Agunga t/a Net International v China Communication Construction Company Limited (Civil Suit E002 of 2021) [2024] KEHC 16980 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 16980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E002 OF 2021

F WANGARI, J

JUNE 28, 2024

BETWEEN

ALFRED NYADIMO AGUNGA T/A NET INTERNATIONAL .... PLAINTIFF

AND

CHINA COMMUNICATION CONSTRUCTION COMPANY LIMITED .... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit through a plaint dated 12/2/2021 and filed on even dated wherein he sought for judgement against the Defendant for the following reliefs: -

   a. A sum of Kenya Shillings One Hundred and Eighty-Seven Million, Seven Hundred and Twelve Thousand and Seven Hundred and Sixty-Eight (Kshs. 187,712,768/=;

   b. Commercial interest of 14% per annum from 24/9/2020 until payment in full;

   c. Costs of the suit.

   d. Costs of and/or incidental to this suit.

2. Together with the plaint, the Plaintiff filed the accompanying documents as required under Order 3 Rule 2 of the Civil Procedure Rules, 2010. Upon service of the pleadings upon the Defendant, it entered appearance on 1/3/2021 and filed its statement of defence dated 9/3/2021 on 11/3/2021. The Plaintiff then filed its reply to the Defendant's statement of defence dated 29/3/2021 on even date.

3. As parties were contemplating trial conference, the Defendant moved the court vide a Notion of Motion application dated 27/9/2021 on even date. It sought to strike out the plaint or have the suit dismissed in its entirety. The reason for the application was that the matter had been settled. The Plaintiff filed his replying affidavit dated 27/10/2021 wherein he opposed the application on the grounds that he had engaged the Defendant on a without prejudice basis on the understanding that

the entire sum pleaded would be wired to his account. It was only upon payment that he realized it is only a paltry Kshs. 87,600,000/= had been paid.

4. Parties filed their respective submissions in relation to the application and the court through its ruling delivered on 28/2/2022 dismissed the application with costs. The matter was thereafter referred to mediation. However, the mediation was not successful as can be evinced from the mediator's report dated 21/5/2022 and filed on 6/7/2022.

5. Mediation having failed, the Defendant then filed an application dated 3/8/2022 and filed on 30/9/2022. The application sought for leave to amend its statement of defence and the same was allowed and the Plaintiff was granted leave to amend its plaint if need be. The Defendant then proceeded to file its amended on even date. Upon service of the amended defence, the Plaintiff filed its amended plaint dated 12/10/2022 on even date. Parties thereafter complied with trial directions upon all parties filing all their requisite documents and statements.

Summary of the pleadings

6. The Plaintiff's claim is that on 25/3/2019, it entered into a lease agreement with the Defendant for equipment being excavators and bulldozers. The rental fee agreed was dependent on the type of excavator or bulldozer but ranging between Kshs. 45,000/= to Kshs. 70,000/= per day. It was a material term of the agreement that the Defendant/Lessee would make payments to the Plaintiff/Lessor within seven (7) days of receiving an invoice from the Plaintiff.

7. The Plaintiff had raised several invoices totalling to Kshs. 300,441,872/=. The Defendant did not dispute even a single invoice or raised an issue on the money claimed and had been paying until they stopped on or about 24/9/2020. The amount the Plaintiff had received by the time it moved court was Kshs. 128,729,104/= leaving a balance of Kshs. 187,712,768/= which after negotiations, a sum of Kshs. 87,600,000/= was paid thereby leaving a balance of Kshs. 100,112,768/= which amount the Plaintiff was thus claiming.

8. For the Defendant, it was its position that the lease agreement was for a period of four (4) months subject to renewal only if the parties desired to renew and that there was no current lease agreement in existence. It was averred that the rental rate was to be calculated by total working hours and was only payable if the Plaintiff fulfilled its part of the contract and the equipment actually worked per day. In breach of his warranty under the equipment lease agreement, the Plaintiff provided equipment not fit for purpose, not in good working order and not capable of working the whole day and did not in fact work the whole day on many days so as to entitle the Plaintiff to claim the full daily rate as he sought to do.

9. On the claim of Kshs. 187,712,768/=, the Defendant averred that the Plaintiff was estopped from seeking the same since on reliance of the Plaintiff's letter dated 14/7/2021, it paid him a sum of Kshs. 87,600,000/= in full and final settlement of the claim. The Defendant then enumerated the particulars of waiver and/or estoppel. Based on the foregoing, it prayed that the Plaintiff's suit be dismissed with costs.

10. Parties opted to file written submissions which they highlighted.

Plaintiff's Case

11. At the time of the hearing, the Chinese language interpreter was Hildah Akoth Juma, whose services were procured by the court. The Plaintiff, Alfred Nyadimo Agunga, PW1, also trading as Y Net International, testified that he was a contractor whose business was hiring plant machinery. He adopted his witness statement dated 6/3/2023 as his evidence in chief. He also relied on his documents as per

the List of Documents dated 12/2/2021 and Further List of Documents dated 12/10/2022, which he produced as exhibits 1-8. This court relies on the witness statement and the documentary exhibits filed.

12. The Plaintiff testified that he was involved in hiring equipment to the Defendant but he was not involved in the day to day workings of the machines. The machines were being operated by the drivers of the Defendant, who were supervising the machines.

13. The Plaintiff testified that after the Defendant did the work analysis, after receipt of the same with ETR attached, thereafter, the Plaintiffs would raise invoices.

14. On cross examination, he testified that the rental agreement was based on the agreement dated 25/3/2019, which was for 4 months. The Plaintiff admitted that Y Net International was not a Limited Company, but a Sole Proprietorship. The agreement dated 25/3/2029 was to lapse on 25/7/2029.

15. In respect to clause 7 on the working hours and shifts, the Plaintiff said the work sheets were in possession of the Defendant as they attached them to the invoices issued by the Plaintiff. On clause 8, payments were done according to the records signed by both parties.

16. The Plaintiff admitted that invoices in pg. 28, 29, 31 and 32 were all dated 1/4/2020. They were not accompanied by annexures for reasons that the originals had the annexures and that is why they were received and stamped by the Defendant.

17. The witness in reference to the Confirmation of audit Process dated 31/12/2019, the witness admitted to confirming that Kshs. 83,557,517 was owed to the Plaintiff. At this point, the court took a break and adjourned the matter for further cross examination.

18. On further cross examination, the Plaintiff stated that the last invoice was issued on 26/7/2019 until April 2020 when another invoice was issued. He testified that the amount had grown to Kshs. 187 million. The audit report had not indicated the work done, work in progress and that it only indicated the invoices issues from 3/4/2019 to 26/7/2019. He had other invoices ending April 2020. The Plaintiff claimed a further Kshs. 104 million as from December 2019.

19. The Plaintiff admitted that after filing the case, the parties negotiated and agreed that if Kshs. 87 m was paid; he would withdraw the suit. Kshs. 87,600,000 was wired to the Plaintiff through RTGS on 17/7/2021, Thereafter on 22/7/2021, the Plaintiff wrote to the Defendant demanding the balance of Kshs. 100 million as promised by the Defendant. The Plaintiff admitted having been paid Kshs. 108,744,312 being the amount payable for the period between 12/7/2019 to December 2019, and up to 20/9/2020, total amount received was Kshs. 128,729,104, leaving a balance of Kshs. 187 million as at the time of filing this suit.

20. The Plaintiff denied that invoices no. 1803 to 1808 were fake. The words "according to the attached analysis" were not written to the invoices. He said all payment were done after the attachment of ETR receipts. Further, in clause 7.3 of the agreement, time sheets were to be submitted to equipment department. The Plaintiff reiterated that the basis of his claim was the invoices which he said were not fake.

21. On re-examination, the Plaintiff stated that even after the contract expired after 4 months, the Defendant continued hiring the machines from the Plaintiff. At no time did the Defendant query the validity of the invoices, and the issue was first raised during trial.

22. He further stated that the timesheets were prepared by the Defendant which remained in its custody together with the receipts. He said he raised several invoices in the month of April 2020 because the Finance Department 'was not around' and that the Defendant did not have money to pay.

23. On the Kshs. 87 million, the Plaintiff said that it was the initial deposit towards the claim, and he was to withdraw the suit after the entire amount due to him was paid. The Plaintiff's case was then closed.

Defence Case

24. During the Defence hearing the Chinese language interpreter was absent. The Defence Counsel stated that his witness was willing to communicate in English language but at a slow pace.

25. The Defence witness, Pan Jun stated that he was the Commercial Manager at the Defendant Company, where they had a project with KPA. He adopted his witness statement dated 1/11/2023 as his evidence in chief, and he produced as exhibits 1 to 7, the documents as listed in the List of Documents dated 17/5/2023.

26. The witness testified that even though he could not recall the terms of the contract, after the expiry of the same, the Defendant continued leasing the machines from the Plaintiff. He said they would make payments after receipt of invoices together with the ETR receipts.

27. On time sheets, he said they were to be submitted to the Equipment Department, while the invoices and ETR receipts to the Finance Department. If an invoice was not accompanied by the ETR receipt, it would not be received. He was not aware of any invoice that was rejected by the Finance Department, and neither was he aware if there were fake invoices or amount involved in them.

28. The witness further stated that all payments were made after comparing their records with the invoices. The parties settled the matter without involving the Advocates on record, and after the payment of Kshs. 87 million, the suit was to be withdrawn.

29. It was stated that the Defendant disputed some invoices but the same was not brought to the attention of the Plaintiff. All invoices raised had ETR as that was mandatory. The witness admitted that payments were not being made within 7 days after receipt of invoice as per the agreement. Payments would not be made if the invoices differed with their records.

30. On re-examination, the witness stated that after the invoices are received, they would compare the Defendant's timesheet with that of the Plaintiff. Once the figures agree, payments were made. The invoices submitted by the Plaintiff were disputed.

31. On the negotiations, the witness admitted that there was no written consent as the conversations were done on phone. He said there was a text message which was produced as an exhibit, where payment of Kshs. 87 million was agreed upon despite money owed being Kshs. 83 million. A statement dated 14/7/2021 was prepared before the payment was done. It is after payment that the Defendant received a demand letter of Kshs. 100 million from the Plaintiff.

32. The Defence closed its case at this point. Parties were directed to file their written submissions. Both parties complied by filing their rival submissions together with the supporting authorities.

Plaintiff's Submissions

33. They are dated 13/3/2024 and filed on 28th November, 2022. The Plaintiff framed four (4) issues for determination which are: -

    i. Whether there existed a valid lease of agreement between the Plaintiff and the Defendant herein;

    ii. The validity of the subject lease agreement after the lapse of the agreed four months' lease duration;

iii. Whether the Plaintiff is estopped or waived from claiming the remaining amount of money owed by the Defendant herein; and

iv. Whether the Plaintiff has proved its case on preponderance of evidence.

34. On the first issue, it was submitted that the Law of Contract explicitly dictates the first task of a party who wishes to place reliance on the existence of a contract is to prove the existence of an offer, proof of an offer to enter into legal relations upon definite terms followed by adduction of evidence from which courts may infer an intention by the offeree to accept that offer. From the lease agreement produced, there existed a valid lease agreement between the Plaintiff and the Defendant. It was signed by the Plaintiff and Pan Jun together with Lin Zhi Ping on behalf of the Defendant.

35. The Lessor was to lease items of equipment being bulldozers and excavators to the lessee for a period of four (4) months and be renewed automatically if both parties to the agreement were desirous of renewing it. It was thus the Plaintiff's position that the requisite elements of a contract had been proved. Having established offer, acceptance and consideration, the Defendant could not resile from the terms of the agreement. The case of Chon Jeuk Suk Kim & Kim Jong Kyu v E.J. Austin & Others [2013] eKLR was relied upon in buttressing the above.

36. On the second issue, the Plaintiff made reference to clause 2.2 of the lease agreement which stipulated that the lease duration was four (4) months and would automatically renew if both parties desire to do so. The same clause provided that after the lapse of the 4 months' duration, any party intending to terminate was to provide a minimum written notice of seven (7) days to the other party. There was no termination notice and no actual termination issued.

37. It was submitted that after the lapse of the initial 4 months, parties continued carrying their contractual obligations as though still bound by the terms of the expired lease agreement since the lease agreement was neither renewed nor terminated by either party. Reference to defence witness testimony who executed and attested the lease agreement was made to buttress the point that upon lapse of the 4 months' lease duration, the Defendant did not renew the lease between it and the Plaintiff though it continued to make use the equipment and paid for the use and as such, the contractual relationship continued even after the lapse of the contract.

38. The existence of the contractual relationship between the parties even after the expiry of the lease was further evidenced by the numerous invoices adduced by the parties in support of their rival positions. It was the Plaintiff's contention that the fact that parties continued to execute their respective contractual obligations as per the expired lease agreement was an outright indication of the parties' desire to automatically renew the initial lease agreement dated 25/3/2019. This was as per clause 2.2 and this was only until the Defendant breached clause 8.1 which provided that payment was to be paid within 7 days after receiving invoice with ETR as approved by the Defendant's Finance Department.

39. On the third issue, the Plaintiff referred to two (2) decisions of the Court of Appeal addressing the issue of estoppel. These are; Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR and First Assurance Company Limited v Seascapes Limited [2008] eKLR. It was the Plaintiff's submissions that the Defendant's reliance on the doctrine of estoppel or waiver was an afterthought. The Defendant did not establish existence of any representation on the part of the Plaintiff. According to the terms of the lease agreement, there was a presumption that the Defendant was to pay the accrued rent payments. It was an outright breach of contractual obligation on the part of the Defendant since it was duty bound to pay the accrued rent payments.

40. The Plaintiff contended that it diligently discharged his side of the bargain and that it would be a fundamental breach of contract and fraudulent for the Defendant to refuse to settle the claim it

had admitted as evidenced by part payment of the claimed sum. It was further submitted that the Defendant did not point any action or step taken by the Plaintiff demonstrative of the fact that he had waived his rights to recover money in default of payment.

41. It was thus the Plaintiff's position that the Defendant had no reasonable grounds whatsoever to use the doctrine to defend itself since it was clear that they breached the contract. The case of Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR was relied upon. In concluding this issue, the Plaintiff submitted that the alleged correspondences between the Defendant and the Plaintiff and other documents relied upon by the Defendant to raise the defence of estoppel or waiver sufficiently demonstrate a provisional view that the Plaintiff upon full ventilation of the proposed out of court settlement, there is a probability that the Plaintiff made a representation that it will not waive the remaining amount of Kshs. 100,112,768/= upon payment of Kshs. 87,600,000/=.

42. On the last issue, it was submitted that the Defendant's claim that Kshs. 87,600,000/= paid on 17/7/2021 was agreed that it would extinguish the claim of Kshs. 187,712,768/= is baseless and not supported by evidence. The Defendant did not and does not have a defence to the claim of the monies due and owing. It did not present any document challenging the amount and the invoices apart from saying that the amount is not payable. The Plaintiff submitted that the Defendant's defence was disjointed and ever shifting from pleading fake invoices, discrepancies in the monies due while not offering counter-evidence, denying contract existence to lastly pleading estoppel and/or waiver. It was thus the Plaintiff's position that on a preponderance of evidence, he had proved his case and asked the court to allow his case as prayed in the amended plaint dated 12/10/2022 with costs.

Defendant's Submissions

43. The Defendant filed its submissions dated 2/4/2024. The following issues were identified for determination.

    a. Whether the Plaintiff's invoices issued on 1/4/2020 are deficient and cannot form a valid basis for award of Plaintiff's purported claim herein; and

    b. Whether by virtue of his representation and actions, the Plaintiff is estopped from continuing to pursue the purported claim herein against the Defendant and or waived such right.

44. On the first issue, it was submitted that invoices numbers 1803, 1804, 1806, 1807 and 1808 all dated 1/4/2020 are deficient because there are no supporting time sheets showing the working analysis of the time worked. As such, they cannot to form a valid legal basis for the award of the purported amount claimed by the Plaintiff. They are issued after the expiry of the lease period and are not drawn according to the contractual requirements as set out in the agreement. In fact, they are said not totaling the claimed amount.

45. The Defendant submitted that parties to a contract are bound by the terms of their agreement and all the court can do is case of a legal dispute is to enforce and give effect to the parties' intentions. The Court of Appeal decision in Coastal Bottlers v Kimani Muthika [2018] eKLR which cited with approval the case of Damondar Jihabhai & Co. Ltd & Another v Eustace Sisal Estates Ltd [1967] EA 153 was relied upon for the above proposition.

46. Further, the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (k) Ltd & Another [2001] eKLR was cited in further reliance. The Defendant submitted that from the foregoing binding decisions, it follows that the purported invoices drawn by the Plaintiff on 1/4/2020 if they were to be considered the same must be considered and examined in accordance with the agreement.

47. Making reference to clause 2.2, the Defendant submitted that the lease period was for 4 months and the same could be renewed if so intended by parties. It was its position that the agreement was not renewed whether expressly or impliedly after the lapse of the 4 – month period and this was affirmed by the fact that no invoices were issued from the end of July, 2019 to 1/4/2020 when the disputed invoices were suddenly issued.

48. For argument sake, even if the agreement was renewed in accordance with clause 2.2, it would follow that the invoices dated 1/4/2020 ought to have been drawn in accordance with the mandatory provisions of the agreement to form a valid and legal basis for award of the claim sought. Since the said invoices lacked material timesheets, they cannot be claimed to be valid invoices to form the cause of action.

49. Moreover, the said invoices were not signed by a representative of the Defendant in accordance with clause 8.1 of the agreement. The Defendant submitted that the invoices dated 1/4/2020 did not conform with the contractual stipulations binding the two parties and are deficient thus cannot form a legal basis for the award of the purported claim.

50. The case of Helga Christa Ohany v ICEA Lion General Insurance Company Ltd [2022] eKLR which quoted with approval the Supreme Court of United Kingdom in Arnold v Britton [2015] UKSC 36 on interpretation of written contracts was cited. In conclusion, the Defendant submitted the subject invoices did not satisfy the mandatory provisions of the agreement binding the parties and thus could not form a basis for the award of the amount sought.

51. On the second issue, the Defendant submitted that it was an uncontested fact that through a WhatsApp message on 14/7/2021, the Plaintiff offered the Defendant a proposal that if he was to be paid Kshs. 87.76 million, he would pull down the case even the following day. It was also a fact that as a further inducement to the Plaintiff, the Defendant on 14/7/2021 sent the Plaintiff a draft containing the Plaintiff's proposal for withdrawal of the suit titled "Suit Withdrawal".

52. The contents of the letter dated 14/7/2021 were produced verbatim. The Defendant submitted that it is the Plaintiff that wrote the letter dated 14/7/2021, signed it willingly and forwarded the same to the Defendant through WhatsApp on the same day. According to the Defendant, the court is left with no option but to enforce and give effect to the terms of the said letter as it was an expression of an agreement binding the parties in the suit.

53. The Defendant contended that it relied on the Plaintiff's representation and wired to the Plaintiff Kshs. 87,600,000/= being the full and final agreed settlement amount. Citing the provisions of section 120 of the *Evidence Act*, the Defendant submitted that it is trite that when a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

54. The Defendant then went ahead to give the Black's Law Dictionary, 8th Edition at p. 629 what estoppel is define. The decision of Pickard v Sears 112 E.R. 179 was cited to buttress the foregoing. The Defendant placed further reliance on the Court of Appeal decision in Serah Njeri Mwobi v John Kimani Njoroge (supra) and this court's decision in Carol Construction Engineers Limited & Another v National Bank of Kenya [2020] eKLR where the court quoted with approval the rationale in the case of Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (1946) to reiterate its position.

55. In the alternative, the Defendant submitted that the Plaintiff can be said to have waived any right to continue the proceedings herein. Being an abandonment of right, it is a defence against its subsequent

enforcement. It was submitted that waiver may be express or where the knowledge of the right may be implied from conduct which is inconsistent with the continuance of the right. Halsbury's Laws of England London: Butterworths & Co. Ltd 4th Edn Vol 45 (2) para. 385 was cited in support.

56. To buttress the issue of waiver, the Defendant relied on the cases of Sita Steel Rolling Mills Ltd (supra), Coastal Bottlers v Kimani Muthika (supra) and Bernard Maina Kiama & 42 Others v Rift Valley Railways (Kenya) Limited [2019] eKLR. In conclusion, the Defendant submitted that the Plaintiff through its letter dated 14/7/2021 expressly waived his right to sue the Defendant.

57. The Plaintiff represented to the Defendant that upon payment of Kshs. 87.6 million, the same would offset the claim and all the pending invoices had been cleared. Thus, the Plaintiff cannot legally purport to claim the suit amount from the Defendant. It thus urged the court to dismiss the plaint dated 12/2/2021 as amended on 12/10/2022 with costs.

Analysis and Determination

58. I have carefully considered the parties' respective pleadings, the evidence tendered, submissions filed together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -

    a. Whether the equipment lease agreement dated 25th March, 2019 was extended after the lapse of the agreed four (4) months;

    b. If the answer to (a) is in the affirmative, whether each party continued discharging their respective obligations under the agreement;

    c. Whether the invoices dated 1st April, 2020 were deficient to form a valid basis for the Plaintiff's claim;

    d. Whether the Plaintiff having received the sum of Kshs. 87,600,000/= was estopped from demanding any other further sums;

    e. Whether the Plaintiff's receipt of Kshs. 87,600,000/= amounted to waiver;

    f. Whether the Plaintiff made out a case for grant of the orders sought in his plain dated 12/2/2021 and amended on 12/10/2020; and

    g. What is the order as to costs and interests?

59. At the onset, the following issues are not in dispute:

    i. The Plaintiff and the Defendant entered into an equipment lease agreement dated 25/3/2019;

    ii. The equipment lease agreement was for four (4) months;

    iii. The lease agreement was renewable if both parties have the desire to do so; and

    iv. After the lease period, any party intending to terminate the agreement should provide minimum written notice of seven (7) days to the other.

60. Having settled on the above, a consideration of the first issue is the natural flow of events. The Defendant argued that the lease agreement lapsed sometime in July, 2019 and as such, there was nothing regulating the parties' relationship. However, the Plaintiff is of a contrary view since there was no written notice terminating the agreement that was issued in terms of clause 2.2 of the agreement. This being the contract entered into by the parties, it is not this court's business to rewrite the same

but only to construe what the parties agreed. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal held as follows: -

> “…A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved…”

61. The court cited the decision by Shah, J (as he then was) in *Fina Bank Limited v Spares & Industries Limited, Civil Appeal No. 51 of 2000* (unreported) where it was held as follows: -

> “…It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”

62. In resolving this issue, the court has considered the testimony of DW1 who confirmed that after the lease agreement lapsed, the same was not renewed. Despite the non-renewal, it continued using the machinery and continued making payments for their use. In this case, even after the lease agreement lapsed, the Plaintiff availed its equipment to the Defendant and the Defendant continued paying for the same at the same agreed rental rates.

63. Since the Defendant averred that the lease agreement having lapsed towards the end of July, 2019, there was no longer anything binding the parties together. However, it continued using the Plaintiff’s equipment and made payments with no variation to the initial agreement. In certain circumstances, parties may continue performing prior contractual obligations after the expiry of the term of the previous contract. The question thus arises as to whether the parties are still under a contract? The answer is that this is a question of fact. The facts will show whether or not there is a new implied agreement or not.

64. In the present case and having reviewed clause 2.2 on the aspect of termination, even if the lease agreement had lapsed, there was no formal termination as envisaged by the lease agreement. Since parties continued performing their respective obligations, I have no hesitation to hold that parties were still under the terms of the initial lease agreement. In Kenya Breweries Ltd v Kiambu General Transport Agency Ltd [2000] EA 398, the Court of Appeal held as follows: -

> “…A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract…”

65. To give efficacy to what the parties agreed on 25/3/2019, it would be necessary to imply that the lease agreement absent any termination as agreed was impliedly extended.

66. Having found in the affirmative and based on the discourse above, there is no dispute that both parties continued discharging their obligations under the lease agreement.

67. On the third issue, the Defendant poured cold water on the invoices dated 1/4/2020 for failure to attach supporting time sheets. The relevant clauses are 7.2 and 7.3 of the lease agreement. The two (2) clauses are worded as follows: -

    7.2 Signing the time sheet from an authorized person from the Lessee daily with the acceptance of the driver with his signature.

    7.3 The time sheet should be gathered and submitted to equipment department.

68. On cross examination of PW1, he stated that the work sheets were with the Defendant. This was confirmed by DW1. Looking at the agreement as a whole, the work/time sheets were not a central document in terms of what the Plaintiff was required to submit. I say so on the strength of clauses 11.2 and 11.3 which provided as follows: -

11.2 The Lessor shall provide the official invoice and ETR addressed to: China Communications Construction Company Limited.If the Lessor refuses to re-offer or delay to offer valid invoice, the Employer is entitled to refuse to pay and deduct from the rent as compensation of caused economic losses.

11.3 All the payment will be executed only after the Lessor submit the officially invoice with ETR receipt.

69. From the above clauses, if the Defendant intended to have the work/time sheets central to what needed to be submitted prior to any payment, nothing was easier than to insert that clause. A party is not allowed to unilaterally vary an agreement to the detriment of the other party. In the present case, the work/time sheets did not go to the root of what the Plaintiff was required to submit and the fact that they were not attached on the invoices dated 1/4/2020 did not of itself invalidate the said invoices.

70. Though the issue of the invoices being fake had been raised, DW1 confirmed that none of the invoices were fake and were indeed received by the Defendant. I thus return a finding that indeed the invoices dated 1/4/2020 were not deficient and could form a basis of the Plaintiff's claim.

71. On the fourth issue, it is not in dispute that the Plaintiff received a sum of Kshs. 87,600,000/= from the Defendant. Was he estopped from demanding any further sums from the Defendant? The key documents supporting the Defendant's position are text messages, WhatsApp messages and a letter dated 14/7/2021. On cross examination, the Plaintiff confirmed that they had commenced negotiations with the Defendant with a view of resolving the matter out of court.

72. A sum of Kshs. 87,600,000/= was agreed and the same was thereafter wired to his account through RTGS on 17/7/2021. However, on re-examination, he stated that the amount of Kshs. 87,600,000/= was a deposit towards payment of the of the claimed amount. Section 120 of the *Evidence Act* as well as the various authorities relied by the parties in support of their respective rival positions represent the doctrine of estoppel and its applicability and I need not restate them.

73. The Defendant stated that negotiations were commenced by the parties directly without the involvement of their Counsel as they had previously had mutual relationships. It thus believed in the Plaintiff. The negotiations took the form of short messages (sms) and WhatsApp. This culminated in a letter dated 14/7/2021. The messages are contained at pages 1 to 5 and 7 of the Defendant's exhibits. These are the documents which are said to have finally settled on the sum of Kshs. 87,600,000/=.

74. The messages are a form of electronic evidence and for them to be admissible, they must comply with the provisions of section 106B as read with section 65 of the *Evidence Act*. Though none of the parties addressed it, the court has inherent powers to consider an issue not covered by parties as long as it is relevant to the determination of the matter. The relevant provisions of section 65 are 65 (5) (c), (6) and (8). I reproduce the same as hereunder: -

> "Section 65 (5)(c)a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer printout"), shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without

further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible."

"Section 65(6) The conditions referred to in subsection (5) in respect of a computer printout shall be the following, namely—

(a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;

(b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;

(c) the computer was operating properly or, if not, that any respect in which it was not operating properly was not such as to affect the production of the document or the accuracy of its content;

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business."

"Section 65(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying a document containing a print-out or statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence."

"Section 106B

1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly;

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

75. The above requirements were put in place to ensure that whatever is being produced in the form of electronic evidence is foolproof. Though no objection was raised by the Plaintiff, for an exhibit to be given judicial application, it must have gone through processes which the Court of Appeal set out in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2008] eKLR. It was held thus: -

> "...The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record..."

76. Having found that the documents in issue are not compliant with the statute, I find no reason to give them any consideration on the issue of estoppel. That only leaves the latter dated 14/7/2021. A perusal of the same confirms that the letter though communicating intention to withdraw the suit, the figures at which the settlement were arrived at are missing. Similar, it is not a withdrawal by itself by requires the respective Counsel for the parties to do something to perfect it.

77. Before concluding this matter, I note that five (5) days, that is, 22/7/2021, after the matter was said to have been settled, the Plaintiff's Counsel writes a letter to his counterpart requesting that a further sum of Kshs. 16,800,000/= so as to conclude the matter. This clearly leaves no doubt that the sum of Kshs. 87,600,000/= paid to the Plaintiff was not the final sum. Worse still, another letter dated 19/8/2021 was once again sent now clarifying that the sum owing was Kshs. 100,112,768/= and not Kshs. 16,800,000/= as communicated on 22/7/2021.

78. Considering the immediate developments after the matter was said to have been fully settled, am not convinced that the Plaintiff is estopped from claiming the balance for the reason that clearly the parties did not have a meeting of the minds (consensus ad idem). I thus return a finding that the Plaintiff was not estopped from pursuing its balance.

79. On the fifth issue, considering the relationship between the fourth issue on estoppel and waiver and having found as above on waiver, the Plaintiff having received the sum of Kshs. 87,600,000/= cannot be said to have abandoned his rights for the balance. He had adduced evidence through invoices and attached ETR receipts and the same having been received without any complaint, it would be onerous to hold that the Plaintiff abandoned his rights to claim the outstanding sum.

80. Lastly, the duty to prove the claim was upon the Plaintiff. That is what section 107 of the *Evidence Act* postulates. The Plaintiff tendered evidence that he rendered services to the Defendant and was paid but there is an outstanding balance of Kshs. 100,112,768/= which is yet to be paid. He adduced evidence in the form of invoices and ETR receipts which were not challenged. The standard of proof required in civil cases is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J (as he then was) in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows: -

> " ...In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred..."

81. I found that the Plaintiff proved his case on a balance of probabilities and as such, he is entitled to the reliefs sought.

82. Lastly, on costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

83. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion,

courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

84. There was no evidence led to show that the Plaintiff was guilty of any misconduct to be deprived of costs and as such, I award the Plaintiff the costs of the suit which shall be taxed by the Deputy Registrar of this court.

85. The sum sought being a liquidated sum, I am alive to the provisions of section 26 (1) of the *Civil Procedure Act*. Considering that the Defendant made part payment, I shall order interests at commercial rate from 12th October, 2022 when the amended plaint showing the outstanding balance at that time was filed.

86. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. Judgement is hereby entered in favour of the Plaintiff against the Defendant as follows; -

        i. A sum of Kenya Shillings One Hundred Million, One Hundred and Twelve Thousand, Seven Hundred and Sixty - Eight (Kshs. 100,112,768/=);

        ii. The sum in (i) above shall attract commercial interest of 14% per annum from 12th October, 2022 until payment in full.

    b. Costs of the suit to the Plaintiff.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JUNE, 2024.

……………………

F. WANGARI

JUDGE

In the presence of;

Ms. Mboya Advocate h/b for Mr. Matata Advocate for the Plaintiff

Mr. Kimathi Advocate h/b for Prof. Mumma, SC for the Defendant

Barille, Court Assistant