



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

COMMERCIAL CASE NO. 475 OF 2012

PATMOSE TECHNICAL SERVICES (K) LIMITED..PLAINTIFF

VERSUS

RURAL ELECTRIFICATION AUTHORITYDEFENDANT

JUDGMENT

1. PATMOSE TECHNICAL SERVICES (K) LIMITED the Plaintiff herein instituted this suit by way of the Plaint dated **13th July 2012**. In their Plaint the Plaintiffs sought for Judgment for:-

- 1. USD 199,172.87 being the value of ACSR conductors supplied;**
- 2. Interest on (1) above at the commercial rate of 18% per annum from 8th August 2010; a month from the date of delivery note until payment in full.**
- 3. Cost of the suit together with the interest thereon at Court rates from the date of filing this suit until payment in full.**
- 4. Any other or further relief (s) as this Honourable Court may deem proper to grant.**

2. The Respondent **RURAL ELECTRIFICATION AUTHORITY** filed a Defence dated **15th August 2012** praying that the Plaintiffs suit be dismissed on its entirety and that costs be awarded to the Defendant. The hearing of this suit commenced way back on **19th September 2014** before **Hon. Lady Justice Jackie Kamau** who heard the evidence of all the five (5) witnesses for the Plaintiff. Thereafter I took over conduct of the matter on **14th March 2019** and heard the evidence for the Defence.

THE EVIDENCE

3. PW1 SAMEET PATEL, was the Sales and Marketing Director of the Plaintiff, a limited liability company carrying out the business of supplying electrical materials especially conductors, cables, stay wires and binding wires within the Republic of Kenya. **PW1** relied on his written statement dated **13th July 2012**. **PW1** told the Court that on or about **February 2010** the Plaintiff supplied to the Defendant at their yard in Embakasi under **LPO Number ******* 192 drums (equivalent to **444,100** metres) of Aluminium Conductors Steel Reinforced (**ACSR**) cables. Upon delivery it was realized that the **ACSR** was in excess of the amount indicated in the LPO by **198,958** metres.

4. PW1 states that officers of the Defendant who were present at the yard specifically one **Mr. Joel Omusebe** the Defendants Senior Procurement Officer, pleaded with the Plaintiffs Officers to offload the excess of **198,958** metres as there was at the time a low supply of **ACSR** conductors in the market and the Defendant was facing shortages of the products. The said **Mr. Joel Omusebe** informed the Plaintiff that an LPO for the excess supply would be forwarded to the Plaintiff in due course. Given the longstanding cordial business relationship that existed between itself and the Defendant the Plaintiff accepted to offload the excess supply of **ACSR** which was duly received by the Defendants Officers at the site.

5. Later the Plaintiff received another LPO Number **** from the Defendant and raised a delivery note **No. 1783** dated **7th July 2010** for the supply of **198,958** metres of **ACSR** which had been supplied to the Defendant in **February 2010**. However the Defendant declined to sign the delivery note for the supply of the extra **198,958** metres and further failed and/or declined to remit to the Plaintiff the sum of **USD 199,172.87** being payment for the same. The Plaintiff then filed the present suit.

6. **PW2 JOSHUA MUTISO** was employed by the Defendant as a store keeper and states that in the year **2010** he was based at the defendants Embakasi yard. **PW2** states that whereas he did not witness the actual delivery of the **ACSR** at the Embakasi yard he did peruse the paperwork which indicated that an excess of the material was delivered. **PW2** also states that one **Teddy Odhiambo** who was his supervisor confirmed that the excess supply of **Kshs. 198,958 metres** was delivered and signed for the same.

7. **PW3 ALI ABDI** told the Court that at the material time he worked for the Defendant as a store-keeper whose duty was to receive materials, maintain documentation and ensure the safe custody of supplies and to issue out the same only to authorized users. **PW3** states that on **10th February 2010**, the Plaintiff delivered cable conductors at the Defendants Embakasi yard. **PW3** states that one **JOSHUA MUTISO** brought him the offloading schedule and summary indicating that an excess supply of **198,958 metres** was delivered. **PW3** states that he had no reason to doubt the information given to him by **‘Mutiso’**.

8. **PW4 MICHAEL NDOLO MUTUA** is a Factory Manager employed by the Plaintiff. **PW4** relied on his written statement dated **13th July 2012**. He told the Court that between **26th January 2010** and **2nd February 2010**, he and his colleagues delivered at the Defendants Embakasi yard **192 drums of ACSR cables** in fulfillment of **LPO No. *******. **PW4** state that after delivering the required **441,000 metres ACSR** as per the said LPO, an excess of **198,958 metres** remained. He states that he called and spoke to one **Mr. Joel Omusebe** the Defendants Procurement Officer who told him to offload the excess supply of **ACSR** as the Defendant was at the time facing shortages of the conductors. **PW4** complied with the request of **Mr. Omusebe** and offloaded the excess with the promise that an LPO to cover this extra supply would be forwarded to the Plaintiff later. **PW4** states that the offloading was done in the presence of **Mr. Musyoka** and **Mr. Ndolo** both representatives of the Defendant.

9. **PW5 JONATHAN NZIVO** told the Court that he worked with the Plaintiff as an incharge of stores. **PW5** confirms that between **26th January 2010** and **2nd February 2010** he and his colleagues delivered to the Defendants yard in Embakasi **ACSR** conductors in satisfaction of an **LPO No. *******. **PW5** states that though the LPO was for **441,000 metres of ACSR**, there remained an excess of **198,958 metres**. That his colleague **Mr. Ndolo (PW4)** called and spoke to **Mr. Joel Omusebe** an Officer of the Defendant who instructed them to offload the excess **198,958 metres of ACSR** and promised that the Defendant would issue the Plaintiffs with another LPO to cover this excess supply. This marked the close of the Plaintiffs case.

10. The Defendant called one witness in support of its case. **DW1 WILFRED ODUOR** was the Head of Procurement at the **Rural Electrification Authority** at the material time. **PW1** told the Court that he was not personally present at the Defendants yard when the delivery of the **ACSR** cables was made by the Defendant as his offices were based at **Chancery House** along **Valley Road** in Nairobi. **DW1** stated that one of the Defendants Officers **Mr. Ted Odhiambo** oversaw the offloading of the **ACSR** by the Plaintiff. **DW1** categorically denies that any excess supply of **ACSR** was offloaded. He denies that any request was made to the Plaintiffs to offload the excess cable conductor and vehemently denies that the Defendant was in need of that excess supply due to a shortage in the market. As such **PW1** asserts that the defendant **does not** owe the Plaintiff any money for this alleged supply of **195,958 metres ACSR** cable conductors.

11. Upon the close of evidence both parties were invited to file their written submissions. The Plaintiff filed its written submissions dated **29th May 2020**. Whilst the Defendant filed its submissions dated **2nd July 2020**.

ANALYSIS AND DETERMINATION

12. I have carefully considered the evidence adduced in this case the written submissions as well as the relevant law. The issue which arises in this case whether the Plaintiff has proved its case on a balance of probability.

13. It is trite law that he who alleges must prove. In Civil cases this means that any party seeking to rely on the existence of a set of facts must prove that those facts exist. This is what is known in law as the **“Burden of Proof”** and is encapsulated in **Section 107** of the **Evidence Act, Cap 80 Laws of Kenya** which provides as follows:-

“107 Burden of Proof

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.”

14. In the case of **GICHINGA KIBUTHA –VS- CAROLINE NDUKU [2018]eKLR** the Court stated:-

“It is therefore, settled law that in Civil cases, a party who wishes the Court to give a Judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”

15. The **Sale of Goods Act, Cap 31, Laws of Kenya** defines the terms **“delivery”** and **“acceptance”** and sets out that legal implication. **Section 2(1)** defines the term **“delivery”** as follows:-

“Delivery” means voluntary transfer of possession from one person to another. Further **Section 36** of the same Act defines **“Acceptance”** as follows:-

“36 Acceptance

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

16. Therefore in cases where goods are delivered and are accepted and retained by the consignee, where that possession is inconsistent with the ownership of the said goods by the seller, if the goods are not declined and/or returned, then the consignee is deemed to have ‘accepted’ said goods. The Defendants position is that it did not order the extra **198,958 metres** of cable conductor nor did it accept or retain possession of the same. As such the Defendant states that it cannot be ordered to pay for goods which they neither received nor used.

17. It is not in dispute that the Plaintiff was a supplier of **ACSR** cable conductors to the Defendant. Neither is there any contention that the Defendant had issued the **LPO No. ******* seeking delivery of **444,100 metres ACSR**. The crucial question here is whether the Plaintiff infact **delivered** and the Defendant accepted the **excess 198,958 metres of ACSR**.

18. PW1 told the Court that the Defendant through one of their employees requested the Plaintiff to offload the extra **198,958 metres of ACSR** promising that an LPO to cover this delivery would soon follow. This evidence is supported by **PW4** and **PW5** both employees of Plaintiff of who testified that they delivered the actual consignment to the Defendants yard at Embakasi. **PW4** told that Court that he called and spoke to a **Mr. Joel Omusebe** the Senior Procurement Officer of the Defendant who instructed that the excess **ACSR** cable be offloaded. **PW4** told the Court that the delivery was witnessed by employees of the Defendant. At page 12 of the Plaintiff’s Bundle of Documents file don **12th June 2012** is a hand written note which read as follows:-

“NB

Supplied in excess

198,958

Dated 10-2-2010.”

This endorsement is only signed. **PW2 Joshua Mutiso** an employee of the Defendant confirms that he recognizes the signatures of his colleagues ‘**Ted Odhiambo**’ and ‘**Abdi Ali**’ (**PW3**) on the delivery documents. On his part **PW3** told the Court that this excess delivery was never returned to the Plaintiff.

19. The said **Mr. Joel Omusebe** did not testify in this case to confirm or deny the claims made by **PW1**. **Mr. Omusebe** was an employee of the defendant at the material time. It is the Defendant who would have been best placed to trace and avail this person to testify in this matter. The fact that the Defendant did not avail this witness leads to the presumption that his evidence may have been adverse to the Defendants case. That is why the Defendants did not bother to call him in order to deny the claims made by **PW1**.

20. PW2 and **PW3** were both employees of the Defendant at the material time. Both witnesses supported the evidence of the Plaintiff with respect to the delivery in question. **PW2** told the Court that the **ACSR** conductors were delivered at the Defendants yard and states that the entire consignment was received by one **Ted Odhiambo** the clerk in charge of the Embakasi yard. **PW2** states that although he did not himself witness the delivery, he subsequently received the relevant paperwork from **Mr. Ted Odhiambo**. That the said **Ted Odhiambo** informed **PW2** that he had been verbally instructed by **Mr. Joel Omusebe** from the Plaintiffs Head office to offload the remaining **198,958 metres of ACSR** conductor due to the market shortage of the commodity. **PW2** confirmed that he signed the offloading schedule sheet when the same was brought to him by **Ted Odhiambo** thereby effectively confirming delivery of the extra **198,958 metres** of cable.

21. PW3 who was also an employee of the Defendant told the Court that he signed the relevant offloading schedule confirming that an excess delivery of conductors being **198,958 metres** was made at the Defendants Embakasi yard (see page **6** and **12** of Plaintiffs bundle filed on **3rd July 2012**).

22. Once again the Court takes note that this **Mr. Ted Odhiambo** who at the material time was an employee of the Defendant was not availed as a witness in this case. This was a crucial witness as it was he who actually received the delivery of **ACSR** at the Defendants Embakasi yard. The failure by the Defendants to call this person as a witness is very telling. The Court is at liberty to conclude that the Defendant deliberately omitted **Mr. Ted Odhiambo** as a witness because his evidence would have been adverse to the Defendants case.

23. From the testimony of the Plaintiffs witnesses I am satisfied that the Plaintiff did indeed deliver to the Defendant an extra **198,958 metres** of **ACSR** cable conductors. This extra supply of **ACSR** was duly acknowledged by the employees of the Defendant (see page 12 of Plaintiffs bundles). Further **PW2** and **PW3** both employees of the Defendant confirmed having signed the document thereby acknowledging receipt by the Defendant of the excess **198,958 metres of ACSR**. I am satisfied further that the Defendant did not reject or return this extra consignment but actually retained possession of the same.

24. The Defendant having accepted and retained the extra supply of **ACSR** cable is liable to pay for the same. I find that the Plaintiff has proved its claim on a balance of probability. Accordingly the Plaintiffs suit succeeds and I enter Judgment in favour of the Plaintiff against the Defendant for:-

i. USD 199,172.87 being the value of ACSR conductors supplied.

ii. Interest on the sum awarded in (i) above at Court rates from the 8th August 2010 the date of the delivery note until payment in full.

iii. Costs of this suit as well as interest thereon at Court rates from the date of filing of the suit until payment in full.

It is so ordered.

Dated in Nairobi this 21ST day of DECEMBER, 2020.

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MAUREEN A. ODERO

JUDGE