



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 79 OF 2010

B.M. LOGISTICS LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL BUREAU OF STATISTICS.....DEFENDANT

BULK MOVERS & LOGISTICS (EA) CO. LTD.....INTERESTED PARTY

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 11th February 2010 and amended on 7th November 2014, seeking for judgment against the Defendant for;

- a. A declaration that the plaintiff herein B.M. Logistics Limited is the legal and beneficial lessee of the go down No. 9 located on Nairobi L.R. No. 209/10807;
- b. Judgment for Kshs. 70,096,596 against the defendant as mesne profits;
- c. General damages;
- d. Costs of the suit;
- e. Interest on (b) at court rates from June 2010 till payment in full;
- f. Interest at (c) and (d) above at court rates from the date of judgment until payment in full;
- g. Any other reliefs that the Honourable court may deem fit to grant.

2. The Plaintiff averred that, the company was incorporated on 11th September 2007, as evidenced by certificate No. C. 144566 produced herein. It deals in transport and incidental logistics business. That, part of its operations involves storage of goods before or after transport pending dispatch or collection by clients. As a consequent thereof; it entered into a lease agreement with, Silverstone Quarry Limited, on the 22nd July 2008; to lease its go-down number 9 located and/or constructed on; Nairobi L.R. No. 209/ 10807.

3. In the year 2009, the Government of Kenya announced that it was going to conduct a nationwide census. Therefore, there was going to be massive haulage of census material to the countryside, as well as transporting the material and results back to Nairobi and the Defendant would require warehousing services.

4. On 10th August 2009, the Plaintiff was desirous of transporting census material and wrote to the Director General of the Defendant for consideration. The Plaintiff avers that, it had undertaken similar assignments for various non-governmental organizations and government agencies and therefore had a fleet of vehicles for transport purposes in the event it was awarded the contract. As such, it bid for the warehousing of the material.

5. In further preparation, it engaged the services of, Samuel Ogot Baker and Joseph Kimkung, as part of its preparation team. Unfortunately, the Plaintiff was informed by the Defendant that, the contract had already been awarded to; FedEx which had expressed interest in the provision of the services, before the Plaintiff's letter reached the Defendant.
6. However, the Plaintiff was subsequently informed by the Defendant's logistics and administration manager, Mr. Monyoncho Maina that, FedEx were likely to be overwhelmed by the work and the Plaintiff's services would be required. Therefore, the Plaintiff embarked on the exercise of transportation of the census material. Mr. Samuel Ogot Baker supervised the collection of the census material from various suppliers contracted by the Defendant, for consolidation before transportation to various destinations and various places across the country.
7. The materials were brought to go-down number 9 and the local service order provided for the final destination for the census materials. That the Defendant promptly paid the Plaintiff's transport services. The cheques were collected by Mr. Samuel Ogot Baker and money owed to the Plaintiff and banked the cheques into the Plaintiff's legitimate bank account. The last instalment was paid in October 2009.
8. It is averred that, due to lack of adequate storage space at the Defendant's storage facility, Mr. Fred Ayiera, the Defendant's Procurement Manager, requested for a proposal and floor-plan drawings from the Plaintiff, to facilitate the inspection of the Plaintiff's warehouse by the Ministry of Housing so that it could procure storage services. The Plaintiff requested Mr. Vincent Kulei, an Architect to urgently develop drawings that would make the go down suitable for warehousing of census materials. It involved erecting racks and pallets in the warehouse. Upon receipt of the drawings from Mr. Kulei, Mr. Samuel Ogot Baker forwarded them via email to Mr. C. Kiio on the same date.
9. That, the Plaintiff was informed to make all arrangements for inspection of the warehouse and subsequently, the inspection was done. By a letter dated 2nd September 2009, from the Ministry of Housing to Kenya National Bureau of Statistics and copied to the Plaintiff, the rent for the premises was fixed at Kshs. 30 per square feet per month. The charges for rent and warehousing services were charged separately. The Plaintiff considered the offer and agreed to provide the warehousing services. Thereafter, all the transporters were informed to deliver their census material to the Plaintiff's go down.
10. The Plaintiff then instructed, Mr. Samuel Ogot Baker, to collect the local service orders but he reported that, they were not ready but the Plaintiff continued to provide the services. Thereafter, from 20th October 2009, Mr. Ogot failed to report to the office and stopped answering phone calls. It was assumed that, he had travelled or encountered a major problem and was unable to communicate with the Plaintiff.
11. As a result, on 2nd November 2009, Mr. Joseph Kimkung, went to the Defendant's offices, to follow up on the local service order and payment for services so far rendered, as well as to request the Defendant to formalize the arrangement. However, he was notified that, the payment had already been made and accounts settled for the period in question. The Plaintiff's record did not reflect the payment. Upon further inquiry, the Plaintiff learned that, the payment had been made to; Mr Samuel Ogot Baker, in particular to a company known as; B. M. Logistics (E.A) Co. Limited.
12. Further investigations revealed that, the personal identification number and the value added tax registration number of that company, were personal particulars of; Mr. Samuel Ogot Baker. Apparently, the local service orders had been issued in the name of that company; B. M. Logistics (E.A) Co. Limited.
13. It further emerged that, the local service orders were issued by that company and processed even before it was incorporated. That company received a sum of; Kshs. 7,390,000.00, by the Defendant as rent for the go-down number 9. The Plaintiff avers that, the Defendant failed to exercise due diligence to determine the lessee of the go down.
14. The Plaintiff formally complained to the Defendant, which called for a meeting to resolve the issue as it was apparent that there was a fraud. The Police were also involved and they obtained warrants to investigate the bank accounts of; Bulk Movers Logistics (E.A) Co. Limited. However, it is alleged, the Defendant maintained that, Mr. Samuel Ogot Baker had convinced them that, the Plaintiff and the company paid were one and the same and the Defendant continued to pay the fraudulent company even after the discovery of the fraud.
15. That subsequently, it emerged that, Mr. Samuel Ogot Baker, had leased the go down number 8A, from the Plaintiff's landlord and written to that landlord to the effect that, the Plaintiff had agreed to switch go downs with him. Having failed to forcefully evict the Plaintiff from the premises, Mr. Samuel Ogot Baker, filed a suit; Nairobi HCCC No. 833 of 2009 and obtained an injunction to restrain the Plaintiff from accessing their warehouse number 9. However, the injunction was discharged on the ground of; misrepresentation of material facts and fraud. Mr. Ogot, then filed an application for contempt against the Plaintiff's directors but it was abandoned.
16. That, he then forcefully removed the Plaintiff's materials from go down No. 9 with the assistance of the Defendant who provided security, in breach of an injunction order issued, restraining the removal of the materials from the Plaintiff's go-down. The Plaintiff then filed an application for contempt against, Mr. Samuel Ogot Baker, but he disappeared and a warrant of arrest was issued against him which is still in force.
17. The Plaintiff further reported the matter to anti-banking fraud unit for investigation. It is averred that; the Defendant has refused to pay for services rendered to it and/or acknowledge the payments made illegally, hence the claim herein and the prayers sought.
18. However, the Defendant filed a statement of defence dated 25th February 2010, amended defence and counterclaim dated 19th March 2010 and further amended defence and counterclaim dated 21st January 2015, denying the Plaintiff's claim against it. It was averred that, the Plaintiff together with other companies transported census materials on the Defendant's instructions. The warehouse measuring 8500 square feet, was approved for storage of the census materials at a monthly rent of; Kshs. 255,000, assessed at Kshs. 30 per square foot. That the rates for the warehousing services were negotiated and agreed upon separately, not as a result of the Plaintiff's bidding.
19. That the Defendant lawfully took possession of the warehouse number 9 on plot number; 209/10807 but it is the Interested party, who

accustomed the warehouse to meet its needs by; installing racks, fire-fighting equipment and amenities, worth over; Kshs. 6,000,000. Thus, the Defendant actively and conspicuously took possession of the warehouse on the strength of a proposal obtained from, M/S Bulk Movers and Logistics E.A Co. Ltd. The Defendant therefore, denied trespassing to the go-down number 9.

20. The Defendant also denied fraudulently paying the Interested party and averred that, the sum of Kshs. 7,390,000, was payment of rent agreed between it and the Interested party. That, it is a victim of business rivalry between the Plaintiff and the Interested party. However, upon knowledge of the dispute vide suit, HCC 833 of 2009, the Defendant stopped payment of rent and/or service charges to either; the Plaintiff or the Interested party.

21. The Defendant denied owing the Plaintiff Kshs. 43,000,000 and termed the allegations as baseless, exaggerated and a clear attempt by the Plaintiff to defraud it. That, it has already paid over Kshs. 6,000,000 to customize the warehouse, therefore evicting it would cause it irreparable damage. Finally, the Defendant averred that, it did not sign a formal agreement with the Plaintiff to support any rate claimed herein.

22. The Interested party filed a statement of defence dated, 1st November 2011, and averred that, it is a limited liability company registered under the Companies Act, cap 486, (repealed) Laws of Kenya, and carrying on the business of; storage and transport. It denied the Plaintiff was at all material times the lessee of the demised premises, go down number 9, on plot no. L.R. No. 209/10807-off Mombasa Road and/or that, it bid to transport census materials and/or provide warehousing services, as alleged.

23. It averred that, there was no existing contract to be signed between the Plaintiff and the Defendant, let alone the Interested party. That, on 1st September 2009, the Plaintiff verbally agreed to hand over the demised premises to the Interested party, who then became the lessee of the same. Further that, the Plaintiff is dishonest and is involved in gross and malicious misconduct.

24. The Plaintiff in response, to the further amended defence and counterclaim, filed a reply dated 2nd February, and averred that, the Defendant has admitted the claim for rent and warehousing services. It reiterated that, M/s Bulk Movers and Logistics E.A Company Limited, is a fraudster and that, it was not existent, at the time of the transactions herein. Further, the Defendant has admitted paying a fictitious entity.

25. The case proceeded to full hearing, whereupon the Plaintiff called two witnesses to testify on its behalf. The Plaintiff witness number one, Moses Mureithi Njuguna, a valuer, testified that, on 5th February 2015, he assessed the subject go down and produced the valuation report. The Plaintiff's second witness was its managing director, Dr. Michael Mbito who relied on the witness statement he recorded dated; 29th May 2012 and the bundles of documents filed on; 30th May 2012, 21st July 2016 and 12th January 2017. He basically reiterated the averments in the pleadings as summarized herein. However, he maintained that, the Defendant paid a fictitious company that did not offer it any services, thus depriving it of its lawful warehousing service fees and is liable to pay.

26. The Defendant's case was supported by the evidence of its procurement manager, Mr. Fred Moses Ayiera, who relied on and adopted the statement he recorded dated; 5th March 2012 and a bundle of documents filed on 6th March 2012. He maintained that, the Defendant dealt with the proper company, that offered it services and paid for the same. The Interested party did not adduce any evidence at the trial.

27. At the close of the entire case, the parties filed their final submissions which I have considered herein. I have also considered the evidence adduced and I find the following issues have arisen for consideration namely;

- a. Whether the Defendant procured the services of the Plaintiff for warehousing services.
- b. If so, whether the Plaintiff offered the services as procured.
- c. If the services were offered, whether the Defendant paid for the same.
- d. Whether, the Plaintiff has proved its claim and should be granted the prayers sought.
- e. Who should bear costs of the suit?

28. As regards the first issue, I find that, there is no dispute that, there are two different companies herein, that the Defendant dealt with, that is, the Plaintiff and the Interested party herein. Each of the companies has produced evidence of certificates of incorporation. The Plaintiff has produced a certificate of incorporation of the company issued on 11th September 2007, whereas the interested party has produced its certificate of incorporation issued on 13th October 2009. It is evident that, the Plaintiff company was incorporated before the Interested party company.

29. There is no dispute that the materials, which are the subject of this suit were stored in go down no 9 situated on L.R. No. 209/10807. The question that arises is, who owned the said go down as between the two entities. The evidence reveals that, the go down was leased to the Plaintiff by the landlord Silverstone Quarry Limited, as evidenced by a lease agreement produced herein dated 2nd July 2008, executed by the Plaintiff and the said landlord. Further, a letter dated 13th November 2009, written by the landlord confirmed that, the go down was leased to the Plaintiff. Similarly, in a letter dated 14th January 2010, the landlord confirmed that, the Plaintiff has been leasing the go down since 2nd July 2008 to 15th March 2014. In the same vein, the landlord by a letter dated 10th November 2009, confirmed that, go down no 8A and 4A was leased to M/s Bulk Strategic Suppliers. The certificate of registration of the said Bulk Strategic Suppliers issued on 11th May 2004, indicates that, Mr. Samuel Ogot Baker and Emily Mbithe, wife of Samuel Ogot Baker are the owners.

30. It suffices to note at this stage, according to the evidence adduced herein, the Plaintiff company has three directors and/or shareholders being;

- i. Michael Mbito
- ii. Esther Martha Kimathi
- iii. Richard Avina

Whereas the interested party's directorship or shareholding is made up of;

- i. Samuel Baker Ogot – 400
- ii. Emily Nduku Mbithe – 400
- iii. Purity Adhiambo Ogot – 200

31. It is clear from this evidence that, Mr. Samuel Ogot Baker is a proprietor, director and/or shareholder in two entities; - Bulk Strategic Suppliers and the Interested party herein. It is also clear that, the relationship he had with Silverstone Quarry Limited, was in relation to go down no. 8A and 4A through Bulk Strategic Suppliers as evidenced by the lease agreement produced.

32. However, he alleged in his statement of defence that, he had an oral or verbal agreement, with the Plaintiff to swap go downs so that, he could use go down number 9, and the Plaintiff takes over go down no 8A., in that regard, I note a letter dated 3rd November 2009, written by Silverstone Quarry Limited to the Plaintiff in relation to go down number 9, wherein the landlord notes the internal verbal arrangements of interchange of go downs number 9 and 8A; by the Plaintiff moving into go down no. 8A and M/s Bulk Strategic Suppliers moving into go down number 9.

33. As a result, the landlord notifies the Plaintiff of the new rent payable being Kshs. 185,700.76 instead of Kshs. 225,000. However, by a letter dated 4th November 2009, the Plaintiff denies inter change of go downs. In response thereto, the Interested party writes to the landlord, a letter dated 10th November 2009, insisting there was a verbal arrangement to interchange the go downs as aforesaid. The interested party forwards a cheque number, 200031, dated 3rd November 2009, for payment of Kshs. 225,000 as rent for the month of November 2009 for the go down no 9.

34. The question that arises is whether, there was indeed verbal agreement between the Plaintiff and the Interested party to interchange go downs. In considering the same, I find that, first and foremost, the correspondence referred to, do not relate to interchange of go downs between the Plaintiff and the interested party, but between the Plaintiff and M/s Bulk Strategic Suppliers which is not a party to this suit. It is therefore clear that, at no time did the Plaintiff inter change go down number. 9 with the Interested party herein. Secondly, even if there was such an arrangement, it is not supported by any documentation. If it was verbal as alleged, it is still not supported in the absence of oral evidence by the Interested party to support the same. In that case, I arrive at a conclusion that, at no time did the interested party own or hold the go down number 9 as a lessee or otherwise.

35. The next issue is whether, the Defendant procured the services of the Plaintiff to offer warehousing services. It is not in dispute that, the Plaintiff did not execute any formal agreement or contract for the provisions of the services. To the contrary, the Defendant dealt with the Interested party herein, as evidenced by the minutes of; Tender Committee Awarding Contract, held on 25th September 2009, produced by the Defendant. It is therefore evident, that whereas the lessee did not bid for the supply of the warehousing services, the entity that bid and was awarded the contract was not the Plaintiff.

36. Be that as it were, it is evident the census materials were stored in the warehouse number 9. The documents produced indicate that, the Plaintiff engaged one Samuel Ogot Baker as its operations director, as evidenced by the letters he wrote dated, 10th August, 12th August and 19th October 2009, to the Director General of Defendant in relation to "Delivery and Return of census materials to Rift Valley, Central and Nyanza Provinces Report".

37. That letter is on a letterhead of "B.M Logistics". Notably, the word "Limited" is missing. He signs the letter as Samuel Ogot Baker, operations manager, B. M. Logistics. It is therefore dishonest for Mr. Ogot to aver as stated in the Interested party's pleadings herein that, he was never engaged as an employee of the Plaintiff at any time. Further, in a letter dated 16th December 2009, written by Chelote & Etole Advocates to; the Commissioner of Police, it is stated inter alia that;

"On the other hand, Samuel Ogot Baker did all the sourcing for transport for census materials through bids, contracts, the invoicing and cheque collections on behalf of; B. M. Logistics Limited, a company belonging to Dr. Mbito."

38. It is therefore clear that, Mr. Ogot has acknowledged being an employee of the Plaintiff and in particular in relation to the contract of provision of transport for collection and/or delivery of census material. It does appear after that contract was concluded, he decided to engage the Defendant on the warehousing services but disguised as though, the same was on behalf of the Plaintiff. This is quite evident from the fact that, on 10th August 2009, he wrote to the Director General, of the Defendant, on the letterhead of; B.M Logistics and states inter alia;

"Warehouse; We shall provide warehouse facilities at a rate of Kshs. 250 per tonne/day – 250/T/D (VAT inclusive). This includes security provisions".

39. He signs the letter, as Mr. Ogot for; B.M Logistics. The correspondence that followed, indicates, they were sent from; B. M. Logistics as evidenced by the email dated 21st August 2009 and relates to the go down number 9, the drawings of the “proposed warehousing for Kenya National Bureau of Statistics census materials by B.M Logistics Company Limited on L.R No. 209/10807. Further, the letter dated 2nd September 2009, to Kenya National Bureau of; Statistics from the Ministry of Housing which assessed rent at Kshs. 30 per square foot per month, clearly stated, “the warehousing services should be negotiated separately. It is copied to the managing director of B. M. Logistics, Nairobi. It is therefore clear that, all the correspondences were between the Plaintiff and the Defendant.

40. However, despite all these, the rain started beating the parties herein, when the Defendant subsequently without due diligence, abandoned the Plaintiff company and started dealing with a non-existent company. It suffices to note that, when the Defendant held a meeting on 25th September 2009, to evaluate the bidders for the warehouse services, the Interested party was not in existence. It was incorporated on 13th October 2009. Therefore, the Defendant cannot have entered into a contract with a non-existent entity. It is trite law that, pre-incorporation contracts cannot be ratified by the company upon incorporation. They will not bind the company and the directors become personally liable thereon.

41. Be that as it were, it is noteworthy that, Kenya National Bureau of Statistics wrote a letter dated 15th September 2009, confirming the issuance of local payment order number, 0173468, in favour of the Interested party, in respect of the local service order dated, 12th September 2009, also in favour of the interested party. By that date, of course the interested party had not been incorporated. How could the Defendant be paying a non-existent entity? There is further evidence that, indeed the Defendant paid the non-existent Interested party a sum of; Kshs. 6,878,800, but the particular go down which the Defendant was paying for, is not indicated.

42. I shall now deal with the issue of whether, the payment made to the Interested party should have been made to the Plaintiff and if so, whether the Plaintiff has proved the sums of money claimed. As stated, the Plaintiff had no contract with the Defendant. The evidence available is what Samuel Ogot Baker negotiated with the Defendant. The Plaintiff admits the said Mr. Ogot was its operations manager. Therefore, if he acted, he did so on its behalf, and the negotiation done binds it.

43. In that regard, the Plaintiff negotiated for provisions of services of warehousing in the total sum of Kshs. 20,746,800 as indicated in the award of go down and warehouse services and the local service order dated 10th September 2009 for Kshs. 20,740,800 as follows;

- a. B. M. Logistics vide letter no. EA/WH/09/13-3 dated 8th September 2009, submitted a proposal for all services;
- b. KNBS requested the Ministry of Housing to value a warehouse which had been identified for the service. The warehouse was located along Mombasa Road on plot no. L.R 209/10807;
- c. Due to the urgency at which the service was required, the Bureau issued LSO No. 0173468 for Kshs. 20,740,800;
- d. The KNBS Tender Committee at meeting no. KNBS/4/2009-2010 approved award to M/s B. M. Logistics (E.A) Limited as below;
 - i. Rent at Kshs. 30 per sq ft per month

(8,560 sq.ft) – 255,000	-	Kshs. 3,060,000
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 - ii. Security (12,000 per month) - Kshs. 144,000
 - iii. Safety (surveillance, fire equipment etc)

(85,000 per month)	-	Kshs. 1,020,000
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 - iv. Transport/handling

(190,000 per month)	-	Kshs. 2,280,000
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 - v. Pelleting, forklift, racks and packaging

(765,000 per month)	-	Kshs. 9,180,000
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 - vi. Water, electricity and sanitation

(75,000 per month)	-	Kshs. 2,860,000
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- Grand Total - Kshs. 20,746,000

44. The Plaintiff has claimed for a sum of; Kshs, 70,096,596 as mesne profit. First and foremost, this is a special damages claim that should be specially pleaded and strictly proved. The Plaintiff relies on the report prepared by Zenith (Management) Valuers Limited dated 24th February 2015; based on the inspection of the property on 5th February 2015. The author states inter alia that, the basis of the valuation is the historical rents for the period 2nd September 2009 to June 2010 and comparable on go down no. 1, 4, 6, on L.R no. 209/10807. The

calculation of the plinth area of 7,747.2 square feet at Kshs. 31.5 per square foot totals to Kshs. 244,036.80, exclusive of service charge, therefore, based on the historical period of 10 months, totals to Kshs. 2,440,368.

45. The particulars of the Plaintiff's claim at paragraph 15 shows a claim of Kshs. 2,695,956 as rent for the period September 2009 to June 2010. It suffices to note parties are bound by their pleadings. The total number of months as indicated between September 2009 to June 2010 is nine (9) months and not ten (10) months. Therefore, based on the valuation report putting rent at Kshs. 244,036.80, the rent payable is Kshs. 244,036.80 x 9 months = 2,196,331.20. That is the only sum of money recoverable.

46. The next claim is for Kshs. 67,400,640 as warehousing. The Plaintiff claims for inter alia; commercial rates of Kshs. 25 per day per square foot and Kshs. 750 per square foot as commercial rates per month. It is therefore argued that, a sum of Kshs. 750 x 7,747.2 square feet is Kshs. 5,810,400 per months, and taking into account, the Defendant used the warehouse for ten months, then the sum claimed is Kshs. 58,104,000. However, first and foremost, the basis of the commercial rate claimed is not established. The Plaintiff concedes that, it had no contract with the Defendant over the terms and engagement in relation to the warehousing services. Therefore, there is no iota of evidence that the Defendant conceded to such rates. Secondly, the total number of months as indicated, from September to June 2010 is nine (9) months and not ten (10) months. Thirdly, having held the actions of Mr. Ogot bind the Plaintiff, the sum recoverable by the plaintiff for the services, is Kshs. 20,746,800, all inclusive, which he negotiated. If the Plaintiff is making a claim outside the award, then that, claim will be unsupported due to lack of evidence of bidding and/or tendering for the provision of warehousing services and it will fail. In the circumstances, I enter judgment for the Plaintiff as against the Defendant, in the terms of prayer (a) of Kshs. 20,746,800 and not a sum of Kshs. 70,096,596 as claimed.

47. The Plaintiff has not proved the loss suffered to warrant the grant of prayer for general damages and the same is not allowed. The sum awarded shall attract interest at court rates from the date of judgment until payment in full. The costs are awarded to the Plaintiff as against the Defendant.

48. It is so ordered.

49. As a general observation, the Defendants were certainly negligent in the manner in which they handled this particular transaction. The finding of the anti-corruption court in its judgment delivered in ACCC 11 of 2012 captures that very well. It is noteworthy that, the Defendant is a government department. The sums of money paid herein to the Interested party who has since vanished is tax payers money. It is important and prudent that, the Defendant must follow the interested party to recover all the sums of money so irregularly paid.

Dated, signed and delivered in Nairobi this 28th day of April 2020.

G. L. NZIOKA

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

.....for the interested party

.....Court Assistant.