nothing barred it from communicating its dissatisfaction to the appellant and negotiating new terms as it so wished.

41. Before we conclude on this issue, there is the issue of the import of the 60 days referred to in the award of the tender for Terminal

4. According to the appellant, its understanding was that the contract was to be discharged within 60 days. The appellant indeed rides on this statement for the argument that because the work was not completed in 60 days due to the failure by the respondent to provide the requisite documents, then the contract had been varied. On the other hand, the respondent contends that the 60 days was for the preservation of the quoted price in the tender and not the contract period.

42. The learned Judge addressed the issue as follows:

> "Although, the clearing services exceeded 60 days if it was timebound, the important aspect of the contract is that the services were rendered to the Defendant and the issue of time was not raised or contested; in fact, the evidence adduced the Plaintiff was allocated more work."

43. On our part, we agree with the position adopted by the respondent. In the award of the tender for Terminal 4 issued on 5th May 2014, it was indicated that "the validity period for the quotation is 60 days." This was not the same as saying that the contract was to be performed within 60 days. The terms of the contract were more specifically in relation to pricing and delivery of services. Although there was urgency in the delivery of the clearance services, the timelines were not within the control of the appellant as the provision of the services depended on the arrival of the goods to be cleared in the country. If the contract period was among the terms of the tender, the bidders would have also been invited to bid on the timelines, which was not the case herein. We, therefore, find that the 60 days was in respect to the validity period for the tender and had nothing to do with the period within which the services were to be provided by the appellant.

44. The next issue for our determination is whether the existing contracts were fundamentally altered. As we have already stated, the appellant was awarded two contracts, one for Terminal 4 and another for Terminal 2. Both contracts were for clearing services and would run on similar terms as contained in the appellant's bid for the work for Terminal 4, which was remunerated at 0.1% of the CIF value of the goods. The appellant contends that the contracts were so fundamentally altered that nothing was left of them and that the parties were inclined to negotiate new contracts. Counsel for the appellant equated this to the Ship of Theseus, also known as the Theseus's Paradox, through which the question is posed as to whether an object is the same object after all its components have been replaced over time. Among the reasons advanced by the appellant in support of the contention that the contracts never

remained the same were that there was a new payment rate for cancellation of bonds at 0.4%; that the appellant was also engaged in additional work beyond the scope of the first contract; and that the work was not delivered within the contract period of 60 days owing to frustrations by the respondent.

45. Conversely, the respondent asserts that the tender committee approved payment at 0.4% of CIF value for the cancellation of bonds for all vendors and that the appellant was entitled to benefit from the approval. However, they maintain that the contract terms were not fundamentally altered, as urged by the appellant.

46. In addressing this issue, the learned Judge arrived at the following conclusion:

> " 58. This Court finds that bond cancellation services were rendered to the Defendant by Plaintiff and therefore the Plaintiff is entitled to payment at 0.4% as approved by the Tender Committee..."

47. We have addressed our minds to the record and the reasoning of the learned Judge. We find no fault in the approach and conclusion arrived at by the learned Judge on this issue. The evidence does not support the respondent's assertion that the service of retiring and cancellation of bonds was part of the contract for the clearing services for three reasons. First, the letter dated 8th May 2014 notifying the appellant of the award of the original contract for Terminal 4 was explicit that it concerned clearing services. The same was also captured in the call for expression of interest. If the respondent intended to include the retiring and cancellation of bonds in that contract, the same would have been expressly indicated therein. Secondly, DW2 testified that bond cancellation services were paid at the rate of 0.4% as approved by the tender committee and clearing services at 0.1% as per the appellant's bid, which was the lowest. This means the respondent regarded bond cancellation as a new and independent service that was not part of the clearing services. Thirdly, the respondent's letter by Mr. Patrick Chonde dated 24th August 2016 also refers to different payment rates for clearing services at 0.1% of CIF and for cancellation of bonds at 0.4% of CIF. We do not doubt that even in the respondent's mind, it intended the services for cancellation of bonds to be rendered not as part of the initial contract but incidental to that contract and at a different rate.

48. Section 47 of the Public Procurement and Disposal Act 2005 (repealed), which was operational when the contract was signed in 2013, provided as follows:

> "47. An amendment to a contract resulting from the use of open tendering or an alternative procurement under Part VI is effective only if -
>
> a. the amendment has been approved in writing by the tender committee of the procuring entity; and
>
> b. any contract variations are based on the prescribed price or quantity variations for goods, works and services."

49. Since the evidence on record shows that the 0.4% CIF on cancellation of bonds was approved by the tender committee, the Court is not at liberty to depart from the trial Judge's finding because the contract was amended in compliance with section 47 of the repealed Public Procurement and Disposal Act 2005. Both parties were bound by the new rate of payment for the cancellation of bonds in respect of the two contracts. This change of the payment rate cannot be a valid ground for the appellant's assertion of variation of contract on the basis of change of payment terms. The other ground upon which the appellant based its assertion of variation of contract is that the scope of the assignment kept expanding. We will consider this ground under the next issue as to whether the appellant performed any extra work outside the scope of work agreed in the two contracts.

50. The learned Judge found that the appellant had performed extra work, holding that:

> "71. The Plaintiff is not privy to the processes undertaken internally within the institution, especially when he was authorized and instructed by Defendant's Officers. The Defendant obtained benefit from these services rendered by the Plaintiff as confirmed by documents and correspondence in the Bundles presented in court.
>
> This Court finds that the defendant should not deny liability for extra/additional works and pay.
>
> 72. The Plaintiff did not negotiate and agree on rates applicable for payment of additional/ extra works or the work referred through direct procurement before executing these works. The Court considers the fact that the Defendant a Government Statutory body is bound by Public Procurement & Disposal Act and *Public Finance Management Act* and only pays for goods or services rendered to the institution in accordance with the law. The only rates approved are 0.1% of clearing services and Tender Committee approval of 0.4% of bond cancellation depending on the CIF value of goods. Therefore, where these services have been proved as in the instant case these rates shall lawfully apply."

51. On our part, upon review of the record, we find that what the appellant claims to be extra or additional work were actually activities within the scope of the contract. At paragraph 26 of the plaint and in the statement of the appellant's witness, some of the extra services said to have been rendered to respondent were the processing, preparation, correction and securing of mandatory documents requisite for clearing of imported goods; cancellation of bonds; correcting erroneous entries in the importation documents; securing certificates of conformity; tracing wrongly addressed consignments; amending shipping documents; and taking over clearance from other clearing agencies. DW1 testified, without any rebuttal from the appellant, that the scope of work as per the contract included port logistics and processing and submission of necessary documentation with the relevant authorities. DW1 further testified that:

> " The scope of work expected of the Plaintiff was to offer clearance services for K.A.A to lodge the documents with K.R.A and use password provided by K.R.A. The Plaintiff was to prepare documentation of the K.R.A documents and supervised what deemed for the Defendant was in order and process was dully followed."
>
> Therefore, the tasks identified by the appellant did not qualify to be paid for separately because they were assignments to be delivered in the process of providing clearing services or cancellation of bonds.

52. The second ground upon which the appellant's based its claim for payment for extra work was its assertion that the contract exceeded the contract period of 60 days. We have already addressed this issue and debunked the appellant's notion that the contract was to be performed within 60 days. We therefore need not revisit the issue except to conclude that the allegation that the contract was to be performed within a fixed period cannot be a basis for holding that the appellant performed extra work.

53. The third ground upon which the appellant based its claim for payment for extra or additional work is alleged admission by the respondent. In this regard, the respondent's letter dated 24th August 2016 in response to the appellant's letter dated 14th June 2016 and paragraph 8 of the written statement of DW1 were relied on by the appellant in support of the assertion that the respondent conceded that the appellant performed additional work. The respondent denied such an admission. A perusal of the letter and the evidence of DW1 support the respondent's position. Indeed, in the letter dated 24th August

2016, the appellant was asked to tender any invoices for any extra work it was claiming to have done and it seems it did not do so. As for DW1's alleged admission of extra work, the witness at paragraph 8 of his witness statement dated 29th November 2019 averred that:

> "While still undertaking the services, the Defendant sought to engage the Plaintiff on additional assignment for clearing services for the interim passenger terminal building at the quoted rate of 0.1% and at the estimated value of Kshs. 1,992,000/= as approved by the Tender Committee. The engagement of the Plaintiff was in line with the provisions of the Procurement Act, 2005. The Plaintiff duly accepted to carry out the clearing services thus should not be seen to renege the same."
>
> In his testimony in court, the witness clarified that the interim passenger terminal building he was referring to in his witness statement was Terminal 2. It is therefore clear that the additional assignment mentioned by DW1 did not refer to anything else apart from the work that was to be done in respect to the second contract awarded to the respondent for Terminal 2. The evidence of DW1 cannot, therefore, be taken as an admission of what the appellant pleaded as extra or additional work.

54. In wrapping up our determination of the question as to whether the appellant performed additional work, we observe that at no point during the performance of the contracts did the appellant raise any issue regarding the alleged expanded scope of work. We, therefore, find no reason for agreeing with the learned Judge and the appellant that the appellant had established that it had delivered services to the respondent, which were outside the two contracts.

55. The final issue for determination is whether the appellant was entitled to any of the reliefs granted by the learned Judge. Both the appellant and the respondent argued that the learned Judge failed to consider the invoices they had placed before the trial court in support of their positions. The appellant had placed before the trial court several invoices for over 58 million shillings and averred that out of this amount the respondent had only paid about 7 million shillings. On its part, the respondent had produced invoices and cheques showing that it had paid all the invoices prepared by the appellant based on the agreed rates. The final disposition by the learned Judge was as follows:

> "Disposition
>
> 1. The Plaintiff's claim as outlined in the Plaint is upheld only to the following extent against the Defendant;
>
> 2. 1st Project /Contract the Plaintiff's clearing services for goods/equipment at Terminal 4 shall be paid at contracted the rate of 0.1% of the CIP.
>
> 3. The Procurement of Plant design, supply and installation of Interim Passenger Terminal Building JKIA, Nairobi is subject to payment by the Defendant as per direct Procurement at the rate of 0.1% CIF
>
> 4. The bond cancellation services rendered to the Defendant by Plaintiff and therefore the Plaintiff is entitled to payment at 0.4% as approved by the Tender Committee.
>
> 5. The additional/extra works by the Plaintiff in clearing goods that had been assigned to be cleared by Government Clearing Unit shall be paid upon production of Invoices. The rate of 0.1% CIF shall apply as the rate contracted for in similar clearing services.

6. The Additional works of seeking and obtaining tax exemptions in the process of executing the contracted clearing service shall be paid by Defendant to Plaintiff at 0.1% CIF rate as contracted in similar clearing services upon production of Invoices.

7. The amounts payable to the Plaintiff by the Defendant shall deduct the Ksh 7 (sic) The Defendant shall pay interest at Court rates and costs of the suit."

56. In the record of appeal, we note that there were two sets of invoices. The first batch appears at pages 178-221 but does not bear the respondent's receipt stamp. Another batch appears at pages 222-260 and were received by the respondent on 28th October 2016. The total sum of the amount invoiced by the appellant was Kshs. 58,665,048. It was not disputed that the respondent paid Kshs. 7,038,266. The appellant, therefore, contended that there was an outstanding amount of Kshs. 51,626,782.

57. In the letter dated 24th August 2016, the respondent indicated that the parties had a meeting and the applicable rates were agreed upon. In that letter, the respondent asked the appellant to tabulate invoices raised for various projects based on the contractual rates. It is imperative to point out that the cumulative amount of Kshs. 58,665,048 were based on percentages that did not conform to the contractual rates. The respondent indicated the payment of Kshs. 7,038,266 was based on the invoices raised in compliance with the contracted rates. This assertion was not controverted, save for the continued agitation by the appellant that the rates it used of 2.5% and 3% were the market rates. It is unconscionable for a party to a contract to turn around and impose a perceived market rate when parties had mutually agreed on a given rate.

58. Be that as it may, we have already found that the appellant's claim against the respondent was unfounded since all the invoices that had been generated using the contractual rate had been paid. In the circumstances, the appeal has no merit and is for dismissal. Consequently, the respondent's cross-appeal succeeds so that the appellant's claim before the High Court is dismissed in its entirety. The respondent will have the costs of the appeal and those of the proceedings before the High Court.

59. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

K. M'INOTI

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR