



**Bevaj Furniture Limited v Kenya Power & Lighting Co Ltd (Civil Suit 412 of 2017)
[2024] KEHC 15147 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 412 OF 2017
FG MUGAMBI, J
NOVEMBER 29, 2024**

BETWEEN

BEVAJ FURNITURE LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING CO LTD DEFENDANT

JUDGMENT

1. The present dispute arises from a three-year framework contract dated 30th June 2015 for the supply of furniture, which was awarded by the defendant to the plaintiff. The contract specified that the tender would be delivered in phases (LOTS). According to the plaintiff, the 1st phase was valued at Kshs. 37,813,215.48. The agreement also allowed for subsequent awards during the three-year period on a need/demand basis, up to a maximum value of Kshs. 137,047,794.
2. The plaintiff asserts that the contract framework was to be executed based on Local Purchase Orders (LPOs), with the defendant assuming responsibility for distribution costs. The plaintiff claims that while the original LPOs were all valued at Kshs. 37,813,215.49, corresponding to the contract price, the actual furniture supplied and delivered to the defendant's various stations exceeded the quantities specified in the LPOs, as per the delivery schedules.
3. The plaintiff further contends that after delivering the furniture, they raised invoices totaling Kshs. 27,886,461.90 in June 2016 and May 2017. The defendant acknowledged and paid invoices amounting to Kshs. 25,158,890.92 but requested the plaintiff to issue credit notes for the unpaid balance of Kshs. 2,727,570.98. This adjustment, according to the defendant, was due to defective furniture, which the plaintiff alleges was never returned.
4. The plaintiff also claims an outstanding amount of Kshs. 2,773,117.11 for furniture ordered by the defendant on 13th June 2017, which remains unpaid.



5. Additionally, the plaintiff asserts that although the defendant required the furniture to be supplied to designated regions as per the LPOs, they were later directed, via email, to deliver the furniture to other branches not specified in the LPOs. This resulted in extra transportation and sustenance costs, which have not been reimbursed to date. Eventually, the defendant informed the plaintiff that phases II and III of the tender would not proceed.
6. The plaintiff contends that the defendant admitted owing Kshs. 7,265,192.73, which was settled pursuant to a court order. However, a balance of Kshs. 7,855,900.27 remains unpaid for goods that were delivered.
7. It is these events that precipitated the filing of the suit through the amended plaint dated 22nd February 2022. The plaintiff seeks judgment against the defendant for:
 - i. Kshs. 7,855,900.27 for outstanding amount for goods delivered and not paid for;
 - ii. Loss of profits amounting to Ksh.38,439,886.77;
 - iii. Transport and per diem incurred totaling Kshs 825,920;
 - iv. Interest on (a), (b), and (c) above from the date of contract until payment in full; and
 - v. Costs of the suit.
8. The defendants on the other hand confirm the existence of the contract but assert that it was a one-year agreement, with phases II and III being subject to the defendant's needs. The contract sum of Kshs. 37,813,215.49 for the first phase is not disputed. The defendant further argues that the contract sum included transport charges, and as such, the unit costs of the furniture varied depending on the delivery location.
9. The defendant also acknowledges having paid Kshs. 25,158,890.92 and states that they requested the plaintiff to issue credit notes for Kshs. 2,727,570.98. This amount, according to the defendant, represented furniture that failed to meet specifications and which the plaintiff did not replace as agreed before the termination of the contract.
10. Additionally, the defendants raise concerns about delays and the delivery of substandard furniture, which, in their view, constituted a clear breach of the contract. The defendant notes that the contract was terminated on 31st July 2017 under clause 7.24 of the agreement between the parties.
11. During the trial, both parties called their respective witnesses, whose testimonies reflected the positions outlined in their cases. I will not repeat the testimonies in full but will reference them as needed in my analysis.

Analysis and Determination

12. I have carefully considered the pleadings, evidence, submissions and authorities cited by Counsels for the opposing sides. The following issues arise for determination;
 - i. Whether the plaintiff is entitled to payment of outstanding amounts for goods supplied and delivered and not paid for amounting to Kshs 7,855,900.27;
 - ii. Whether the plaintiff is entitled to reimbursement of costs incurred in transportation of goods to stations far from the regions indicated in the LPOs amounting to Kshs 825,920/=;
 - iii. Whether the defendant is in breach of the agreement between the parties; and



iv. Whether the plaintiff is entitled to damages for loss of profits.

Whether the plaintiff is entitled to payment of outstanding amounts for goods supplied and delivered and not paid for amounting to Kshs 7,855,900.27:

13. According to the plaintiff, this amount comprises the value of furniture delivered in excess of the first batch, the value of furniture supplied at the defendant's request via email dated 13th June 2017 (for which no LPO has been issued to date), and the value of credit notes for goods supplied by the plaintiff.
14. I have reviewed the letter dated 13th June 2017 and find no evidence of any orders for furniture. Instead, the letter written to the plaintiff appears to be a follow-up on the status of deliveries and provision of sample furniture. In any case, the plaintiff correctly notes that deliveries were to be based on issued LPOs. For this reason, not only are the surplus deliveries if any, unsubstantiated, they also are contra statute and in breach of the terms of the contract.
15. I say this noting that the plaintiff identifies the defendant as a state-owned corporation. As such, the plaintiff ought to have been aware that the defendant is bound by the provisions of the *Public Procurement and Asset Disposal Act* Cap 412C. During cross-examination, PW1 confirmed that she was aware of the application of procurement procedures to government agencies like the defendant.
16. In line with this, section 72 of the Act obligates suppliers, such as the plaintiff, to comply with the provisions of the Act and its Regulations. This position was echoed in the case of *Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others*, [2019] eKLR.
17. Section 70(1) of the Act requires the use of standard procurement documents. Section 106(5)(a) in turn provides for the use of Purchase Orders and requires that the procuring entity shall place a purchase order with the person submitting the successful quotation.
18. This requirement is explicitly affirmed in clause 7(c) of the contract, which provides that the performance of the contract was contingent upon the issuance of official orders by KPLC. Furthermore, clause 15.2(b) specifies that delivery documents must be accompanied by an official purchase order. The plaintiff's own schedule, on page 2 of its bundle, confirms that the total value of the issued LPOs was Kshs. 37,813,215.49, similar to the contract value. Consequently, any deliveries made outside the agreed-upon and legally mandated procedures are null, void, and unenforceable.
19. On the question of whether this Court should sympathize with the plaintiff on the grounds that the items it claims to have delivered remain unpaid for, I refer to the decision in *Shabwali Secondary School V Vwinah*, [2024] KEHC 6206 (KLR). The court in that case held:

“This Court is not unsympathetic to this argument yet there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *Ex lurpi causa non oritur action*, that is from a dishonorable cause an action does not arise. There may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless.”
20. For this reason, I would dismiss this argument in as far as the amounts claimed do not rest on any formal purchase orders.
21. On the issue of credit notes issued by the plaintiff but remaining unpaid by the defendant, the facts are clear and corroborated by the evidence presented. At page 196 of the defendant's bundle, a letter dated 27th February 2017 reveals that the defendant requested the plaintiff to issue credit notes against



certain invoices due to allegedly defective furniture items that required replacement. The defendant stated that payment would only be processed once the necessary replacements had been made.

22. The plaintiff, complying with this request, issued the following credit notes amounting to Kshs. 2,727,568.46 as evidenced at pages 197 to 202 of the defendant's bundle:
- i. Credit Note 20164 (Kshs. 254,910),
 - ii. Credit Note 20162 (Kshs. 628,082.46),
 - iii. Credit Note 20217 (Kshs. 113,422),
 - iv. Credit Note 20230 (Kshs. 497,431),
 - v. Credit Note 20218 (Kshs. 385,561), and
 - vi. Credit Note 20216 (Kshs. 848,162).
23. It is clear that the credit notes were issued solely on the understanding that the defendant would return the defective furniture so as to enable the plaintiff to make replacements as required under the terms of the contract. No evidence has been presented to show that the items were returned or that any procedures to initiate replacements by either of the parties was effected. The fact that the defendant effectively continued to retain and use the items in question suggests that the defendant assumed the risk associated with retaining the allegedly defective items.
24. The conduct further implies acceptance of the items, notwithstanding the claim of defects. I take the view that the defendant should not be allowed to benefit unjustly and from its own breach at the plaintiff's expense. This element of the claim has therefore been proved to the required standard.

Whether the plaintiff is entitled to reimbursement of costs incurred in transportation of goods to stations far from the regions indicated in the LPOs amounting to Kshs 825,920.00:

25. The plaintiff contends that the defendant requested the delivery of goods to stations not listed in the Local Purchase Orders (LPOs) and to off-grid stations, which led to additional costs incurred in delivering these items to the required destinations. According to the plaintiff, the contract terms placed responsibility for distribution costs on the defendant, limiting the plaintiff's obligations to deliveries as specified in the LPOs.
26. The defendant, in its submissions, denies that the plaintiff has provided evidence to demonstrate that it requested furniture to be delivered to locations other than those indicated in the LPOs. The defendant maintains that no instructions were issued for deliveries to off-grid areas and, therefore, contends that no additional transport expenses were incurred by the plaintiff.
27. The notification of award dated 9th April 2015, found at page 20 of the plaintiff's bundle, specifies that delivery would be as per the delivery schedule outlined in Appendix VII. This is the case that was advanced by DW1 as well. However, the same notification explicitly states that it does not constitute a contract, confirming instead that a formal contract would be entered into within seven days.
28. The signed contract, found at page 22 of the plaintiff's bundle, lists in clause 5 the documents that form part of the contract. Clause 6 of the contract establishes that in the event of ambiguity or conflict between these documents, the order of precedence shall follow the hierarchy set out in clause 5. As per clause 5, the contract agreement takes precedence over the delivery schedule attached as Appendix I.



29. Additionally, the general conditions of contract (GCC), which form part of the contractual terms, are clear on the issue of transportation. Clause 16 of the GCC, at page 36 of the plaintiff's bundle, stipulates:

“The supplier shall be required to meet all transport expenses until delivery. Transportation of goods after delivery at the initially specified destination indicated in the official Purchase Order shall be the responsibility of KPLC.” (emphasis added)

30. It follows that deliveries to destinations not stipulated in the LPOs were the responsibility of the defendant. This reading is consistent with the precedence of the signed contract over the delivery schedule. While such deliveries could be made, I concur with the submission that they would be subject to the terms that the defendant bears the additional costs for transportation to locations beyond those specified in the LPOs.

31. The plaintiff provided extensive evidence to support its claim. The LPOs, which run from pages 103 to 119 of the plaintiff's bundle, specify the delivery addresses, including Nairobi South, Mombasa, Nakuru, North Rift (Eldoret), Kisumu, and Nyeri. The plaintiff also submitted delivery schedules (pages 120 to 171 of its bundle) and delivery notes (pages 172 to 214) showing that furniture was delivered to stations not listed in the LPOs, including Narok, Bomet, Kilgoris and Kisii.

32. Furthermore, email correspondence at pages 122 to 127 confirms that the defendant requested deliveries to these additional locations. The delivery schedule at pages 128 to 130 introduced new destinations, such as North Rift, West Kenya, Coast, Nairobi and off-grid areas. These destinations were not part of the original LPOs.

33. The furniture distribution areas listed in the defendant's own schedule (see pages 107–110 of the defendant's bundle) further corroborate the plaintiff's claim that new destinations were introduced, which were not covered under the original terms of the LPOs. Importantly, petty cash vouchers in the plaintiff's bundle confirm that monies were expended towards per diem and other allowances for staff tasked with delivering furniture to these additional destinations.

34. The plaintiff's claim for transport reimbursement is a form of special damages, which must be specifically pleaded and strictly proved. In *Hydro Water Well (K) Limited V Sechere & 2 Others (Sued in their Representative Capacity as Officers of Chae Kenya Society)*, [2021] KEHC 22 (KLR), the court held:

“Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.”

35. The delivery schedules, petty cash vouchers, and delivery notes constitute sufficient evidence that additional expenses were incurred in fulfilling the defendant's requests for deliveries to new and off-grid locations.

36. The defendant argues that transport costs had already been factored into the pricing of the furniture. However, no evidence has been presented to support such a claim, and no specific term in the contract indicates that transport costs for locations outside the LPOs were included in the agreed pricing. Without evidence to substantiate this assertion, the court cannot infer the existence of such an agreement.



37. The signed contract and its incorporated terms leave no ambiguity regarding the allocation of transport responsibilities. Clause 16 of the GCC explicitly places the responsibility for transportation beyond the delivery destinations specified in the LPOs on the defendant. When read in conjunction with the hierarchy of contract documents outlined in clause 5, it becomes clear that the defendant cannot shift the burden of these additional costs onto the plaintiff.
38. Moreover, the plaintiff has demonstrated through documentation that the defendant not only requested deliveries to new locations but also accepted the delivered furniture. By retaining and using the furniture, the defendant assumed liability for the associated costs.
39. On the basis of the evidence presented, I find that the plaintiff has proved its claim to the required standard. For these reasons, I am satisfied that the claim for transport reimbursement is valid, and I would hold the defendant liable to compensate the plaintiff for the additional transport costs incurred.

Whether the defendant is in breach of the agreement between the parties:

40. The plaintiff contends that they were not given any prior notice of the alleged termination and only learned of the reasons for the termination during the testimony of the defendant's witness in court. At the time of termination, the plaintiff states that there were still outstanding payments for the 1st phase amounting to Kshs. 7,855,900.27, which remain unpaid. The plaintiff further alleges that the defendant frustrated the performance of the contract by unilaterally changing delivery destinations and withholding payments without justifiable cause.
41. The defendant equally takes issue with the plaintiff for breaching the contract. The plaintiff acknowledges that the origin of some goods was China instead of the stipulated South Korea, as required by the contract. Although issues arose regarding conformity certificates, the plaintiff maintains that the items delivered met the required specifications and that any defects were rectified. Despite these corrections, the defendant raised concerns regarding non-performance, issued notices, and ultimately terminated the contract, barring the plaintiff from participating in phases II and III.
42. Clause 7.24 of the contract explicitly provides for termination, stating that the defendant (KPLC) may terminate the contract by written notice to the supplier if the supplier fails to deliver any or all goods within the period specified in the contract, or within any extension granted by KPLC.
43. The defendant, in a letter dated 31st July 2017, advised the plaintiff that the contract had been terminated. However, this decision was rescinded on 4th August 2017, only for the defendant to later communicate through a letter dated 15th August 2017 that phases II and III of the contract would not proceed. The timeline and method of termination raise important considerations.
44. While clause 7.24 does not require a specific notice period or format for termination, by issuing the letter dated 31st July 2017 and later confirming on 15th August 2017 that subsequent phases would not proceed, the defendant provided sufficient constructive notice under the terms of the contract. This, in effect, brought the contract to an end for all practical purposes, and the plaintiff was aware of the reasons for termination.
45. As to whether the termination was justified, the reasons for termination must be evaluated within the framework of clause 7.24 and the conduct of the parties. The defendant's concerns about non-performance, including delays in delivery and non-conformity of the goods, align with the grounds for termination provided under the contract. While the plaintiff disputes the validity of these reasons, it is clear that the defendant acted within its contractual rights to terminate the agreement. The issues with respect to the transport costs and the unpaid amount have been addressed in the previous paragraphs.



Whether the plaintiff is entitled to damages for loss of profits:

46. The plaintiff asserts that it had anticipated supplying furniture for all three phases of the contract and bases its claim for loss of profit on the full contract sum of Kshs. 137 million.
47. As to what constitutes a loss of profit, the court in *Hydro Water Well (K) Ltd [supra]* defined it as a loss that reflects income from a lost business activity. The court also outlined three key elements that must be satisfied for a claim of lost profit damages:
 - i. Proximate Cause: The conduct upon which the claim is based must have caused the lost profit damages;
 - ii. Foreseeability: The parties must have contemplated the possibility of lost profit damages, or the lost profits must have been a foreseeable consequence of the conduct; and
 - iii. Reasonable Certainty: The lost profit damages must be capable of proof with reasonable certainty.
48. These principles were further reiterated in *National Oil Corporation V Tinfra Engineering Limited, [2023] KEHC 2665 (KLR)*, where the court, relying on the decision in *Hydro Water Well K Ltd [supra]*, underscored that these three elements must be proven for a claim of lost profits to succeed.
49. To evaluate whether the plaintiff has proved its claim for loss of profit, I turn to the contract agreement dated 30th June 2015. This agreement confirms that the tender was for a 3-year framework contract under tender number KPI/9AA-3PT/31/14-15. The tender was to be executed in phases, with phase I being the only phase that was formally awarded and executed by the parties. The contract for phase I was valued at Kshs. 37,813,215.48.
50. The contract agreement, produced by both parties, explicitly states that subsequent awards (phases II and III) would be subject to a need or demand basis. Paragraph 4 of the agreement reiterates this, and the notification of award (found at page 136 of the defendant's bundle) confirms that the contract sum for phase I was Kshs. 37,813,215/= . There is no evidence in the contract to suggest that phases II and III were guaranteed or awarded, nor that the full contract sum of Kshs. 137 million was contemplated at the outset. This strongly refutes the plaintiff's claim that it had a contractual basis to anticipate or plan for all three phases.
51. The plaintiff contends that it imported furniture items with the entire 3-year contract period in mind. However, this assertion raises questions of credibility, particularly considering that there were already delays in supplying furniture for the first lot. This inconsistency undermines the plaintiff's claim that it was adequately prepared for all three phases.
52. To further illustrate the lack of foreseeability, the General Conditions of Contract appended to the main contract, required the defendant to take out a Performance Security pegged to 10% of the annual requirements value. This security was to be renewable annually and was not tied to the entire 3-year contract sum. This provision clearly indicates that the contract was structured on an annual and need-based approach, not as a lump-sum, 3-year guarantee.
53. During cross-examination, PW1 admitted that the defendant had not formally awarded phases II and III. PW1 also acknowledged that the procurement of future phases was contingent on specific processes, including the issuance of new LPOs and approvals. As such, the plaintiff cannot establish that future phases were guaranteed, as these were conditional upon additional approvals and government procurement procedures.



54. The plaintiff's claim, therefore, rests on an uncertain and speculative future event that was never legally acquired or executed. On this point, the Court of Appeal in *Hudani V Mukunya & 5 Others*, [2022] KECA 93 (KLR) emphasized that claims based on speculative future happenings cannot form the basis of a legal claim for damages.
55. While the plaintiff could potentially calculate its profit margins for phase I with reasonable certainty, the alleged losses for these subsequent phases fail to satisfy the elements of proximate cause and foreseeability. Consequently, I find that the claim for loss of profit must fail.

Conclusion and disposition

56. Accordingly, and for the reasons that I have stated, the plaintiff's claim succeeds in part and I make the following orders;
- i. That judgment is entered for the plaintiff for the amount of Kshs. 825,920/= on account of extra costs incurred in transportation expenses together with a further amount of Kshs. 2,727,570.98. in unpaid credit notes.
 - ii. These amounts shall attract interest from the date of filing suit until payment in full.
 - iii. The claim of Kshs. 5,128,329.29 being the balance of outstanding amounts for goods delivered and not paid for as well as the claim for loss of profits amounting to Ksh.38,439,886.77 are hereby dismissed.
 - iv. The plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

