



**Acturial and Benefit Consultants v Independent Electoral and Boundaries Commission  
(Civil Suit E079 of 2020) [2025] KEHC 636 (KLR) (Civ) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL SUIT E079 OF 2020  
LP KASSAN, J  
JANUARY 30, 2025**

**BETWEEN**

**ACTURIAL AND BENEFIT CONSULTANTS ..... PLAINTIFF**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 19<sup>th</sup> August, 2020 Acturial And Benefit Consultants (hereafter the Plaintiff) seeks against Independent Electoral and Boundaries Commission (hereafter the Defendant) reliefs in the nature of a sum of Kshs. 2,030,000/-; loss of interest on investments amounting to Kshs. 23,107,427/-; and costs of the suit and interest thereon, arising out of a claim for alleged breach of contract.
2. It was pleaded that the Plaintiff and the Defendant entered into an agreement for the provision of actuarial services by the former to the latter, towards the establishment of a pension scheme for the latter's staff, at an agreed sum of Kshs. 3,500,000/-. It was further pleaded that the Plaintiff provided the said services to the Defendant.
3. The Plaintiff pleaded that unfortunately, the Defendant only paid it a sum of Kshs. 1,697,500/- leaving an outstanding balance of Kshs. 2,030,000/- inclusive of accrued interest, which sum remains unsettled despite demand having been made for the same coupled with numerous promises from the Defendant.
4. The Plaintiff further pleaded that the failure by the Defendant in settling the outstanding amount has deprived it of the opportunity to invest the said money, thereby causing it to suffer loss to the tune of Kshs. 23,107,427/-.



5. Upon service of summons, the Defendant entered appearance and filed its statement of defence dated 7<sup>th</sup> December, 2020, denying the key averments made in the plaint and liability. The Defendant in particular denied the existence of any agreement of that nature or at all, between the parties herein. The Defendant further averred that pursuant to its policies, its suppliers ought to undergo a prequalification process, which the Plaintiff herein did not undergo. The Defendant equally averred that the Plaintiff did not receive any award for offering the services alleged in the plaint.
6. At the hearing, the Plaintiff and the Defendant each summoned one (1) witness.
7. For the Plaintiff, Lesley Okudo who was PW1 proceeded to adopt his signed witness statement dated 19<sup>th</sup> August, 2020 as part of his evidence-in-chief. He then introduced himself as being an Acturist by profession and the Managing Consultant of the Plaintiff and testified that he is a Co-Director of the Plaintiff together with his wife. The witness testified that the Plaintiff essentially provides actuarial consultancy services. He then stated that on the material date, he was approached by a lady who was one of the Directors of the then Electoral Commission of Kenya (ECK) with the intention of setting up a pension scheme for its staff members. That consequently, he was engaged in discussions with the then Commissioners of ECK upon which it was settled that the formation of a pension scheme was possible. That it was agreed that the witness would be paid a fee of Kshs. 3,500,000/- exclusive of VAT and 3% over tax, to undertake the entire exercise of assisting in the development of a suitable scheme. That it was further agreed that half the abovementioned amount would be paid upon commencement of the scheme, which amount was paid by way of a Local Service Order (LSO) dated 22<sup>nd</sup> July, 2008 to the tune of Kshs. 2,030,000/- thereby leaving a balance of Kshs. 2,030,000/-.
8. The witness stated that upon receipt of payment, he proceeded with the project and developed rules specific to Commissioners, which rules were forwarded to the Retirement Benefits Authority (RBA). That essentially, he completed the development of the scheme as tasked. That subsequently, he demanded payment of the balance from ECK, to no avail. That soon thereafter, ECK disbanded and the Defendant was established. That he therefore wrote to the then Secretary of the Defendant, Mr. Odungu, to follow up on his unpaid fees. That unfortunately, the outstanding balance has not been settled by the Defendant, to date.
9. The witness stated that thereafter, he severally wrote to the Defendant through its officials, with a view to following up on his unpaid fees, to no avail. He further stated that at the onset, the then ECK had engaged the Plaintiff's services sometime around the year 2000 or 2001, for purposes of procuring actuarial services, and that the witness undertook the relevant works to completion within a period of six (6) weeks. He testified that there was an existing contract between the Plaintiff and the Defendant.
10. During cross-examination, the witness reiterated the existence of a valid contract and further restated that he received a sum of Kshs. 2,030,000/- as part payment for the services rendered to the Defendant. He equally testified that he had plans for the remaining balance, namely, to utilize it in purchasing a parcel of land in Ruaka. This marked the close of the Plaintiff's case.
11. For the defence case, Chrispine Owiye by way of his evidence as DW1 adopted his signed witness statement dated 28<sup>th</sup> September, 2021 as part of his evidence-in-chief and proceeded to state that he is an advocate by profession and an employee of the Defendant. The witness stated that the documents being relied on by the Plaintiff were not availed to the Defendant for purposes of scrutiny or at all, despite a request being made to the Plaintiff by a representative of the Defendant. That in the absence of clear correspondences, it would have been illegal and improper for the Defendant to process any payments.



12. It is the evidence by the witness that contrary to the averments being made by PW1, at no point did the Defendant promise to pay the Plaintiff any of the monies sought or at all. The witness therefore urges the court to dismiss the Plaintiff's claim with costs. This marked the close of the Defendant's case.
13. Upon close of the hearing therefore, the parties were directed to put in written submissions.
14. The court, upon considering the evidence placed before it and the submissions on record, has established the following as constituting the key issues for determination here:
  - a. Whether the Plaintiff has established the existence of a valid contract between the parties and if so, whether it has been demonstrated that there was a breach thereof, by the Defendant; and
  - b. Whether the Plaintiff is entitled to the reliefs sought in the pleadings
15. The court will now proceed to address the issues hereunder.
  - a. Whether the Plaintiff has established the existence of a valid contract between the parties and if so, whether it has been demonstrated that there was a breach thereof, by the Defendant
16. In addressing this issue, the court must in essence determine whether the existing elements on contracts have been satisfied here in order to ascertain the question of breach, which forms the basis for the claim here. In *Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another* (2014) eKLR the Court of Appeal succinctly pronounced that the three essential elements giving rise to a valid contract are: offer, acceptance and consideration. This position was restated in *William Muthee Muthami v Bank of Baroda* (2014) eKLR where the same Court reasoned that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration, as follows:

“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.”
17. The Court of Appeal in *Ali Abid Mohammed versus Kenya Shell & Company Limited* (2017) eKLR further reasoned that a contract can be inferred from the conduct of the parties and need not be set out in writing, stating thus:

“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. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.
18. The Plaintiff on the one part avers that a contract existed between the parties at all material times, while the Defendant vehemently denies the existence of the contract referenced in the pleadings or at all.
19. From an examination of the pleadings and material on record, it is apparent that the Defendant's predecessor (ECK) had previously issued the Plaintiff with a tender vide tender reference number ECK/20/2007-2008, as seen in the LSO dated 18<sup>th</sup> July, 2008 and constituting item (i) in the Plaintiff's list and bundle of documents dated 19<sup>th</sup> August, 2020. The terms of the LSO support the averments made on behalf of the Plaintiff; namely, that the Plaintiff was to provide actuarial services to ECK for the establishment of a pension scheme for Commissioners therein, at a fee of Kshs. 3,500,000/- with



the completion period set at 6 weeks therefrom. That the amount payable constituted 50% of the above sum, being the first payment in the sum of Kshs. 1,750,000 plus VAT at the rate of 16% totaling a sum of Kshs. 2,030,000/-. It is apparent that the LSO was executed by the Defendant's officials. The record also shows that previously, ECK had issued the Plaintiff with a letter dated 4<sup>th</sup> July, 2008 (item h) requiring the latter to prepare a presentation of the proposed pension scheme.

20. From a further examination of the pleadings and material on record, it is apparent that ECK drew a cheque dated 29<sup>th</sup> July, 2008 in the name of the Plaintiff for a sum of Kshs. 1,697,500/- copy of which constitutes item (c) of the Plaintiff's list and bundle of documents.
21. From the court's consideration of the above documentation, it is apparent that the same collectively support the pleadings and averments by the Plaintiff, that an agreement for provision of professional services subsisted between the Plaintiff and the Defendant's predecessor (ECK) at all material times.
22. Having laid out the above, it is upon the court to now answer the question whether a breach thereof has been established by the Plaintiff.
23. It is a matter of general legal principle that in claims founded on a breach of contract, the particulars thereof ought to be set out in the requisite pleadings. Upon examination of the plaint on record, the court observed that no particulars for the alleged breach of contract were set out. That notwithstanding, the court observed that the Plaintiff averred that it did not receive full payment for the actuarial services rendered, with PW1 further stating that the outstanding sums owed stood at Kshs. 2,030,000/-.
24. Upon its perusal of the material on record, the court noted that the Plaintiff tendered as items (n) and (o) documents relating to the pension scheme. However, there is nothing on the record to indicate that the said documents were in fact prepared by the Plaintiff in order to justify the payments sought in the plaint.
25. Suffice it to say that it is apparent that the Plaintiff thereafter addressed various correspondences to the Defendant, claiming the outstanding sums on the tender. The Defendant on its part relied on a letter dated 18<sup>th</sup> April, 2019 attached to its list of documents dated 10<sup>th</sup> June, 2024 and in response to previous correspondences by the Plaintiff, by and large requesting for further particulars on the purported contract, to enable it deal further. There is nothing to indicate that the said letter elicited a response from the Plaintiff.
26. Be that as it may, from its overall examination of the record, the court has not come across any credible material confirming whether the Plaintiff fulfilled its obligations under the LSO in order to entitle it to the remaining balance on the fees payable, in any event. The nature and extent of works to be performed by the Plaintiff were ambiguously set out in the LSO but were not clearly defined; and the Plaintiff did not equally tender any credible material detailing an account of the works undertaken, pursuant to the tender.
27. In view of all the foregoing circumstances, the court is not convinced that the Plaintiff has established that the agreement in question was breached by the Defendant's predecessor so as to warrant a finding of liability against the Defendant.
28. Separately, upon its perusal of the pleadings and material being relied on by the Plaintiff, the court noted a pertinent issue which; though not canvassed by the parties before this court; arises and cannot therefore be overlooked. The issue in question touches on the validity of the suit.
29. From a glance at the record, it is not in doubt that the Plaintiff's claim against the Defendant is founded on an alleged breach of contract. That said, while it is apparent from the record that the material



agreement was entered into sometime on or about 18<sup>th</sup> July, 2008 and the alleged breach is said to have taken place shortly thereafter, the suit was brought 12 years later.

30. The applicable law on limitations here is the *Limitation of Actions Act*, Cap. 22 Laws of Kenya. Section 4(1) thereof which is relevant to these proceedings, provides as follows:

The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

31. Further to the foregoing, Section 27 of the *Limitation of Actions Act* expresses that:

Section 4 (2) does not afford a defence to an action founded on tort where—

1.

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

2. ....

3. ....

32. The above provision has been the subject of interpretation in different superior courts. In the case of *Mary Osundwa v Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 [2002] eKLR* the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those



in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.

33. No doubt echoing the holdings in *Wycliffe A. Swanya v Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar V. Mehta v Manilal M. Shah* [1965] EA 321, Aburili J restated the rationale behind the enactment of the *Limitation of Actions Act*, in the case of *Bosire Ogero v Royal Media Services* [2015] eKLR thus:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

34. From a plain reading of Section 4(1)(a) (supra) and based on precedent, a claim founded on contract ought to be brought within a period of six (6) years from the date on which the alleged breach occurred. As earlier mentioned, the present suit was brought 12 years thereafter, which period falls outside the stipulated timelines. There is nothing on the record to indicate that prior leave was sought by the Plaintiff before instituting the claim.
35. Even so, Section 27(1) (supra) clearly stipulates that there is no jurisdiction to extend the time for the filing of a claim founded on an alleged breach of contract. It therefore follows that even if the Plaintiff were to have sought an extension of time to file its suit, no such extension would have been available to it, in any event.
36. In view of all the foregoing circumstances, the court finds that not only did the Plaintiff’s suit fail to meet the threshold of proof set for claims arising out of an alleged breach of contract, but it further finds that the Plaintiff’s suit is incompetent on the basis that it is time barred. It therefore cannot be sustained.
37. Having determined so, the court sees no reason to determine the second issue concerning the reliefs being sought in the plaint.
38. Consequently, the suit is hereby dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**HON. L. KASSAN**

**JUDGE**

In the presence of:

No appearance for the Appellant

Kwamboka for Respondent

Guyo - Court Assistant

