



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 149 OF 2014**

**PIULVA ENGINEERING & TECHNOLOGY LIMITED.....PLAINTIFF**

**-VERSUS-**

**PERMANENT SECRETARY MINISTRY OF STATE**

**FOR SPECIAL PROGRAMMES.....1ST DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2ND DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. *Piulva Engineering and Technology Limited* is the plaintiff in this action. The permanent secretary of the ministry of state for special programmes is the 1st defendant while the Attorney General is the 2nd defendant. This case was fully heard by the late *Justice Onguto* and the responsibility that fell upon me was to write the judgment in accordance with order 18 Rule 8 of the CPR.

**BACKGROUND**

2. It is not denied that the 1st defendant and the plaintiff entered into a contract on **14th February 2013**. According to the plaintiff, the contract was for the supply of 100 units of lightening arrestors.

3. Both the plaintiff and the 1st defendant do not deny that the plaintiff on or about **April 2013** supplied and delivered to the 1st defendant the 100 units of those arrestors. The controversy is whether the plaintiff breached its contract in failing to install those arrestors.

**THE EVIDENCE**

4. The plaintiff's evidence was adduced by *David Macharia*. He is the technical manager of the plaintiff company. He stated that he had personal knowledge of the facts in this case.

5. The plaintiff's witness stated that the plaintiff was informed by the 1st defendant, by letter dated **26th February 2013**, that it had been awarded a contract to supply lightening protection arrestors in respect to the plaintiff's quotation no. 00P/SP/033-2012-2013.

6. On **18th April 2013**, the defendant issued the plaintiff with a local purchase order no. 0097143, dated **14th February 2013** for the supply of 100 arrestors for the amount of Kshs 4,950,000.

7. The plaintiff's witness stated that on the **19th April 2013**, an officer of the 1st defendant telephoned him on his cell phone and threatened to cancel the order of the arrestors unless the plaintiff delivered the arrestors by **22nd April 2013** at **8.00am** at the stores of National Cereal & Produce Boards at Industrial Area in Nairobi.

8. The plaintiff's witness stated that the plaintiff complied with that request but that on his arrival at the cereal board, he found that there was no one who knew about the delivery and when he called the officer of the 1st defendant, he found that the cell phone number of that officer switched off.

9. After waiting at the cereal board upto 12 pm, the plaintiff made delivery of the arrestors at the 1st defendant's premises where they were accepted by the officials but the officials refused to sign the delivery note.



19. The 1st defendant confirmed that the plaintiff did supply all the 100 arrestors.

20. The defendants by their defence raised a defence which it was admitted by the defendant's witness cannot be supported by any document before court or any document supplied to the plaintiff. If indeed it had a viable defence, as stated in the written submissions the 1st defendant would have filed a counter claim for an order for specific performance. The remedy of specific performance was discussed in the case of **Henry Mwangi Gatai & another v Margaret Wanjiku Godwin & 2 others [2018] eKLR** as follows:

*“Reliable Electrical Engineers Ltd (supra), the Court held that:-*

***“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable.”***

The defendants did not seek specific performance and neither did they return the good to the plaintiff. There was no notice issued to the plaintiff to collect the arrestors delivered to the 1st defendant. It follows that the defendants' reliance on section 36 of the Sale of Goods Act Cap 31 is not supported by the evidence. That section provides as follows:

*“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.”*

21. In my view the plaintiff has proved its case on a balance of probability. It is entitled to judgment for the amount claimed.

22. Before concluding this judgment, I wish to state that in considering the parties evidence, it becomes clear to me that the actions of the government of Kenya's officials in the 1st defendant's ministry, shows the impunity with which civil servants sometimes operate ministries, like they are their private entities. This is done at the expense of the tax paying public which is made to bear the expenses of dubious decisions made by such government officials.

23. In this case the officials of the 1st defendant awarded the plaintiff a contract. The contract curiously stated that it was for supply and installation of the arrestors. No evidence has been adduced to show that the plaintiff contracted to instal such arrestors at any specific place. That indication in the LPO on installation, no doubt to me, was intended to force the plaintiff to be at the mercy of those government officials. When it seems the plaintiff refused to bend to those officials bidding, the plaintiff was denied payment for goods supplied and its contract was irregularly cancelled.

24. The above is made clear by the plaintiff's evidence, which was not contradicted, that a government official phoned and threatened the plaintiff's officials. The impunity with which the 1st defendant's ministry officials operated will lead to the government paying not only the contractual amount but also interest and costs of this suit. As a society, we may have to consider whether such government officials should be surcharged for the judgments, such as this one, that are entered against the government.

25. In conclusion, I enter judgment for the plaintiff as follows:

*a. Judgment is entered for the plaintiff against the 1st defendant for Ksh 4,950,000 plus interest at court rate from the date of this suit until payment in full.*

*b. The 1st defendant shall also bear the plaintiff's cost of this suit.*

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of October, 2018.**

**MARY KASANGO**

**JUDGE**

**Judgment read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

**MARY KASANGO**

**JUDGE**