



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 233 OF 2014

EXCLESIOR MIHASO LIMITED.....PLAINTIFF

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH...1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 17th April 2014, seeking for Judgment against the Defendants for:-

- (a) General damages for breach of contract;*
- (b) Special damages of as per paragraph 15 of the plaint;*
- (c) Interest on (a) and (b) above at commercial rates till payment in full;*
- (d) Costs of the suit;*
- (e) Any other or further relief that the Court may deem fit and just to grant.*

2. The brief facts of the Plaintiff's case are that, the 1st Defendant, by an advertisement contained in the nation daily newspaper dated 21st May 2004, invited members of the public to bid for a tender number MOH/2/2004-2005, for supply of pharmaceutical items to the Ministry of Health.

3. It was *inter alia* a mandatory term of the tender invitation that parties wishing to participate in the same had to obtain:

- a) Tender documents at Kshs. 5,000/=;*
- b) Bank bid bond equivalent to 10% of the offer price;*
- c) Manufacturer's letter of authorization to supply the said drugs; and*
- d) Sample of the goods to be supplied.*

4. That the Plaintiff responded by tendering a bid to; supply Amoxicillin Trihydrate Capsules B.P 250 mg, in a quantity of, 50,000 of 1,000 units at a price of; Kshs. 879.83 per unit and at a cumulative price of Kshs. 43,991,500. The supply was to be delivered in eight (8) weeks.

5. Subsequently, the 1st Defendant, by a letter dated 16th November 2004, informed the Plaintiff that it was successful in its bid for the supply of the goods tendered. The letter further stated that, the Plaintiff's acceptance of the offer was subject to:

- a) Execution of a formal contract;*

- b) *The Plaintiff providing a performance bond equivalent to 10% of the total price of the goods;*
- c) *Goods supplied being in conformity with the earlier samples;*
- d) *Goods supplied to be marked GOK/MOH;*
- e) *Goods would be supplied upon issuance of an L.P.O by the 1st Defendant; and*
- f) *Goods would be supplied upon the 1st Defendant issuing to the Plaintiff with an irrevocable letter of credit of the goods value.*

6. The 1st Defendant thereafter, issued the Plaintiff with LPOs numbers; 860022 and 860023; for supply of the said goods. On 3rd February 2005, the 1st Defendant instructed, the Co-operative Bank of Kenya Limited, to issue an irrevocable letter of credit to the Plaintiff.

7. That, upon receipt of the irrevocable letter of credit, the Plaintiff embarked on the process of fulfilling its obligations under the contract, which included hefty and serious financial obligations and undertakings including but not limited to:

- a) *Shipment of the goods from India to Nairobi;*
- b) *Payment of duty and related expenses;*
- c) *Engagement of 3rd party contractors such as transporters, customers, agents and warehousing; and*
- d) *Borrowing a sum of Kshs. 25,000,000 as working capital from the Bank of India under a Letter of Credit payable on or before 26th April 2004, secured by the Irrevocable Letter of Credit issued by the 1st Defendant.*

8. On or about 9th May 2005, the Plaintiff, in compliance with the terms and conditions of the tender and contract, supplied to the 1st Defendant and/or its agent, Kenya Medical Supplies Agency, the contractual goods, which were accepted and stored at the agents' warehouse situated at Industrial Area, Nairobi.

9. The Plaintiff thereafter demanded for payment of the goods but the 1st Defendant failed, ignored and/or refused to settle the same, despite repeated demands.

10. On 30th January 2006, the 1st Defendant informed the Plaintiff that, no payments would be made since the subject contract was under investigations by Kenya Anti-Corruption Commission, then. The Plaintiff avers that, the 1st Defendant is in breach of the contract by failing to make the payment and by reporting the matter to a third party.

11. That it obtained a loan, financed and purchased the goods and as a result of non-payment, it has suffered loss and damage hence the claim of special damages as tabulated here below:

Item	Amount in Kshs.
Contract sum for Kshs. 43,991,500, in respect of goods delivered but expired in KEMSA stores	43,991,500/=
Purchase of Tender documents	5,000/=
Transport, storage and warehousing	1,960,000/=
Fees for extension of irrevocable letter of credit from Co-operative bank of Kenya Limited	1,410,004/=
Fees for double extension of letter of credit from Bank of India	952,618/=
Fees and commission per conversion of letter of credit with Bank of India and securing it with debenture of Kshs. 25,000,000 over the Plaintiff	2,514,408/=
Charges and Interest on the debenture at Kshs. 2,803,084 per month from 30 th March 2006 until payment in full	25,227,756/=
Miscellaneous expenses	708,218/=
Total	76,769,504/=

12. That, subsequent demands for payments through letters dated 30th January 2006, 15th February 2006 and 27th March 2006 were not responded to, as a result, on 29th May 2006, the Plaintiff wrote to the 1st Defendant demanding the return of the goods supplied in order to mitigate its losses. However, the 1st Defendant responded by a letter dated 4th July 2006, in which it alleged that the contract was founded on 'misrepresentation' and purported to rescind the same.
13. The Plaintiff avers that, letter was copied to various parties and the general public with the intent of seriously injuring its reputation as a supplier of pharmaceutical products. As a result, it has sustained serious loss and harm and claims for general damages.
14. However, the Defendants filed a joint statement of Defence dated 14th March 2014, and denied entering into a contract with the Plaintiff worth; Kshs. 43,991,500 for the supply of 50,000 units of Amoxicillin Trihydrate capsules B.P. 250 mg as alleged in the Plaintiff. The Defendants averred that, the alleged contractual relationship between it and the Plaintiff was induced by misrepresentation since the Plaintiff was not a manufacturer of Amoxicillin Trihydrate capsules B.P. 250 mg.
15. Further, the purported Contract was marred with numerous irregularities as no contract documentation was ever executed by the accounting officer of the Ministry of Health. That the numerous irregularities prompted the Anti-Corruption Commission; to conduct investigations into the matter.
16. Further, in the absence of a contract duly executed by the Permanent Secretary-Health, any local purchase order purported to have been issued by the Ministry of Health was irregularly and unlawfully issued. That even then, the cause of action is statute barred.
17. The case proceeded to a full hearing. The Plaintiff's case was supported by the evidence of Edgar Ivan Manasseh who relied on the statement recorded dated 17th April 2014, and a further statement dated 6th February 2018. He also relied on documents filed by the Plaintiff. In a nutshell, he reiterated the averments in the plaint verbatim. Save to add that, the he was maliciously charged in the suit; ACCC No. 1 of 2008, with conspiracy to commit a misdemeanor, which charges were withdrawn.
18. That, if at all there were fraudulent deals conducted by the Defendants' officers, the Plaintiff ought not to be blamed for the same. Further, the charges against the 1st Defendant's officers should not be an excuse by the 1st Defendant not to pay for the goods supplied. That, the goods supplied to the 1st Defendant were marked "GOK" as per the requirements and even if the Plaintiff was to collect them, they would not be of use to it.
19. In cross examination, he insisted that, the goods were supplied as per the requirements and acknowledged. Further, a sample thereof was availed as required. It was on that basis that the tender was awarded. He reiterated that, by the time the goods were released, they were about to expire and were still marked "GOK".
20. The Defendants' case was supported by the evidence of Aura Danstan Chibole, a financial forensic investigator with Ethics and Anti-Corruption Commission. He relied on the witness statement recorded dated 15th November 2018. He stated that, he participated in the investigations of the award of the tender herein and made a finding of conspiracy to pervert, Public Procurement Regulations. The investigations were initiated by KEMSA. He took over the investigations of case number, ACCC 01 of 2008. Republic vs. Zachary Awino Mbolo and documents, among them the two LPOs herein. He also collected the alleged samples that were switched or replaced or delivered late, and showing alleged imposed coding.
21. That, further investigations revealed that the LPOs and award letter were allegedly issued by the Zachary Awino Mbolo. As a result, the Ministry was asked to withhold payments until investigations were complete. Thereafter, the entire tender committee members were charged alongside other persons. However, upon evaluation of the case by the Director of Public Prosecution, all the accused persons were released except Zachary Awino Mbolo; who was later acquitted due to lack of evidence following the murder of two persons, a storekeeper and the person in charge of coding.
22. During cross examination, he conceded that he has not worked with the Ministry of Health or KEMSA. That, the complaint received was in relation to lack of a tender sample. His recommendation was that, the supplier committed irregularities by supplying a different sample after the first one was lost.
23. The parties filed their final submissions. The Plaintiff's submissions dated 14th March 2019, were filed 29th March 2019. It was submitted that, the Plaintiff complied with all the pre tender conditions, in particular, they bought tender documents at Kshs. 5,000, provided a bank bid bond equivalent to 10% of the offer price, a manufacturer's letter of authorization to supply the said drugs and supplied the sample of the goods.
24. Similarly, it complied with the conditions set out in the letter dated 16th November, 2005, by supplying the 1st Defendant's agent, Kenya Medical Supplies Agency, with the goods, and it accepted the same into its warehouse situated at Industrial Area, Nairobi, by signing on a delivery note.
25. The Plaintiff further, submitted that, the Defendants did not call the main witnesses or the persons that actually worked for the 1st Defendant or its agencies and handled the matters in dispute to give evidence to rebut its evidence That, reliance on investigator as a witness, diminished the veracity of the evidence adduced by the said witness, which includes but is not limited to, the competence as to production of documents relied upon by the Defence.
26. Further the Defendants have not proved the allegations of misrepresentation or irregularity against the Plaintiff, in that, there was no mandatory condition that, the supplier had to be the manufacturer. The conditions permitted the supplier to avail the manufacturer's letter of authorization, which the Plaintiff duly complied with. The Plaintiff further submitted that, there was no stipulation that a particular format of

contract would be availed, and in any event was the responsibility of the 1st Defendant. Besides, issuance of the LPO's constituted a contract.

27. It was further submitted that, in any event, having cleared the Plaintiff to supply the goods, it was a clear implication that the contractual conditions and/or pre-supply conditions, including the pre-tender samples and/or requirement for execution of contract by the accounting officer of the Ministry, had either been complied with and/or waived. Thus, the Defendants are estopped from going back on their conduct and/or waiver.

28. Further, the 1st Defendants conduct gives rise to estoppel by conduct, election and/or waiver, based on the principles of justice and equity. The provisions of Section 120 of the Evidence Act, Cap 80, laws of Kenya, was relied on which states: -

“When one 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.”

29. The Plaintiff further relied on the Court of Appeal decision in the case of John Mburu –v- Consolidated Bank of Kenya [2018] eKLR ('Mburu Case'), quoting D & C Builders –v- Sidney Rees (1966) 2 QB 617 where Lord Denning, M.R. stated,

‘It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties’.

30. Similarly, the case of Sita Steel Rolling Mills Ltd –v- Jubilee Insurance Company Ltd [2007] eKLR, was cited where the Court stated,

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

31. It was reiterated that, the goods were labelled GOK/MOH, and the Plaintiff was not with any discretion to resell the goods to mitigate the loss. The marking of goods as such made them Government stores as per section 324 of the Penal Code, making resale by the Plaintiff difficult.

32. The Plaintiff submitted that, the Defendants waived and/or abandoned the claims on limitation of action, in that the preliminary objection on limitation filed by the Defendants on 7th April 2015, has never been prosecuted, denying the Plaintiff an opportunity to tackle the same.

33. The Plaintiff relied on the provisions of section 49 of the Sales of Goods Act, to claim for the price of the goods. Further, reliance was placed on the decision of the Court of Appeal in Delilah Kerubo Otiso -v- Ramesh Chander Ndingra [2018] eKLR, where it was held that, in exceptional circumstances, courts do award general damages for breach of contract, especially where it is shown that the Defendant has been oppressive, high handed, outrageous, callous and underhanded.

34. Finally, the Plaintiff relied on the provisions of; Sections 26 and 27 of the Civil Procedure Act, to claim for interest on the damages as from both, the date of institution of the suit as well as interest earned before institution of the suit, at the usual court rates of 12% per annum and commercial rates of at least 14% per annum respectively and costs as well.

35. However, on 25th March 2019, the Defendants filed submissions dated 21st March 2019 and stated that, the case herein turns on the finding of fraudulent procurement practice by the Plaintiff, specifically, the failure to participate in the tendering process evinced in the lack of a tender sample and the fraudulent introduction of a replacement sample to induce acceptance of the goods supplied.

36. That fraud and illegality not only impinges on the validity of a procurement contract but also renders a procurement contract, voidable and therefore unenforceable. Further, a contract for sale of goods by sample contemplates, the implied conditions as set out in statute, namely the Sale of Goods Act, thereby rendering the contract a conditional contract, whereupon property in the goods may only pass to the buyer upon satisfaction of the prerequisite condition.

37. The Defendants further submitted that, the procurement of goods by a public entity may only be done in accordance with the provisions of the Public Procurement & Disposal Act (Cap 412 C) Laws of Kenya, repealed and replaced by the Public Procurement & Asset Disposal Act No. 33 of 2015.

38. That, Section 2 of the Public Procurement & Disposal Act 2005 defines ‘procurement’ as:

“procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination;”

Similarly, Section 4 provides as follows:

“(1) This Act applies with respect to—

(a) *procurement by a public entity;*

(b) *contract management;*

(c) *supply chain management, including inventory and distribution; and*

(d) *disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.”*

39. Thus as a general rule, the procurement of goods and services by a public entity under the said Public Procurement & Disposal Act 2005, must be preceded by a tendering process in which the tenderers must participate in a competitive process, whereupon their tender bids are evaluated by the procuring entity in determining the winning bid.

40. In the alternative, the failure to participate in the tendering process contemplated under the Public Procurement & Disposal Act 2005 or otherwise a flawed tendering process in the procurement of goods and services by a public entity, effectively renders the subsequent procurement contract a blatant contravention of; statute and amounts to an illegality and therefore, void and invalid.

41. The Defendants relied on the decision of Devlin L.J in *Archbolds (Freightage) Ltd –v- S Spanglett Ltd [1961] 1 QB 374*, quoted in the case of, *Patel –v- Singh [1987] eKLR* where it was held that: -

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

42. The Defendants further submitted that, to the extent, the procurement process for the supply of, the Amoxicillin Trihydrate Capsules envisaged the submission of a tender sample as a prerequisite, along with the tender bid by the tenderer, the same was therefore integral to the tender bid and its evaluation for purposes of awarding the tender.

43. The provisions of, Section 41 of the Public Procurement & Disposal Act 2005 where cited which provides as follows:

“(1) No person shall be involved in a fraudulent practice in any procurement proceeding.

(2) If a person contravenes subsection (1) the following shall apply—

(a) the person shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.”

44. It was further submitted that, “*fraud unravels all*” . That, this legal principle is encapsulated in the maxim, ‘*ex turpi causa non oritur actio*’ translated as, ‘*from a dishonorable cause an action does not arise*’. The legal principle is underpinned in the leading case of *United City Merchants V Royal Bank of Canada [1983] AC 168* in which the Learned Lord Diplock stated:

“The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim ‘ex turpi causa non oritur actio’ or if plain English is to be preferred, “fraud unravels all”. The courts will not allow their process to be used by a dishonest person to carry out a fraud.”

45. Finally, the Defendants submitted that, to the extent a contract for sale of goods by way of sample is a conditional contract, the buyer is not deemed to have accepted the goods or otherwise the property in the goods nor the risk transferred to the buyer, until *inter alia* the buyer has had an opportunity to examine goods in conformity with the sample as per Section 35 of the Sale of Goods Act.

46. At the conclusion of the hearing of the case and the submissions, I note that the Plaintiff filed issues for consideration on 14th August 2016 and in addition, invited the court, through the submissions to consider the following issues:

a) Whether, the parties entered into a contract for the supply of pharmaceutical products;

b) If so, whether there was breach of such contract; and

c) If there was breach, what remedies are available for the breach.

47. The Defendants on its part, on 11th November 2018, filed the following issues for determination. Whether: -

a) The Plaintiff is entitled to any damages;

- b) *A valid contract was entered into between the parties;*
- c) *The contract for supply of Amoxicillin Trihydrate capsules is tainted with illegality;*
- d) *The contractual relationship between the parties was induced by the misrepresentation and illegal conduct of the Defendant; and*
- e) *The contract is binding on the Defendant.*
- f) *A valid claim arises against the Defendant on the said contract?*
- g) *Whether there was any breach of the contract agreement?*

48. I have considered the issues raised by the parties and wish to consolidate them as follows, whether: -

- a) *The 1st Defendant advertised the tender referred to herein and whether the Plaintiff bid for it successfully;*
- b) *The Plaintiff supplied the goods which were the subject of the tender. If so, whether the Plaintiff has been paid for the same;*
- c) *There were irregularities in the procurement of the goods stated herein;*
- d) *The Plaintiff should be granted the reliefs sought for in the Plaintiff; and*
- e) *Who should bear the cost of the suit?*

49. In addressing these issues, I have considered, inter alia, the documents produced and I find that, the Plaintiff has produced a letter from the Ministry of Health dated 16th November 2004, written to the Plaintiff, informing the Plaintiff that, its tender for supply of the items detailed therein and which are the subject of this suit, was successful. The letter required the Plaintiff to observe and/or adhere to a delivery period, failure to which, the contract would be cancelled.

50. It indicated that, the payments would be made against certified goods and delivery notes for goods supplied against confirmed LPO(s). The Plaintiff was required to acknowledge receipt of the letter of acceptance on the duplicate copy, and have it duly witnessed, and dated where shown. There is no dispute to the fact that the Plaintiff accepted the offer.

51. The Plaintiff was also required by the pre-tender conditions, to provide proof of the manufacturer's letter of authority to supply the goods. In that regard, the Plaintiff has produced a Manufacturer's Authorization Form dated 17th June 2004, from Aurobudo Pharmaceuticals Limited, in India, addressed to the 1st Defendant authorizing the Plaintiff to submit a bid for the tender No. MOH/02/2004-2005 and subsequently, negotiate and sign the contract with the 1st Defendant for tender goods manufactured by them. The 1st Defendant responded to the manufacturer vide a letter dated 20th March 2001, notifying it that, its application for registration of drugs listed; had been evaluated and approved for registration and the certificate for registration would be issued to them soon.

52. The Plaintiff was also required, to provide a Tender Security Form and/or bank bond in a sum equivalent to 10% of the tender sum. The Plaintiff provided tender security form dated 24th June 2004, from Bank of India, in the sum of \$ 43,098.46, and a performance security Form dated 6th December 2004, issued as a guarantee in the total of \$ 112,471.54, both documents were issued in favour the 1st Defendant, in fulfilment of pre tender conditions.

53. It suffices to note that, at this stage of the process, the Plaintiff had purchased the tender documents, as evidenced by a receipt dated 14th June, 2004, in the sum of Kshs. 7,000, supplied a manufacturer's authorization on 17th June 2004, a tender security form on 24th June 2004, and was notified its bid was successful on; 16th November 2004, a period of five months after the bid. Apparently the issue of lack of the sample of the goods supplied, is not addressed in any of the documents produced by the parties.

54. It is also noteworthy that the 1st Defendant on its part, issued the Plaintiff with a Local Purchase Order dated No. 60022 dated 24th December 2004, in the sum of Kshs. 21, 995, 575.80. I note that the Plaintiff pleads under paragraph of 10 that the 1st Defendant issued two, local purchase orders numbers; 860022 and 860023, but only one; number 860022 was produced in the bundle of documents filed on 3rd June 2014. None of the parties seem to have noticed it or did and just decided to let it pass.

55. Be that as it were, after issuance of the order, the Defendant caused the Co-operative Bank of Kenya, on 3rd February 2005, to issue an irrevocable documentary credit to Bank of India, for the benefit of the Plaintiff, in the sum of USD 1,215,715.44. It does appear that, up to that stage, the parties had complied with the terms and conditions of engagement and upon issuance of the local purchase order, the Plaintiff was at liberty to supply the goods.

56. The Plaintiff has produced delivery note number 003 dated 6th May 2005, addressed to KEMSA, care of Permanent Secretary Ministry of Health. It indicates details of batch numbers, expiry date and pack, and a quantity of 50,000 ZMOX 250mg caps, Amoxicillin Trihydrate 250mg. It is stamped by the Plaintiff and evidently signed for by the warehouse manager, of KEMSA.

57. On 12th May 2005, the Plaintiff wrote to the 1st Defendant to the effect that, it had supplied the entire consignment of ZMOX 250mg

caps, Amoxicillin Trihydrate 250mg, 50,000, in quantity as per the tender of 9th May 2005, and sought for immediate settlement of the order by release of payment thereof. The Plaintiff further raised an invoice No. EML/MOH/APR/003, dated 16th June 2005, in the sum of; USD 556,000. The invoice is also stamped by the Plaintiff and signed for by the warehouse manager of; KEMSA.

58. The 1st Defendant responded to the request for payment through a letter dated 21st June 2005, from KEMSA which reads as follows: -

“RE: TENDER NO. MOH/2/2004-2005 – SUPPLY OF AMOXICILLIN CAPSULES B.P 250 MG BY AUROBINDO PHARMA LTD.

We are currently undertaking receipt procedures for your above products and subsequent generation of payment documents to be forwarded to the Ministry of Health.

Matters on receipt procedures in regard to the above product have not been satisfactorily resolved.

You will be advised by Ministry of Health on the outcome of the receipt and payment process.”

59. It is noteworthy that, the author of the letter makes reference to “receipt procedures” and does not specifically single out the issue of lack of a sample of the goods. Even then the goods had been delivered and received on 6th June 2005, a month earlier.

60. Be that as it were, it is surprising that, neither the 1st Defendant nor its agent KEMSA reverted back to the Plaintiff as to whether they had finalized the “receipt procedure” and/or settled the invoice issued on 6th June, 2005. As a result, the Plaintiff wrote a further letter dated 18th November 2005, reiterating that it had supplied all the goods required and made satisfactory representations to KEMSA’s queries and requested for payment. The Defendants did not respond to this letter which was written four months after the Defendants requested for time to deal with receipt procedures.

61. On 21st December 2005, the Plaintiff wrote another letter complaining that, it was incurring charges on the letter of credit for every extension and/or bank interest charges from the manufacturer. On 30th December 2005, the Principal Accountant Ministry of Health, on behalf of the Permanent Secretary, wrote to the Director KEMSA, in response to the Plaintiff’s letter dated 21st December 2005, directing that, if the Director was satisfied that, the Plaintiff had fulfilled all the conditions in the tender, they should release the relevant documents to enable the Ministry process their payment. There is no evidence that the Director of KEMSA responded to this letter.

62. The 1st Defendant also wrote to the manager Co-Operative Bank of Kenya on 4th January 2006, to the effect that, it had no objection to the amendment of the letter of credit or extension thereof, by 30 more days. But then, the payment was not made.

63. On 16th January 2006, the Permanent Secretary Ministry of Health wrote to the Director, KEMSA, informing him that, Kenya Anti-Corruption Commission had informed that there was complicity by the Ministry and KEMSA officials, in the procurements of the goods herein. That the dealer “supplied the drugs as ordered for and the consignment was distributed and dispensed”. That KACC had indicated that, as they continue with investigations, “the Ministry should use its discretion to determine whether to pay or not on the terms agreed upon with the supplier”.

64. On 17th January 2006, the Director of KEMSA, Dr. C. K. Kandie wrote back to Permanent Secretary, Ministry of Health, indicating that the product supplied was placed under quarantine on 9th May, 2005, “after it was noticed that there was an anomaly between the pre-delivery sample and the tender sample”. He then indicated that the procurement process was flawed, as inter alia, “no tender sample was provided by the supplier as required by section 10 of the Tender specification of the tender document”.

65. He then states that the supplier did not qualify to be awarded the tender and that, the examination of the documents showed strong evidence that the “sample receipt voucher had been forged to try and create the impression that, the supplier had provided the sample for the item in dispute”.

66. That, further, “there is no evidence that the supplier participated in the tender for the supply of this item”. He then strongly recommended that payment should not be made “to deter corruption in the procurement of medical commodities and will send a signal to all officers that, the Ministry is determined to fight and win the war against corruption.”

67. I have dwelt at length on this letter by the director KEMSA, because it does in a nutshell summarize the Defendants’ case. However before, I comment on the same, it is noteworthy that, on the 25th January, 2006, Kenya Anti-Corruption Commission wrote to the Permanent Secretary, Ministry of Health, and informed him that, the “supplier are likely to have committed the offence of conspiracy to pervert Public Procurement Regulations”. The Permanent Secretary, was advised to withhold payment until investigations were complete.

68. As a result, the 1st Defendant wrote to the Plaintiff on 30th January 2006, to the effect that, Kenya Anti-Corruption Commission was investigating the matter and therefore payment could not be made. Upon receipt of that letter, the Plaintiff instructed the firm of; Kipkenda, Lilan & Company Advocates, to demand for payment. The demand was made vide a letter dated 15th February 2006.

69. The 1st Defendant, then wrote to the Chief Executive Officer of KEMSA by a letter dated “January 16 2006” (though I believe it should have been “February” as it was responding to a letter of 15th February 2006), calling for a meeting on 16th February 2006, to discuss the issue.

70. By a letter dated 4th April 2006, the 1st Defendant referred the matter to the Office of; the Attorney General and enclosed the demand

letter from the Plaintiff's lawyers, which had apparently been copied to the Attorney General. On 12th April 2006, the Deputy Solicitor General, wrote to the 1st Defendant, advising that they consider rescinding the contract on the ground of mistake, fraud and/or misrepresentation from the supplier and once the contract was rescinded, then there would be a question on return of the goods.

71. On 7th March 2006, the firm of Kipkenda, Lilan & Company Advocates wrote to the 1st Defendant, demanding that they pay for the goods or return the goods in the condition in which they were on delivery, subject to payment of interest, charges, commissions up to the date of release which stood at Kshs. 7,509,404 as at 30th April 2004. There was no response to this letter. The same law firm then wrote a follow up letter dated 29th May 2006, requesting for return of the goods.

72. It suffices not that, the letter from the Solicitor General dated 12th April 2006, and the law firm representing the Plaintiff dated 27th March 2006, was only brought to the knowledge of the Chief Executive Officer KEMSA, on 20th April 2006.

73. By a letter 28th April 2006, the Chief Executive Officer KEMSA, recommended that the contract be rescinded, but no action was taken until 4th July 2006, when the 1st Defendant wrote to Plaintiff rescinding the contract. On 5th July 2007, the Attorney General brought to the knowledge of the Defendant the notice by the Plaintiff to sue.

74. From the analysis of the above evidence, it suffices to note that, as aforesaid, there is no dispute that the 1st Defendant was notified that it was successful in its bid to supply the tender goods and subsequently issued with LPOs to the supply the same. The Plaintiff has only produced a copy of only one LPO but the Defendants through correspondence confirm that, the Plaintiff supplied the whole consignment. There is no dispute that the Defendants have not paid for the goods.

75. Indeed, this matter rests on the alleged failure by the Plaintiff to supply the sample of the goods as required before the tender was awarded and/or forgery of a receipt voucher of supply of the sample. It does not rest on non-delivery of the goods.

76. Having considered the issue in the light of the evidence adduced the following matters and/or issues come to fore: -

- a) *Who had the responsibility to ensure that the sample had been submitted;*
- b) *What informed the 1st Defendant's decision to inform the Plaintiff that it was the successful bidder in the absence of the sample and/or why did the 1st Defendant issue the LPOs when the pre-tender requirements had not been met by the Plaintiff;*
- c) *How did the warehouse manager of KEMSA receive the bulk of the goods in the absence of the sample;*
- d) *At what stage did the 1st Defendant realize the sample had not been submitted;*
- e) *What action did the 1st Defendant take on realising the sample was missing? Did it rescind the contract immediately and/or return the goods to mitigate the consequential loss;*
- f) *If it is true the Plaintiff committed a conspiracy, was its directors arrested and charged, and if so what was the decision thereof;*
- g) *Finally has the Defendants called rebuttal evidence against the Plaintiff's case.*

77. In addressing the above issues, I find that, the 1st Defendant had the primary responsibility to ensure that all the pre-tender requirements set were met and in particular the supply of the sample of the goods. As already stated herein, it is evident that the Plaintiff bought the tender documents at Kshs. 5,000, issued a bank bid bond equivalent to 10% of the offer price and a manufacturer's letter of authorization to supply the said drugs. The Plaintiff alleges that it submitted the sample of the goods as required.

78. The Defendants allege that the Plaintiff did not supply the sample. The provisions of, Section 107 and 109 of the Evidence Act (Cap 80) Laws of Kenya, states that;

"107 (1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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."

79. Furthermore, I note that the Defendants' evidence is not clear as to whether the sample was supplied before the tender was awarded or not. The evidence of the Defendant's witness as per his statements states as follows: -

"The gist of the matter was that the samples supplied and coded to conceal suppliers name were interfered with during the coding such that the actual samples supplied by the Plaintiff on opening day of the tender or after were exchanged or switched or never supplied." (emphasis mine)

80. The question is, whom was the Plaintiff submitting the sample to and has that person denied receipt of that sample? Was the sample being supplied to the Investigating officer who testified on behalf of the Defendants? Can his evidence rebut the Plaintiff's evidence on the same?

81. It does appear that a pre-delivery tender sample was tendered on 18th April 2005, after the issuance of the LPOs on 25th December 2004, but before delivery of the goods. However, it is not evident whether it was the first samples or the replacement. In my considered opinion, the proper persons who should have answered all the questions regarding the procurement process, are the tender committee members, who were involved in the procurement process.

82. The Investigating officer was not a member thereof and cannot competently aver to the same. Similarly, the Director of KEMSA, Dr. C. K. Kandie, came out strongly on this issue on the letter I have referred to herein, there is no reason why he did not testify for the Defendants.

83. Finally, even if I were to give the Defendants the benefit of doubt, it suffices to note that, the Plaintiff witness was charged vide Anti-Corruption Court Case No. 1 of 2008, and the charges subsequently withdrawn. Therefore, the alleged conspiracy has not been proved.

84. The other allegation raised by the Defendants is of misrepresentation and/or fraud by the Plaintiff, I also find that there is no evidence adduced to support the same. The nature of misrepresentation and the person to whom the same was made is not clear.

85. Similarly, the 1st Defendant's conduct in the entire process reveals total ineptness, and/or sheer negligence. It suffices to note that, it took the Defendants almost one year from the date of delivery of the drugs on 6th May 2005 to 4th July 2006, to rescind the contract. In fact, even after the Attorney General advised them to rescind the contract and return the goods on 12th April 2006, they didn't until 4th July 2006, three months later.

86. Of course the 1st Defendant knew the goods had an expiry date, and they were already in their possession. They were marked GOK. Why didn't they mitigate the losses? And when the Plaintiff requested for them, why didn't they release them immediately.

87. I shall now consider whether the Plaintiff has proved its case as required. A claim for special damages should be specifically proved. In that regard I find that, there is no dispute that the Plaintiff supplied the tender goods in the tender sum of ; USD 56,000 as per the invoice or Kshs. 43, 991, 500. The Defendants support the same as indicated in the copy of the summary on tender number; MOH/02/2004-2005 produced by the Defendants. The payment has not been made and therefore I award the same as prayed.

88. As regard the sum of the purchase of the tender documents of Kshs. 5,000, this was a pre tender requirement and non-refundable and therefore it is not recoverable. Similarly, the amount of Kshs. 1,960,000 for transport, storage and warehousing was part of the Plaintiff's expenses that should have been catered for in the tender sum thus it is not recoverable. In the same vein I find no evidence to support the claim of; Kshs. 1,410,004 as fees for extension of the irrevocable letter of credit as much as there was evidence it was so extended.

89. However, the claim of Kshs. 952,618. in respect of fees for double extension of the letter of credit from India Bank is supported by a letter dated 22nd March, 2006. I therefore award the same. The claim in the sum of Kshs. 2,514,408, as fees and commission of letter of credit with the Bank of India is not proved by any documentary evidence and therefore it is not allowed.

90. The next claim is for a sum of Kshs. 25,227.756, in respect of charges and interest on the debenture at Kshs. 2,803,084 from 30th March 2006 to payment in full. The Plaintiff in support this claim has produced a letter dated January 2006, but the letter that dates before the 30th March 2006, and does not state the penalty interest on delay in receipt of payment from the Ministry of Health.

91. A letter dated 22nd March 2006, from the Bank of India produced by the Plaintiff shows that, the Bank was advising the Plaintiff that the interest on the loan was Kshs. 302,084 as at end of March 2006. In another letter dated, 2nd May 2006, interest is indicated as Kshs. 721, 835.45 by March 2006. What is not clear is why this figure includes interest for January and February 2006.

92. Similarly, I notice that the interest was being charged on the loan and overdraft, Even, then by April, 2006, the interest payable was Kshs. 1,000,000. There is nowhere in the documents produced to support interest of; Kshs. 2,803,084, per month claimed herein and neither is it tabulates for better understanding. If anything there is the evidence that sum of money was ever paid to be reimbursed. The only direct evidence in support thereof would have been the Plaintiff's bank statement to support the charges and or payment thereof. I therefore find the claim is not proved. I also find that, the claim for miscellaneous expenses is not supported either by particulars and/or evidence. I dismiss it.

93. Finally, the claim for general damages is not proved as the Plaintiff has not pleaded to the loss suffered and or adduced evidence to support loss and damage out of the alleged breach of contract and neither is there a claim for general damages for malicious prosecution. That claim is not supported and I disallow it.

94. In conclusion I enter judgment in favour of the Plaintiff as against the Defendants in the sum of Kshs. 44,944,118, plus interest at court rate from the date of the letter of demand to payment in full. The Plaintiff shall also have the costs.

95. Finally, I note that these amounts awarded will be paid out of the public funds, and to allow the perpetrators of this loss to go scot free will amount to an abuse of the integrity of all tax payers who earn their funds painfully. Therefore, I order that, the relevant law enforcement agencies must get to the bottom of the matter with a view to recover the funds from those who are responsible.

96. It is so ordered.

Dated, signed and delivered on this 29th day of April 2020

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Sang for the Plaintiff

No appearance for the Defendants

.....Court Assistant