



**Suken International Limited v Ministry of Health & another (Civil Suit 006 of 2021)  
[2023] KEHC 19556 (KLR) (Commercial and Tax) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 006 OF 2021  
EC MWITA, J  
JUNE 30, 2023**

**BETWEEN**

**SUKEN INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

**MINISTRY OF HEALTH ..... 1<sup>ST</sup> DEFENDANT**

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

**JUDGMENT**

1. The plaintiff, a limited liability company supplying pharmaceutical, non-pharmaceutical and medical equipment to private hospitals, government and quasi-government bodies in Kenya. The plaintiff averred that on 25<sup>th</sup> June 2014, it was contracted by the 1<sup>st</sup> defendant to supply and install medical equipment worth Kshs. 17,320 at 7 Kibra container clinics.
2. The plaintiff supplied the equipment but had not been paid despite demand. The unpaid amount together with accrued interest was Kshs. 66,666,368.81.
3. By plaint amended on 12<sup>th</sup> November 2019, the plaintiff sought special damages of Kshs. 63,666,368.81 with interest until payment in full. In the alternative, the plaintiff sought return of the equipment, loss of user of the equipment from the date of delivery until the plaintiff was put into possession of the equipment.
4. The plaintiff further sought *mense* profits for use, depreciation and conversion of the equipment, including transport/logistical expenses incurred in the delivery and return of the equipment, plus costs of the suit.



## Evidence

5. The plaintiff called Paul Otieno (Mr. Otieno) and Apollo Nyabola (Mr. Nyabola) as witnesses. Mr. Otieno, the plaintiff's director, testified that the Kibera container clinics project began when the Beyond Zero clinics project was ongoing. He received instructions on phone from Dr. Nicholas Muraguri, then the Director of Medical Services (DMS) to supply medical equipment to 7 Kibera clinics, namely; Soweto, Toi, Kianda, Karanja, Gatwekera, Lindi and Silanga. This was during the subsistence of the Beyond Zero clinics tender (No. MOH/Beyond Zero Clinic/01/2013-2014-RT) which the plaintiff had won earlier.
6. The DMS asked Mr. Otieno to urgently supply the equipment to the container clinics as the President was about to launch the project. Mr. Otieno told the court that the DMS also informed him that the supplies fell under the Beyond Zero contract and that the Local Purchase Orders (LPOs) for the supply of the equipment would be issued later in the week.
7. Mr. Otieno stated that he directed his staff to deliver the equipment worth Kshs. 17,320,600. The equipment was delivered and was received and signed for by NYS staff. The 1<sup>st</sup> defendant did not, however, issue the LPOs as promised.
8. In February 2015, the plaintiff raised invoices for Kshs. 17,320,000 which were sent them to the Permanent Secretary (PS), as the accounting officer but were not paid.
9. In cross examination, Mr. Otieno admitted that there was no written request, contract, open or direct tender, or LPOs for the supply of the equipment. Mr. Otieno maintained, however, that the 1<sup>st</sup> defendant was responsible for preparing the contract but due to the urgency, the plaintiff had to supply the equipment and the DMS was to confirm that the clinics had been equipped and were ready. Mr. Otieno further stated that the equipment was to be handed over to the NYS staff who were in charge of the clinics.
10. Mr. Otieno stated that the documents signed the NYS staff confirming receipt of the equipment originated from 1<sup>st</sup> defendant. He however admitted that the documents did not have anything to show that they had originated from the 1<sup>st</sup> defendant.
11. Mr. Apollo Nyabola, an employee of the plaintiff, testified that his role was to ensure that all the 7 clinics had been equipped in accordance with the Beyond Zero clinics standards.
12. Mr. Nyabola reiterated that the supply of the equipment was based on the Beyond Zero contract and that he was guided by a list that had been prepared by the 1<sup>st</sup> defendant showing the number of equipment to be supplied.

## Submissions

13. The plaintiff submitted through written submissions, that it delivered the medical equipment for the 7 container clinics. The plaintiff maintained that there was a valid contract between the parties for the supply of the equipment.
14. The plaintiff relied on *Sun Sand Dunes Limited v Raiya Construction Limited* (Civil Appeal No. 26 of 2017) [2018] eKLR, and urged the court to interpret the terms of contract in a manner that establishes the intention of the parties by discerning what a reasonable person in the position of the parties would have understood the words to mean.
15. The plaintiff again relied on *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC (KLR) on the test for interpreting



contractual terms and *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd* (Civil Appeal No 95 of 1999) (2002) 2 EA 503 [2001] eKLR, that the role of the court is to interpret and not re-write contracts for the parties.

16. The plaintiff disagreed with the contention that the supply of equipment to clinics was a different contract. Citing clauses 5, 6, 7 and 8 of the contract, the plaintiff argued that the request for additional equipment was made during the subsistence of the contract; that the items in the contract were the indicative of minimum and that more quantities could be procured as and when required within the contract period but with no price variations.
17. The plaintiff argued that under the contract, the 1<sup>st</sup> defendant could increase the quantity of goods specified in the schedule of requirements (annexed to section VI of the agreement) without changes in unit price.
18. The plaintiff asserted that the argument that the container clinics were not part of the tender only arose in the testimony but was not raised in the amended defence.
19. The plaintiff relied on *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, for the submission that any evidence at variance with the pleadings must be disregarded.
20. The plaintiff took the view, that the defendants' evidence was contradictory and was of no evidentiary or probative value. This was because Mr. Otieno had admitted in cross-examination that the order for the equipment was done through phone calls, despite earlier stating that instructions to equip the clinics were initially made in writing.
21. According to the plaintiff, the fact that the items were incorporated into different clinics did not render the procurement different. The 1<sup>st</sup> defendant's argument that procurement of supplies of additional equipment for the seven clinics was not in line with the 1<sup>st</sup> defendant's procurement methods and processes ought not to be accepted. The plaintiff urged that the suit be allowed as prayed.

### **Defendant's case**

22. The defendants filed a joint amended statement of defence denying the plaintiff's claim. The defendants denied that the 1<sup>st</sup> defendant entered into a contract for the supply of equipment worth Kshs 17,230,000 as prayed for in the plaint. According to the defendants, there was no budge, advertising or tendering for the supply of medical equipment for the Kibera container clinics project. The defendants further denied that the plaintiff could supply equipment to the Kibera container clinics under the Beyond Zero clinics contract because it could only have been a separate and distinct contract.

### **Evidence**

23. Martin Sirengo (Mr. Sirengo), the 1<sup>st</sup> defendant's head of department of health infrastructure and previously the head of National AIDs and STIs Control Program (NASCOP), which was the co-ordinating secretariat for the Beyond Zero project, admitted that the 1<sup>st</sup> defendant entered into a contract with the plaintiff on 25<sup>th</sup> June 2014 for the supply and delivery of mobile clinic equipment and items under Tender No. MOH/Beyond Zero Clinic/01/2013-2014-RT.
24. He (Mr. Sirengo) signed the letter dated 16<sup>th</sup> June 2014 on behalf of the PS, notifying the plaintiff of the award of the tender. Mr. Sirengo, however, maintained that the award was with respect to the Beyond Zero clinics only; that the contract was fully performed and the plaintiff was paid in full.



25. According to Mr. Sirengo, the contract that was signed between the parties did not relate supply of equipment to the container clinics as claimed by the plaintiff. Mr. Sirengo stated that whereas the Kibera container clinics were branded Beyond Zero, they were not within the 1<sup>st</sup> defendant's mandate but that of the county government.
26. Mr. Sirengo also maintained that the 1<sup>st</sup> defendant did not issue instructions or contract the plaintiff to the supply medical equipment to Kibra container clinics and there was no tender or contract for that supply. Any supply of equipment was contrary to section 3 and section 29 (1) of the Public Procurement Act, 2005 (now repealed).
27. The alleged procurement of the equipment for the container clinics had also not been planned or budgeted for. The equipment was also not received, inspected or accepted.
28. In cross examination, Mr. Sirengo admitted that instructions could be issued by phone and that the 1<sup>st</sup> defendant could increase the quantity of goods originally specified (in terms of clause 8 of the contract), but he was not aware if the DMS issued instructions to the plaintiff with regard to supply of the equipment.

### Submissions

29. The defendants submitted that the plaintiff failed to prove that there was a valid contract for supply of the equipment. The defendants maintained that the Beyond Zero contract was different from the Kibera container clinics and that the plaintiff should not be allowed to benefit twice. Further, if what the plaintiff supplied was based on the Beyond Zero contract, the supply could only be done as and when required and only upon issuance of LPOs.
30. The defendants relied on *Caleb Onyango Odongo v Bernard Ouma Ogur* (Civil Appeal No. 14 of 2019) [2020] eKLR, to argue that an aggrieved party must prove that there was offer, acceptance and consideration
31. The defendant submitted that supply of equipment on the basis of phone call instructions from the DMS, would be irregular, illegal and contrary to law (sections 73, 92, 131, 132 and 133 of the *Public Procurement and Disposal of Assets* (PPDA) Act, 2018 and regulation 71 of the *Public Procurement Asset regulations*, 2020.
32. The defendants also contended that handing over the equipment to NYS personnel would be irregular, illegal and contrary to section 48(3) of the *PPDA* and clause 3.8 of the contract which required inspection and acceptance of the goods supplied to ensure they complied with specifications in the contract.
33. The defendants relied on *Pakatewa Investment Company Limited v Municipal Council of Malindi* (Civil Appeal No. 21 of 2015) [2016] eKLR, that a supplier is required to prove that he followed the lawful procurement procedures, and *Stephen Maigwa Wachira v Kenyatta University* (Cause No. 186 of 2016) [2020] eKLR on the importance of the duty of the inspection and acceptance committee to inspect the goods supplied to ensure that they conform with specifications in the contract.
34. The defendants urged the court to dismiss the suit with costs.

### Determination

35. I have considered the evidence, exhibit and arguments by parties. The core issue in this case is whether there was a contract between the plaintiff and 1<sup>st</sup> defendant for supply of medical equipment to 7 Kibra container clinics.



36. The plaintiff's claim arises from an alleged supply of medical equipment to seven Kibra container clinics on the instructions of the 1<sup>st</sup> defendant. The supply was said to have been authorised through a phone call from the DMS in the 1<sup>st</sup> defendant. This was due to some urgency because the President was about to launch the clinics. Secondary to the above question is whether medical equipment was indeed supplied and delivered.
37. The plaintiff's case is that the equipment was supplied and that supply of the equipment was additional to the original contract that had been awarded to the plaintiff and formed part of that contract. The plaintiff admitted, however, that there was no LPOs and did not sign documents to actualise the instructions received on phone.
38. The defendants disputed the plaintiff's claim regarding supply of the equipment. The defendants argued that there was no contract between the parties and that the supply of equipment could not have been done under the original contract. The defendants further argued that the issue of equipping the clinics was a county government mandate and not that of the 1<sup>st</sup> defendant, an entity under the national government.
39. In civil proceedings the burden of proof falls on the plaintiff to proving his case on a preponderance of evidence. In this regard, section 107 of the *Evidence Act* provides that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
40. Under section 109, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
41. In *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* (Civil Appeal No. 342 of 2010[2013] eKLR, the Court of Appeal rendered itself on the point as follows:
- Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence....The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.
42. I have carefully considered the evidence and perused the exhibits produced in this case. The plaintiff's claim is based on contract. However, the plaintiff did not produce any document to show that it had entered into a valid contract with the 1<sup>st</sup> defendant and what the terms of that contract were. The plaintiff did not also produce any document to show which equipment and what quantity it was to supply. Further still, the plaintiff did not adduce credible evidence to show that the equipment was delivered to the 1<sup>st</sup> defendant or its authorised agents.
43. The plaintiff stated that the equipment was delivered and handed over to NYS personnel at the clinics who signed for them, The plaintiff produced what it said were sheets of paper showing that the equipment was indeed received and signed for. A perusal of the documents reveals that there are no names or personal numbers of the people who received and signed for the equipment.
44. As correctly argued by the defendants, this was supposed to be procurement by a public entity. Such procurement was governed by the repealed *Public Procurement and Asset Disposal Act* 2005. Section



- 4 of that *Act* provided that the Act applied to procurement by public entities, which included the 1<sup>st</sup> defendant.
45. Section 26 (3) of the *Act* required that all procurement to be within an approved budget of the procuring entity and to be planned by the procuring entity concerned through an annual procurement plan. Section 26(4) required the procuring entity to have a tender committee while under section 26(6), a procuring entity could not commence any procurement procedure until it was satisfied that sufficient funds had been set aside in its budget to meet the obligations of the resulting contract.
  46. The defendants argued that there was neither budget nor plan to procure the alleged medical equipment. The defendant further argued that even if there had been a plan and budget to procure, procurement process was not followed in that a tender was not awarded, equipment was not delivered, inspected and accepted.
  47. As already stated, the plaintiff's own evidence before court showed that there was no any semblance of procurement process for the equipment. No credible evidence was led with regard to delivery, inspection or acceptance of the equipment by the 1<sup>st</sup> defendant.
  48. Where a party alleges existence of a contract, the burden is on that person to prove existence of the contract and that terms of the contract were complied with. In this case, there was no evidence of a contract or that the plaintiff discharged its obligation under that contract.
  49. Parties must be cautious when tempted to enter into contracts with public entities, and ensure that any procurement is in conformity with the law, lest they suffer the consequences of being lured to act outside the law.
  50. In the present case, I am not satisfied that the plaintiff had a contract and that it supplied the equipment. The evidence fell short of the proof on a balance of probability required in civil proceedings. Consequently, the plaintiff's suit fails and is dismissed.
  51. This being a suit against public entities, there will be no order for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2023**

**E C MWITA**

**JUDGE**

