



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

HCCC NO. 170 OF 2012

SIDOLANA GENERAL SERVICES.....PLAINTIFF

=VERSUS=

1. KILIFI COUNTY

2. THE GOVERNMENT OF KILIFI COUNTY.....DEFENDANTS

J U D G M E N T

The Plaintiff is seeking payment of Kshs. 8,724,500 being the costs of goods supplied to the defendants sometimes in 2011. The Plaintiff's evidence is that the defendant made a request for quotations for building materials in 2011. The request was not made by way of press advertisement. He presented his quotation for his company and was declared to be the lowest bidder for the category of materials he had bid for.

It is the plaintiff's evidence that he was given five local service orders as follows:

	LSO NO.	DATE	AMOUNT
1.	00041	25/8/2011	1,460,000
2.	00042	25/8/2011	1,824,500
3.	00043	25/8/2011	1,740,000
4.	00045	30/8/2011	1,800,000
5.	00046	31/8/2011	<u>1,900,000</u>
	TOTAL		8,724,500

It is his evidence that he supplied all the required materials as per the local service orders and issued the defendant with delivery notes as follows:-

	DATE	LSO NO.	DELIVERY NOTE	AMOUNT NO.
1.	26/8/11	00042	109	-

2.	26/8/11	00041	110	-
3.	1/9/11	00043	111	-
4.	6/9/11	00045	112	-
5.	10/9/11	00046	113	-

	DATE	LSO NO.	INVOICE NO.	AMOUNT
1.	26/8/11	00041	210	1,460,000
2.	26/8/11	00042	211	1,824,500
3.	1/9/11	00043	212	1,740,000
4.	6/9/11	00045	213	1,800,000

It is the Plaintiff's evidence that the supplied materials included cement, iron bars, sand and coral blocks. All the supplied materials were duly received. The defendant issued him with local service orders which is the same as a local purchase order (LSO). Upon delivering the materials, he went for his payment but the town clerk refused to pay him. He was based in Mombasa and went to Malindi for payment but all in vain. He sent a demand letter but no payment was made. He decided to file this case.

PW2 FREDRICK YAA CHARO was the head of procurement section at the then Municipal Council of Malindi. His evidence is that in 2011 there was a project known as Local Authority Service Delivery Plan (LASPAD). They required building materials. The procurement committee organised a meeting to deliberate on the issue. Members of the committee included the Town Clerk, Town Engineer, Legal Officers, Town Treasurer and Senior Administrative Officers among others. They all attended the meeting on 14th May 2011 which authorised the sourcing of quotations.

It is PW2's evidence that they obtained quotations from several companies. The plaintiff was chosen to supply building materials. He is the one who issued the LSO'S as they had ran out of LPOs. According to him, the plaintiff claim is genuine. The materials were duly supplied upon sending his invoices, PW2 took them to the Town clerk for him to breakdown each LSO so that it could be easy for the council to pay. There was a change of Town Clerks sometimes in September 2011. The plaintiff's invoices had already been prepared. The new Town Clerk declined to pay the debt.

According to PW2, he was empowered by his employer to issue the LSOs. The goods where supplied and the plaintiff should be paid his dues. He was suspended from his employment by the new Town Clerk on the allegations that he issued the LSOs without authority.

The defence closed its case without calling any witness. Parties filed written submissions. Counsels for the Plaintiff submitted that the plaintiff has proved his case. Minutes of the relevant committee were produced an the claim is payable. Counsel maintains that the defendant's witness who filed a witness statement did not testify and his statement cannot form part of the evidence. On his part, counsel for the defendant contends that there was no contract between the plaintiff and the defendant. There was no tendering for the supply of the alleged goods. The Municipal Council of Malindi had stopped issuing LSOs long before 2011. Only local purchase orders (LPOs) were in use that time. LSOs were stopped in the 2007/2008 financial year. PW2 was suspended because he issued the alleged LSOs.

The main issue for determination is whether the plaintiff has proved his case to the required

standard. It is the evidence of PW2 that members of the tender committee held a meeting and deliberated on the issue of procurement. A notice calling for the meeting dated 14/5/2011 was produced. The meeting was held on 16/5/2011 at 10:00 am and Minutes of the meeting were also produced. I have gone through the minutes, minute number 97/2011 relates to the purchase of hardware item and detergent for drainage system. The committee approved the procurement of those items as they were not included in the tender for the financial year 2011/2012. It is indicated under minute number 98/2011 that Local Purchase Orders were to be drawn for the supply of the materials. The list of the firms that were awarded the supply of the materials is given under minute number 99/2011. These included :

1. Pekatewa agencies of P. O. Box 288 Malindi 4, 165,000
2. Sindolana general services Mombasa 8,724,000
3. Rogen Traders agency Mombasa-2,400,000
4. Ammar Tulla Agency 3,621,000
5. To empower the supplies assistant. I to issue local purchase orders for both hardware and detergents manually in the absence of Lai Forms at the moment.

The committee also resolved that the LPOs were to be split so that the council could easily pay. Those who attended the meeting included the Town Clerk, Ahmed M. Hemed, Town Engineer, Nurein Hetimy, Senior Administration Officer, Mohamed S. Bate, E. Thoya from Town Engineering department, Johny Elija Mwangombe, Clerical Officer, Fred Yaa, Supplies assistant and Daniel Tsofwa, Front office cashier. The Town Treasurer, Senior Accountant, Works Officers and Surveyors were in attendance.

It is the plaintiff's evidence that he had heard of the request for quotation in May 2011. He gave out his quotation and was called to pick LPOs. According to PW2 the materials were required urgently. It is clear from the evidence that the materials were indeed supplied. The delivery notes and invoices by the plaintiff were duly stamped with the official stamp of Municipal Council of Malindi. The dates on which deliveries were done are indicated on the delivery notes.

According to PW2, he took the plaintiff's invoices to the town clerk for payment. He was advised to split them for ease of payment. This is what he

procurement committee had resolved. The defendant did not tender any evidence to show that the minutes produced by PW2 are not true. The minutes were stamped with the official stamp of the Municipal Council of Malindi.

Given the evidence on record, I am satisfied that PW2 was duly empowered to issue the LSO's. The procurement meeting took place in May 2011 and the LSO's were issued in August 2011. There is no evidence that PW1 colluded with PW2 to defraud the Council. It is PW2's evidence that they ran out of LPOs. That is why he used LSOs which have the same effect as an LPO. The allegation that the Council stopped the use of LSOs way back in 2007 is not supported by any evidence.

In the end, I do find that the plaintiff has proved his case on the required standard. The problem was caused by the new town clerk who was not present when the decision to procure the goods was made in May 2011. The Kilifi County Government succeeded the operations of the Municipal Council of Malindi. This suit was instituted in 2012 before the devolved Governments started operating.

I do find that the plaintiff has proved his case. The defendants to pay the plaintiff Kshs.8,727,500 as prayed in the plaint. The plaintiff shall have costs of the suit and interest at court rates.

Dated and delivered in Malindi this **23rd** day of **February** 2016

S.CHITEMBWE

JUDGE