



**Tropical Technology Limited v Principal Secretary, State Department of Correctional Services, Ministry of Interior & Co-ordination of National Government & another (Civil Suit E321 of 2020) [2024] KEHC 15045 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15045 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL SUIT E321 OF 2020**  
**FG MUGAMBI, J**  
**NOVEMBER 29, 2024**

**BETWEEN**

**TROPICAL TECHNOLOGY LIMITED ..... PLAINTIFF**

**AND**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF CORRECTIONAL SERVICES, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background and introduction**

1. The genesis of the suit before the court is a tender for motorised vehicle number plate materials, including blanks and hot stamping foils, which was advertised by the 1<sup>st</sup> defendant on 4<sup>th</sup> February 2015. The plaintiff submitted bids for both tenders but was not successful in the initial award. After challenging the tender allocation process at the Public Procurement Administrative Review Board, the Board ultimately ruled in the plaintiff's favour and the 1<sup>st</sup> defendant was ordered to award Tender No. KPS/ICB/T10/2014-2017 (the first tender) to the plaintiff.
2. On 27<sup>th</sup> September 2017, the 2<sup>nd</sup> defendant advised the 1<sup>st</sup> defendant to proceed with the execution of the contract. Consequently, a notification of the award was issued to the plaintiff on 16<sup>th</sup> October 2017, which was accepted by the plaintiff the following day. A formal contract was signed on 7<sup>th</sup> November 2017 (the contract).



3. The plaintiff provided a hologram sample, which was approved by the 1<sup>st</sup> defendant and registered on behalf of the Republic of Kenya and gazetted. The plaintiff claims USD 60,397 for the cost of the hologram.
4. Further, pursuant to the terms of the agreement, six Local Purchase Orders (LPOs) were issued and the plaintiff sourced for four consignments of number plate blanks from EHA Hoffman International in Germany, at a total cost of USD 740,900. The plaintiff made partial payments to the company with a balance of USD 105,138.76 which EHA Hoffman International now claims from the plaintiff and which the plaintiff in turn claims from the defendants.
5. The plaintiff further claims with respect to LPO Nos. 275406, 275407, and 275408 that they delivered two 40-foot containers of blank number plates, which the 1<sup>st</sup> defendant received and acknowledged. Despite delivery and acknowledgment of receipt, the 1<sup>st</sup> defendant has refused to pay USD 718,610 for these deliveries without any justification.
6. The plaintiff further contends that in July 2019, they attempted to deliver a third consignment to the 1<sup>st</sup> defendant but they refused to accept delivery without any justification. Consequently, they were forced to hire external storage for the consignment, incurring ongoing costs.
7. The plaintiff contends that on 9<sup>th</sup> March 2018, the 1<sup>st</sup> defendant advertised a new tender for a License Plate Marking Machine, essential for the modern number plates project. The plaintiff won the bid, receiving a notification of the award on 11<sup>th</sup> June 2018, valued at Kshs. 16,500,000/=. To expedite delivery, the plaintiff procured the machine for USD 59,182 although the contract was yet to be executed. The plaintiff contends that, despite repeated requests, the 1<sup>st</sup> defendant has refused to formalise the contract or accept the machine, incurring additional storage costs. It is on these grounds that the plaintiff prays for:
  - i. A declaration that the 1<sup>st</sup> defendant is in breach and continues to be in breach of the contract dated 7<sup>th</sup> November 2017;
  - ii. An order compelling and/or directing the 1<sup>st</sup> defendant to fully perform the contract by issuing Local Purchase Orders for the entire contract consignment and accepting full deliveries from the plaintiff and making payment in settlement thereof;
  - iii. In the alternative to (b) above, payment of the full contract value of USD 10,051,000;
  - iv. Immediate settlement in full of USD 1,437,040 being the value of the Local Purchase Orders issued to the plaintiff and which the plaintiff duly performed together with interest at commercial rates from 1<sup>st</sup> January 2018 till payment in full;
  - v. Immediate settlement in full of USD 105,138.76 being the value of the already manufactured but undelivered number plate blanks together with interest at commercial rates from 1<sup>st</sup> September 2019 till full payment;
  - vi. Immediate settlement in full of USD 60,397 being the cost of originating design and registration of Chrome Hologram for the Republic of Kenya together with interest at commercial rates from 1<sup>st</sup> February 2018 till full payment.
  - vii. An order directing the 1<sup>st</sup> defendant to issue a formal contract to the plaintiff for tender No. SDC/RT/7/2017 for the supply and delivery of licence plate marking machine and take delivery thereof;



- viii. In the alternative to (g) above, payment of the full award value of Kshs. 16,500,000 for the licence plate marking machine;
  - ix. Immediate settlement in full of USD 56,882 being the value to the License Plate Marking Machine together with Interest at commercial rates from 1<sup>st</sup> September 2018 till full payment;
  - x. Immediate settlement in full of Kshs. 1,791,982 being the storage charges incurred for the storage of the blank number plates and the license plate marking machine together with interest at commercial rates from 10<sup>th</sup> October 2018 till full payment;
  - xi. Payment for all other direct expenses that the plaintiff has incurred as a result of the 1<sup>st</sup> defendants breach of contract;
  - xii. General damages for breach of contract; and
  - xiii. Costs and interest.
8. At the hearing of the case, the plaintiff called its Managing Director, Abraham Kamunya Wahome as PW1.
  9. The defendants acknowledge the advertised tenders for the supply of motor vehicle number plate blanks and hot stamping foils. It is however their case that only the accounting officer of the procuring entity has the authority to formally notify successful bidders of their tender acceptance. They maintain that in this case the notification for award of the tender to the successful bidder was not issued by the accounting officer contrary to the law. They assert that they are therefore not aware of any contract specifically issued by the State Department for the design of holograms.
  10. The defendants further take issue with the LPOs which they state were irregularly issued having not been authorized by the Head of Supply Chain Management.
  11. Regarding the deliveries, it is their case that any delivered goods must undergo inspection by an Inspection and Acceptance Committee, which issues a certificate of acceptance if the goods meet standards or reject them if they do not. According to the defendants, there was no certificate confirming acceptance of goods allegedly delivered by the plaintiff, nor was there any record of the plaintiff being denied access to complete delivery as alleged. It was argued that if the plaintiff had arranged third-party storage facilities, the 1<sup>st</sup> defendant would not be liable, as they were not aware of such arrangements.
  12. Finally, the defendants reiterated that once the evaluation phase concludes, the accounting officer must issue a formal notification to the successful bidder, followed by the execution of the contract signing. It is only after compliance with this that an LPO is issued, authorizing actions under the contract.
  13. David Njoroge Mwangi, an officer at the State Department for Correctional Services within the Ministry of Interior & Coordination of National Government, testified on behalf of the defendants.
  14. I will not regurgitate the testimonies of the witnesses but I will refer to them as necessary in my analysis of the issues hereunder.

### **Analysis and determination**

15. I have considered the pleadings filed herein, the oral and documentary evidence presented by the parties together with their written submissions. The issues for determination are:



- i. Whether there was a valid and enforceable contract between the plaintiff and the 1<sup>st</sup> defendant for the supply and delivery of motorized vehicle number plate blanks - Tender No. KPS/ICB/10/2014-17;
  - ii. If so, whether there was breach of the said contract?;
  - iii. Whether there is a valid and enforceable contract between the Plaintiff and the 1<sup>st</sup> defendant for the supply and delivery of licence plate laser marking machine Tender No. SDC/RT/7/2017-2018?;
  - iv. If so, whether there was breach of the said contract?; and
  - v. What relief if any is the aggrieved party entitled to?
16. The plaintiff contends that the contract dated 7<sup>th</sup> November 2017, found at page 37 of the plaintiff's bundle is valid and enforceable. The plaintiff notes that the contract was executed by both parties and that the entire procurement process was confirmed as having been followed by DW1. The witness testified that the notification of award, the acceptance of award, the contract and the subsequent LPO's were all in conformity with the PPADA. To bolster this assertion, the plaintiff relies on the 2018/2019 Auditor-General's report, which references the contract and confirms its validity.
  17. The defendants' main argument is that the Notification of Award letter was not issued by the accounting officer contrary to the provisions of the PPADA. They contend that this procedural lapse renders the contract unenforceable.
  18. Section 87(1) of the PPDA stipulates that:
 

“Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.”
  19. Further, Section 67 of the *Public Finance Management Act* (PFMA) 2012 defines an accounting officer as a person designated by the Cabinet Secretary responsible for the proper management of the finances of the different national government entities as may be specified in the different designations. Section 67(2) further clarifies that:
 

“Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.”
  20. The evidence shows that the notification of award dated 16<sup>th</sup> October 2017 was signed by the Principal Secretary, and not the designated Accounting Officer. Section 135(5) of the PPADA emphasizes that contracts signed without the authority of the accounting officer are invalid. It provides:
 

“An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.”
  21. Although the Principal Secretary is not the designated Accounting Officer, section 135(1) of the PPADA permits delegation of authority for signing procurement contracts. The section allows an officer authorized in writing by the accounting officer to execute such contracts. There is no express



provision in the PPADA prohibiting such delegation. If the intention of the law were to restrict this authority exclusively to the accounting officer, it would have been explicitly stated.

22. Applying the doctrine of ostensible authority, as established in *Royal British Bank V Turquand*, (1856) E&B 327, this court finds that the Principal Secretary acted with the apparent authority of the Accounting Officer. The Principal Secretary's actions, including signing the notification of award and the subsequent contract, were consistent with the authority typically conferred within the institutional framework. Accordingly, the contract awarded under Tender No. KPS/ICB/10/2014-17 is valid and enforceable.
23. The agreement dated 7<sup>th</sup> November 2017 is located at page 37 of the plaintiff's bundle. It clearly stipulates that the parties agreed to the supply of motorized vehicle number plate blanks at a total contract value of USD 10,051,000 over a three-year period. The execution of this contract is evidenced at page 38 of the bundle. Six LPOs issued pursuant to the contract are detailed at pages 62 to 67 of the bundle, collectively amounting to USD 1,437,040.
24. Upon review of the LPOs, it is apparent that they were issued by the Commissioner General of Prisons. Each LPO is signed, dated, and bears an official stamp from the Commissioner General of Prisons, along with an approval signature and a receipt stamp from the Chief Accountant at Prisons Headquarters. These formalities affirm the validity of the LPOs on their face.
25. Additionally, delivery notes at pages 68 and 69 of the bundle confirm that the plaintiff delivered two consignments of number plate blanks, which were received and acknowledged by the defendant. This evidence directly challenges the defendants' claim that the LPOs were defective due to the alleged absence of a signature from the Head of Supply Chain Management. Notably, the defendants failed to provide any statutory or procedural requirement mandating that LPOs must be signed specifically by the Head of Supply Chain Management.
26. Furthermore, DW1, testifying for the defendants, conceded that the LPOs were issued by the 1<sup>st</sup> defendant. This acknowledgment, coupled with the delivery notes confirming receipt of the consignments, significantly weakens the defendants' argument regarding the alleged irregularity of the LPOs. In light of this evidence, the court finds that the LPOs are valid and binding and ought to be settled.
27. Turning to the storage charges and the prayer for provision of security, the plaintiff has not demonstrated that the contract between the parties imposed an obligation on the 1<sup>st</sup> defendant to bear such costs. PW1 referred this court to pages 105–116 of the bundle, which contain invoices for storage charges. While these invoices provide evidence of costs incurred, PW1 admitted that the amounts had not been paid and further acknowledged that the plaintiff cannot access the stored items unless payment is made.
28. The Court of Appeal considered whether an invoice is proof of sale in the case of *Great Lakes Transport Co (U) Ltd V Kenya Revenue Authority*, [2009] eKLR and stated as follows:

“With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word “PAID” on the invoice and that would turn the status of the invoice into a receipt. or a binding contractual



obligation for the other party to cover such costs. In the absence of such proof, this claim cannot stand.”

29. Similarly, the plaintiff has failed to prove that the 1<sup>st</sup> defendant was contractually obligated to provide or finance security for the consignments. Although the plaintiff has argued that the consignments involved high-security, sensitive items, the letters requesting security (found at pages 84–87 of the bundle) do not indicate any acceptance or acknowledgment from the 1<sup>st</sup> defendant. Indeed, there is no evidence before this court to suggest that the 1<sup>st</sup> defendant agreed, either expressly or impliedly, to cater for such security arrangements.
30. During cross-examination, PW1 conceded that there was no clause in the contract requiring the 1<sup>st</sup> defendant to provide or finance security services. He further clarified that any security arrangements were made as part of an informal understanding between the parties and not as a contractual obligation. In the absence of any contractual or documentary evidence to the contrary, this court finds no basis to presume that the 1<sup>st</sup> defendant undertook to bear security or storage-related costs. Consequently, this aspect of the plaintiff’s claim must fail.
31. However, I do concur that the 1<sup>st</sup> defendant’s refusal to accept delivery constitutes a fundamental breach of the contract. A party’s failure to perform a primary contractual obligation, such as the acceptance of delivered goods, undermines the essence of the agreement and is a clear violation of the binding terms.
32. The plaintiff is entitled to settlement of USD 1,065,040 for the value of Local Purchase Orders (LPOs) numbered 2755404, 2755405, 2755406, 2755407, 2755408, and 2755409. These LPOs were issued to the plaintiff, and the plaintiff has provided sufficient evidence of performance under the terms of the contract.
33. Regarding the prayer for specific performance, the same is discretionary and is dependent on there being other viable and available remedies. In my view, monetary relief is sufficient and proportionate to address the breach of contract while safeguarding public resources in the circumstances.
34. Regarding Tender No. SDC/RT/7/2017-2018 (the second tender) for the supply of a license plate laser marking machine, I refer again to section 135 of the PPADA which governs the formation of procurement contracts. It mandates that such contracts must be confirmed through a written agreement incorporating all terms, signed by the accounting officer of the procuring entity and the successful bidder, and executed within the tender validity period.
35. While the plaintiff acknowledges receiving a Notification of Award, as evidenced at page 117 of the bundle, both parties agree that the formal contract contemplated under section 135 was never executed. This position was confirmed by PW1 during testimony. The absence of a duly signed contract precludes the formation of a binding legal relationship between the parties. As a result, the tender award is invalid under section 135, and any claim arising from it cannot succeed.
36. In considering the plaintiff’s prayer for relief, this court is guided by 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.”

37. The plaintiff, as a supplier interacting with a public government entity is presumed to have been aware of the requirements under the PPADA, including the need for a signed contract to formalize procurement obligations. Section 72 of the PPADA specifically obligates suppliers to adhere to the Act's provisions and regulations. This position is consistent with the principles espoused in *Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others*, [2019] eKLR which emphasized the primacy of statutory compliance in public procurement.
38. The plaintiff's prayer for an order compelling the 1<sup>st</sup> defendant to issue a formal contract would amount to cleansing an otherwise unlawful process. The plaintiff was aware that no valid contract had been executed and should not have incurred any expenses or proceeded with procurement without such a contract. This position is corroborated by the letter at page 124 of the bundle, which highlights that the plaintiff was advised to await the issuance of a LSO before proceeding. The plaintiff's decision to act prematurely undermines its claim for relief.
39. The plaintiff cannot invoke the doctrine of legitimate expectation, as discussed in *Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 5 Others*, [2014] eKLR, to argue that it anticipated a formal contract based on the Notification of Award. While legitimate expectation allows a party to anticipate certain outcomes based on established practices or promises, such expectation cannot override statutory requirements. The plaintiff's expectation of a formalized contract, though understandable, does not exempt it from complying with the mandatory provisions of the PPADA.
40. The court finds that the plaintiff acted prematurely and imprudently by procuring the license plate marking machine without a valid, executed contract. The financial loss incurred as a result of this procurement is therefore self-inflicted and cannot be attributed to the 1<sup>st</sup> defendant. Additionally, the plaintiff failed to pursue enforcement of the tender through the proper forum, namely the Public Procurement Administrative Review Board (PPARB), when the execution period for the contract lapsed. This further undermines the enforceability of the tender award.
41. In the absence of a valid contract for the supply of the license plate marking machine, there can be no breach of contract. Consequently, the plaintiff's claim under this head fails.

## **Disposition**

42. The prayer for storage charges is dismissed as there was no evidence proving that the 1<sup>st</sup> defendant agreed to bear these costs. The same case applies to security charges, as there was no contractual basis for the 1<sup>st</sup> defendant to provide or finance security for the consignments. The claim for specific performance of Tender No. SDC/RT/7/2017-2018 for the supply of the License Plate Marking Machine, is dismissed as no valid contract was executed under section 135 of the PPADA.
43. It is trite law that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered because of the breach. As such, the claim for general damages fails as well.
44. Accordingly, and in conclusion, the plaintiff's claim succeeds to the following extent:
  - i. The plaintiff is entitled to the payment of USD 1,437,040 representing the total value of the LPOs issued under Tender No. KPS/ICB/10/2014-17 for which the plaintiff delivered and



the 1<sup>st</sup> defendant accepted the consignments and failed to pay for as well as the LPOs whereby the 1<sup>st</sup> defendant did not accept deliveries;

- ii. The above shall attract interest at commercial rates from the date of filing suit until payment in full; and
- iii. The plaintiff is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

