



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 36 OF 2015

TULA GENERAL CONTRACTORS & SUPPLIES LIMITED.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF REGINA PACIS

UNIVERSITY COLLEGE (RPUC).....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 3rd January 2015, seeking for judgment against the Defendant for, a sum of; Kshs. 33,784,700 and interest at court rates till payment in full, together with costs and interest thereon.

2. The Plaintiff's case is that, on the 14th August 2014, the Defendant issued it with Local Purchase Order (LPO), No. 031, requesting for delivery of the following items: -

(a) 112 Dell Inspection Desktops @ Kshs. 62,640-----Kshs. 7,015,680

(b) 40 Dell Inspiron Laptops @ Kshs. 64,960-----Kshs. 2,598,400

(c) 180 Samsung Galaxy Notebooks @ Kshs. 49,300----Kshs. 8,874,000

(d) 244 Samsung Galaxy Tablets @ Kshs. 49,300-----Kshs. 12,029,200

(e) 16 Samsung 51 LCD @ Kshs. 107,300-----Kshs. 1,716,800

(f) 10 LED TVs @ Kshs. 104,950-----Kshs. 1,049,500

(g) 12 Alex 113 Projector @ Kshs. 41,760-----Kshs. 501,120

Total-----Kshs. 33,784,700

3. That, on 18th August 2014, the Defendant confirmed with the Plaintiff's bank; First Community Bank Ltd; that it had issued the LPO and all payments would be made through the Plaintiff's bank account. Subsequently, the Plaintiff delivered the goods vide delivery note number 303 and issued the Defendant with an invoice number 001 in the sum of; Kshs. 33,784,700. The Plaintiff avers that, despite the Defendant acknowledging receipt of the goods, it refused to pay for them.

4. That by its letter dated 23rd September 2014, the Defendant purported to vary the already completed transaction by claiming that, it was not responsible to pay the debt but rather a Third party who was not privy to the contract between the parties herein would pay.

5. However, on 13th March 2015, the Defendant filed a statement of defence dated 12th March 2015, denying the Plaintiff's claim and averred that it would, at the appropriate time apply to strike out the plaint for being bad in law and for misjoinder.

6. Be that as it were, the Defendant denied issuing the LPO or entering into any contract with the Plaintiff for supply and/or delivery of any

of the items particularized in paragraph 3 of the plaint or at all. That, in the alternative, if at all, the Defendant entered into any contract with the Plaintiff, the Defendant was induced through fraud and/or misrepresentation by the Plaintiff, its servants and/or agents into believing that, the equipment subject matter of this suit were donations to the Defendant's institution; by one Professor Bernard Muita Ngugi. The Defendant averred that at the appropriate time, it would seek to enjoin Professor Bernard Ngugi; as a Third party to the proceedings.

7. Similarly, if there was any contract, it was vitiated on the part of the Plaintiff and/or its agents for want of essentials of a contract; as there was no offer, acceptance, consideration nor the intention to create a legally binding relationship. Further, the alleged contract if any, was in breach of the Defendant's Rules of procurement and procedures and contrary to the law.

8. The Defendant averred that, the Plaintiff and/or its agents, willfully and knowingly misrepresented that the equipment which are the subject matter herein were donations and thereafter demanding payment. and/or committed fraud by: -

- a) *Fronting itself and/or its agents as donors when they knew or ought to have known that they were not donors;*
- b) *Signing the LPO on behalf of the Defendant when they were not authorized to do so;*
- c) *Colluding with members of staff of the Defendant institution;*
- d) *Failing to deliver all the items subject matter of the suit;*
- e) *Fraudulently diverting the items intended for donation and retaining the same; and requisitioning for items which the Defendant did not require.*

9. The Defendant averred that it is a stranger to the letter it allegedly issued, as stated in paragraph 4 of the plaint, and if it was issued, the same was issued without its knowledge or authority and/or under duress and/or collusion. It further denied that, all the items set out in the plaint were delivered, and/or it was responsible for payment. The plaintiff filed a reply to the defence and joined issues on facts admitted.

10. Subsequently, the Defendant filed an ex parte chamber summons application dated 7th April, 2015, seeking for leave to serve a third party notice to; Professor Ngugi, on the ground that, he introduced the Defendant to the events that led to the supply of the subject matter of the suit herein, therefore, he is an integral party to the suit, and the Defendant would seek for indemnity from the third party, in case it is held liable to the Plaintiff.

11. On 22nd May 2015, the court granted the leave sought, however, the third party did not enter appearance nor participate in the proceedings. Subsequently, the Defendant sought for a warrant of arrest against him but all the efforts to trace him have not borne fruits. The Defendant also filed a notice of motion application dated 22nd May, 2015, seeking for orders that, the Honorable court be pleased to direct and/or to order the parties to settle the suit, and upon issuance of that order, the Honorable court be pleased to order the Defendant to release the goods, the subject matter of the suit to the Plaintiff forth with.

12. The application was opposed by the Plaintiff vide a Replying affidavit filed in Court on 4th March, 2016; wherein the Plaintiff restated that the claim is valid and payable by the Defendant. The application was canvassed before Hon Justice E Ogola, who was seized of the matter, but apparently, no decision was rendered, if it was, there is no copy or record thereof. It appears the parties opted to proceed with the main hearing.

13. Subsequently, and after the case commenced the Defendant filed a chamber summons application dated 12th June, 2017, seeking for an interlocutory judgment against the third party, Bernard Muita Ngugi, but there is no evidence that the same was prosecuted and/or judgment entered as prayed.

14. Be that as it were, the case proceeded to full hearing. The Plaintiff's case was supported by the evidence of; Ibrahim Somo who relied and adopted his statement dated 3rd January 2015 and a list of documents of even date. He literally reiterated the averments in the plaint. In cross examination, he stated that, the Defendant's Principal went to his premises in the company of another to request for the subject goods. That, he personally delivered the goods and took photographs with the Defendant's agents who received the items for authenticity thereof. However, his image was not in the photos taken.

15. He vehemently denied that, Professor Ngugi was supposed to pay for the goods and insisted that all the goods were supplied. He vehemently opposed the suggestion that, the goods should be returned to the Plaintiff.

In re-examination, he stated that, the letter dated 23rd September, 2014, purporting to cancel the order of the goods was not brought to his knowledge until the case was filed. He maintained that, the Defendant wrote the letter to the bank confirming it would pay for the goods and did not honour the promise to pay.

16. The Defendant's case was supported by the evidence of; Dr. Marie Theresa Gacambi, the Chair of the Defendant's trustees. She relied on the statement she recorded dated 16th March, 2015, which basically reflect the Defendant's pleadings, though quite elaborate. In view of the fact that, it lays down details of the role played by the third party, I will summarize it herein for better understanding of defence case.

17. She stated that, on 1st July 2014, she held a meeting at the Defendant's premises with; Sister Joyce Karimi and one; Professor Bernard Ngugi Muita who introduced himself as a Donor. The agenda of the meeting was to discuss the donation, supply and funding components of; e-learning program for the Defendant's university. Professor Bernard Muita explained that, the e-learning facility was estimated to cost the sum of; Kshs. Sixty-Eight Million (Kshs 68,000,000), whereof he would donate, 72.5%. However, the university needed to officially register

for technology accreditation, hence the need to open a file with the donor.

18. On the same day, the Defendant, at the behest of Professor Bernard Muita, paid a total of; Kshs. 123,000, for registration, sent via Mpesa to +25471718836, in the name of; Lelgong Joseph, whom Professor Bernard Ngugi Muita; alleged to be his Accountant. A further Kshs 74, 155 was paid to open an account with the donor. However, no official receipts were ever received to date, despite the demanded for official documentation from the donor so as to enable her introduce the matter to the Defendant's Board of Directors.

19. On 3rd July, Professor Bernard Ngugi Muita, requested to see the Defendant's existing computer laboratory which request was granted. On 17th July 2014, the Defendant held a board meeting where the Professor Bernard Muita, was introduced to the board members, who took him to task to explain about the ICT agenda. He introduced his technical personnel, one Mr. Wangombe to explain.

20. On 13th August 2014, Professor Bernard Muita was introduced to the linkage officer and three University ICT officials. On 25th August 2014, another meeting was held at J J McCarthy Centre, by Sr. Joyce Karimi and Professor Bernard Muita, and the witness where the Professor informed them that, the technology plan draft was ready and was to be emailed to the Board by Mr. Wangombe.

21. He further stated that, the donor funded ICT equipment was about to arrive and inquired for sufficient space. However, he was reminded that he had not forwarded the official documents which the Defendant had requested for since July, and that, the Defendant was concerned to know who the actual donor was and the value of the equipment donated.

22. However, the Professor was further taken to assess the Defendant's buildings which were still under construction and was requested to hold the equipment until the room for storage was complete and secure. On 27th August 2014, Professor Bernard Muita, informed the witness that, the donated equipment had been brought and the trucks had left to get the reminder. Apparently the Professor did not accompany the trucks delivering the equipment.

23. The witness stated that, she was taken aback by the Professor's hasty move having requested him to hold the equipment to enable the Defendant secure storage room. In the company of Development officer, Sr. Joyce Karimi they went to ascertain the equipment, whereupon they found the Defendant's Principal; Sister Justina Ndaita, with some men and a lady alleged to be Plaintiff's representatives.

24. Upon arrival, Professor Ngugi hurriedly called everyone to the room where the equipment had been placed and asked the witness to sign some documents brought by the people delivering the equipment. That, he also caused her and the Principal to take photographs as an indication that, they had received the items. The witness testified that, she agreed to take the photos, as it is the norm when gifts, donations and/or grants are presented to the Defendant's Institution.

25. That she was made to believe that, the said documents were a confirmation of delivery and receipt of the donated equipment and was hurriedly told to sign. That; she requested for a copy of the signed documents and upon perusal, discovered that it was an LPO issued by the Defendant in favour of; Tula General Contractors and Suppliers Limited amounting to; Kenya Shillings Thirty-Three Million, Seven Hundred Eighty-Four Thousand, Seven Hundred (Kshs 33,784,700). She further realized a copy of the LPO and other documents had been signed by the Principal of the Defendant and Professor Bernard Muita.

26. On 29th August 2014, she held an urgent meeting with Professor Bernard Muita, questioning him on how he and the Defendant's Principal could sign a serious document that has legal implications without reference to anyone but the Professor countered and confirmed that, he was the one liable to pay as a representative of the donor. She further questioned the Principal, if she had signed the LPO and other documents regarding the e-learning donor equipment, but she denied but when confronted with signed documents, she reluctantly admitted.

27. It transpired that an LPO dated 14th August 2014, had been issued to; Tula General Contractors and Suppliers Limited and prices therein adjusted increasing the total amount from Kshs. 26,032,350 to Kshs. 33,784,700 and the changes signed against. The Defendant's Principal had also authorized the Defendant's accountant to write another LPO No.031 and backdate to 14th August 2014, though adjustments were done on 18th August 2014. It also transpired that, a letter had been fraudulently written to; First Community Bank committing the Defendant to pay the money in reference to, LPO No. 031 which was not authorized by the Defendant's Board of directors.

28. The witness testified that, Professor Bernard Muita submitted a letter through email dated 23rd September 2014, from; Pacitech-Zania Technology Consultancy, stating that the Consultancy was having links with the Donor and the Plaintiff herein and that, Pacitech-Zania Technology Consultancy, had fully indemnified the Plaintiff of all the equipment supplied so that the Defendant was not liable to pay for any equipment.

29. On 23rd September 2014, the Defendant wrote to the Plaintiff stating that, it was not liable for payment of the LPOs and explained to the Plaintiff that it was the Donor, Digital Agenda Africa that was liable. On the same date, the Defendant wrote to; First Community Bank, cancelling its Principal's letter dated 18th August 2014, and notifying the bank that the Defendant was not liable for any payment of LPO No. 031.

30. On 12th November 2014, Sr. Joyce Karimi called the Plaintiff to confirm receipt of the letter dated 23rd September 2014 and whether the Donor had made payments for the e-learning equipment. On that date, the Defendant learnt that, a further consignment of the equipment had been delivered on 22nd September 2014, vide a delivery note No. 303 and received by Professor Bernard Muita, yet the Professor was not a representative of the Defendant.

31. The Defendant states that, by a letter dated 12th November 2014, Professor Bernard Muita, introduced Digital Agenda Africa as the Donor that had sub-contracted the Plaintiff as its Assembly's Accredited Equipment Supply & Procurement Unit. That in the circumstances, it is evident that the Plaintiff and the Professor were working in cahoots with the Defendant's Principal, and they were all aware of the

choreographed deal to induce, misrepresent and/or fraudulently extort from the Defendant monies for the equipment represented as donation only to demand payment later.

32. That as a result of the unfolding circumstances, the Defendant's Board of Directors summoned its Principal to answer to questions as to her involvement in signing of the LPOs without the authorization of the Board and contrary to the law and laid down procedures. She orally stated that, she did not know the Plaintiff at all.

33. She denied the Plaintiff's evidence that, the goods were delivered in three instalments. She identified the tall man in the photos taken as the Professor Bernard Muita, and the other man as the representative of the Plaintiff who delivered the goods.

34. The witness maintained that, the Defendant issued the letter to the bank undertaking to pay on the understanding that, the Donor would pay for the goods and the Defendant only discovered that, it was to pay upon demand.

35. However, the witness was not availed for cross examination, after she was stood down, despite several adjournments, as she was indisposed. Nonetheless, the Defendant availed its second witness, Sister Joyce Karimi, who relied on her witness statement dated 16th March, 2015. Her evidence was similar in all aspects with that of first witness Sister Dr. Marie Theresa Gacambi (DW1).

36. In cross examination, she confirmed that the LPO and invoice produced bears the Defendant's stamp and that, there was another LPO that replaced the original one. She confirmed the goods are in the Defendant's possession and the Defendant was willing to return them to the Plaintiff.

37. In re-examination, she reiterated that, the Defendant was not buying the goods. That the delivery note did not bear the Defendant's stamp, though signed by the Defendant. That the Defendant cancelled the order when demand for payment was made.

38. The parties filed the final submissions wherein the Plaintiff stated that, there is a valid contract between the parties and that the LPO constituted the offer; the Defendant being the offeror and the Plaintiff the offeree, that the delivery constitutes acceptance and consideration was based on the invoice. Thus, the parties intended to create a binding contract.

39. That, "a written contract cannot in law be cancelled orally at all. It can only be cancelled in writing". Further the alleged fraud and/or misrepresentation on the part of the Plaintiff is not supported by evidence and neither does the Defendant have a counter claim against the Plaintiff.

The Plaintiff relied on the provisions of; sections 3 and 4 of the Sale of the Goods Act, (cap 31) Laws of Kenya Section 3 thereof provides: -

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

4.

(5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

40. Further, section 97 (1), of the Evidence Act (cap 80) laws of Kenya, provides that: -

"97(1) when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a

document, and in all cases in which any matter is require by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or Secondary evidence is admissible under the provisions of this Act”

41. Similarly, 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 representatives shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

42. Finally, that in the case of; Kenya National Corporation Ltd v Albert Mario Cordeiro & Another (2014) eKLR, quoting from; Cheshire, Fifoot and Formstons, the Law of Contract, 14th edition at pages 34 and 35, it is stated that “...proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer”

43. Additionally, the Court of Appeal held in; AFC v Lengetia Ltd (1985) KLR, stated that “as a general rule, a contract affects only the parties to it and the case of; Nurdin Bunduli vs Lombank Tanganyika Ltd (1963) EA the Court of Appeal stated that; “estoppel is primarily a rule of evidence whereby a party to litigation (is) prevented from denying something which he had previously asserted to be true.”

44. However, the Defendant submitted that, there was no meeting of minds of the contracting parties and thereby making the contract incapable of performance, more so due to the misrepresentation of facts by the third party herein, who since the delivery of the said goods disappeared and despite efforts by the Directorate Criminal Investigation (herein “the DCI”) to trace him, he has never been found. That, the court record will show that warrants of arrest had been issued against the third party herein on 7th April 2016 and the court directed that the same be executed by DCI.

45. The DCI tried to trace the third party herein but their investigations did not bare any fruits as per its report dated 26th May 2017 and filed in court on 29th May 2017 and in which the arresting officer made a finding that, the third party had left a trail of criminal activities that needed to be investigated and recommended that the court do consider him a criminal. The third party is yet to be arrested due to his evasive tactics.

46. The Defendant further submitted that, the Plaintiff could have mitigated the loss by taking possession of the goods supplied to the Defendant when it realized that the contract had been frustrated. That in the case of; African Highlands Produce Limited vs Kisorio KLR (2001) 172, the Court of Appeal held:

“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or tort, and he is then bound to act, as best he may not only in his own interest but also in those of the defendant..... The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of the fact in the circumstances of each particular case.....”

47. The Defendant reiterated that the person liable to pay for the goods supplied by the Plaintiff to the Defendant is the third party who fraudulently misrepresented to the Defendant that, he was to pay for the goods. Further reliance was placed on the case of; Kilimanjaro Distillers Limited vs Safepak Limited (2010) eKLR.

48. I have considered the evidence in total and I find that, the issues for determinations are: -

- a) *Whether the defendant lawfully ordered for the subject goods from the plaintiff;*
- b) *If so whether they were delivered as per the order;*
- c) *If they were delivered whether the defendant is liable to pay for the same;*
- d) *Whether the court should grant the orders sought for; and*
- e) *Who will bear the costs of the suit?*

49. In relation to the first issue, I note that, the Plaintiff has produced an LPO No. 031 dated 14th August 2014, on the letterhead of the Defendant and bears the stamp of the Defendant. It describes the quantities of the goods, the unit price, giving a total of; Kshs 33,784,700. However, the Defendant has produced an amended LPO which has a different print in terms of; style, writing and the pre-printed words thereon. The words “Local Purchase Order” are bold, larger and underlined, unlike in the original LPO produced. The details of description of the goods, include an item described as “table” which has been cancelled and counter-signed by Sister Dr. Justina.

50. Remarkably are the particulars of the unit price and the total amount per item. The same are extremely altered in terms of the unit amount and the overall totals. In fact, the initial total amount in the altered LPO was; Kshs 26,032,380, being the total price of the goods. After the amendment it reads; Kshs 33,785,070. This amount is slightly different from the amount in the LPO produced by the Plaintiff which reads Kshs 33,784,700.

51. It is noticeable that, the altered LPO has the stamp of “Principal; Regina Pacis University College (RPUC)” and does not bear the rubber stamp of the Defendant. It also suffices to note that, there are remarks that the Principal instructed one Mr. Peter Mbisi, RPUC Accountant; to write another LPO as per the changes made on the altered LPO. The Professor signed the LPO as the person requisitioning the goods and

Sister Dr. Justina as the person authorizing and who instructed the Accountant. It does appear after the accountant effected the instructions; the LPO was issued to the Plaintiff. The amended LPO does not show it is a replacement of the LPO No. 031. There is no serial number on the amended LPO.

52. The question that arises is; who issued instruction for the altered LPO and/ordered for the alterations. Unfortunately, none of the signatories thereto, testified to explain what necessitated the changes. Neither did the accountant who was instructed to effect the change.

53. The next question is whether the goods were supplied. I note from the Plaintiff's documents, a delivery note No. 303, showing the goods were delivered to the Defendant on 22nd September 2014 pursuant to the issuance of the LPO No 031. The delivery note is signed for by Muita Ngugi. It is however significant to note that, the signature of the person that delivered the goods is not endorsed thereto.

54. The Defendant has denied receipt of all the goods allegedly delivered to it. According to the statement filed in court by Sister Joyce Karimi, she states that, on 12th November 2014, she called the Plaintiff to confirm whether they had received the Defendant's letter dated 23rd September 2014 and if the donor had made payments for the equipment. She spoke to the Plaintiff's witness One Mr. Ibrahim Somo who informed her that, "a further consignment of equipment had been delivered on 22nd September 2014, which delivery was allegedly received by Prof. Bernard Muita vide a delivery note No. 303 and that the same were delivered at Runda, where Prof. Bernard Muita was staying".

55. She questioned the delivery with Mr. Somo, as the Defendant had not received any delivery note to that effect. Mr Somo asked her to go to the Plaintiff's office, as he could not discuss the matter over the phone. She went to the Plaintiff's office located at Chester House, Koinange Street, 1st Floor, Room number 5, where she met Mr. Somo and another gentleman whose name she could not recall, although he confirmed that he had accompanied the first batch of delivery delivered at Karen.

56. That she informed them that the Defendant had only received a quarter of the total equipment which in any case was a donation. The Plaintiff's witness asserted that, the remainder of the equipment had been delivered to Prof. Bernard Muita in Runda, as the space in Karen was not secure. She demanded that the Plaintiff takes the goods back as the Defendant had not tampered with any and was not liable to pay. She further questioned why the remainder of the goods were taken to Runda when the first batch had already been delivered to Karen, despite the Defendant's plea that, the facility was not complete and secure.

57. That, the two confirmed that, the delivered goods were at the request of Prof. Bernard Muita. She further questioned them as to how the Plaintiff came to know of the Defendant and they mentioned a lady called Judy Kwamboka whom they said works for Digital Agenda Africa as having linked them with the Defendant University. Judy was called to the Plaintiff's office and in the presence of the witness, said that she knew where the other equipments were and she could ask Prof. Muita to have them delivered in Karen.

58. The witness further interrogated Judy who confirmed that she works for Digital Agenda Africa, the Implementing agents for donors. The witness offered to return the goods but the Plaintiff declined to accept them. However, she asked for a copy of the delivery note which she was given and she left.

59. It is clear from the aforesaid that, the evidence reveals that, there were a total of three deliveries. The goods were delivered to the Defendant on 27th August 2014 and signed by the Defendant's computer technician. These goods are indicated as follows: -

- a) Complete computers (HP PRO)42 Pcs
- b) Laptops.....40 Pcs
- c) LCD TVs.....16 sets
- d) Projectors.....12 Pcs

60. The delivery document is supported by an invoice of the same date of 27th August 2014; which reflects the same items save for one (1) unit of each of Samsung Galaxy Tabs and Samsung Note. Therefore, these documents support the position that, the goods were not delivered once. The question is whether any other goods were delivered to the Defendant? The Defendant has denied receipt of any other goods.

61. I note from the documents produced by the Plaintiff filed in court on 30th January 2015 that, only documents that relate to one delivery of 22nd September, 2014, were produced. These are the goods delivered at Prof. Muita Ngugi's residence at Runda and which the Defendant allege were not delivered to them.

62. Further, the Plaintiff has produced only one invoice dated 27th August 2014. The invoice relates to all the goods in the LPO No. 031. However, several questions arise:

- a) How many delivery notes were issued by the plaintiff;
- b) How many invoices did the plaintiff issue;
- c) Were the goods delivered to the residence of Muita Ngugi;
- d) If the answer to (c), above is in the affirmative, is the Defendant liable to pay for them;

- e) *Did the Plaintiff know the official residence of the Defendant where the goods were delivered;*
- f) *Were any goods delivered to the Defendant; if so were they on sale or donations*

63. As aforesaid, it is clear from the evidence that, the first consignment of delivery was on 27th August 2014 and another on 22nd September 2014. However, the Plaintiff has produced only one invoice dated 27th August, 2014, in support of the delivery of the same date and the subsequent date. The question that arises is; if further delivery was made by the Plaintiff on 22nd September, 2014, how come the invoice the Plaintiff has produced at page 4 of its documents, in support of that delivery is dated 27th August 2014. How could that invoice be issued before the goods were delivered? Certainly, something is not adding up.

64. Be that as it were, Sister Joyce Karimi gave a long narrative of how she engaged the Plaintiff's witness; Mr. Somo as to where the 2nd consignment was delivered and he confirmed that it was not delivered to the Defendant's premises. I note from the Plaintiff's witness's evidence in court, that, he went the Defendant's premises which is in Karen when the 1st consignment was delivered. If that is so, why were the second delivery if sold to the Defendant not delivered in its premises where the first consignment was delivered?

65. The Defendant has acknowledged receipt of the 1st consignment of goods. Once the Defendant disputed receipt of the subsequent deliveries the Plaintiff had to prove that, the Defendant received the goods. A person can only pay for goods in their possession. I find no evidence that the consignment delivered on 22nd September 2014 was delivered to the Defendant. If the same was delivered to the Professor and/or Muita Ngugi at his residence at Runda then, he is responsible for the payment thereof.

66. The next question is; whether the subject goods were for sale or donation? Obviously goods for donation do not requires an LPO and delivery notes or accompanying invoices. The Defendant was properly lured by the alleged Professor Muita Ngugi who conned them, super. The Plaintiff too whether aware or not, fell victim on the last consignment. The Defendant is therefore liable to pay for the first consignment of the goods received and acknowledged on 27th August 2014. The prices thereof will be based on the unit price indicated in the LPO.

67. In that case the amount payable works out as follows;

- a) *42 pcs Complete computers (HP PRO) @Kshs 62,640--Kshs 2,630,880*
- b) *40 pcs Laptop @Kshs 64,960----- Kshs 2,598,400*
- c) *16 sets LCD TVs @ Kshs 107,300-----Kshs 1,716,800*
- d) *12 pcs Projectors@ Kshs 107,300-----Kshs 1,287,600*

Total-----Kshs 8,233,680

68. I further find that if the Plaintiff wanted to mitigate its loss, it would have done so when the Defendant wrote to it on 23rd September 2014, denying having purchased the goods. The goods had not been used, the Plaintiff would as well have taken them back and tried to trace the goods delivered on 22nd September 2014

69. Be that as it were, I enter judgment in favour of the Plaintiff in the sum of Kshs 8,223,680 plus interest at court rates from the date of judgment to payment in full. As none of the parties have fully won I order each party do bear its own costs. The Defendant can dispose of the goods and mitigate the effect of the judgment if it so wishes.

70. It is so ordered.

Dated, delivered and signed on this 28th day of May 2020, virtually.

GRACE NZIOKA

JUDGE

In the presence of:

Mr. Mugo for Mrs Wambugu for the Defendant

No appearance for the Plaintiff

Robert; Court Assistant