



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 21 OF 2015

PAKATEWA INVESTMENT COMPANY LIMITED APPELLANT

VERSUS

MUNICIPAL COUNCIL OF MALINDI RESPONDENT

(Being an appeal from the Judgement and Decree of the Honourable Senior Principal Magistrate (L. Gicheha, dated on 20.3.2015 in Malindi CMCC No. 293 of 2015)

JUDGEMENT

This is an appeal from the decision of L. Gicheha delivered on 20.3.2015 in Malindi CMCC No. 293 of 2015. There are sixteen (16) grounds of appeal. The same are reproduced as hereunder: -

1. That the learned Senior Principal Magistrate erred in law and fact in holding that there was no contract between the appellant and the respondent herein.
2. The learned Senior Principal Magistrate misdirected herself on what constitutes formal documentation in a supply of goods contract.
3. The learned Senior Principal Magistrate erred in failing to appreciate that in commercial transactions, an LPO issued to a Supplier by a purchaser and accepted by the supplier through delivery of the ordered goods constitutes a valid contract.
4. The learned Senior Principal Magistrate erred and misdirected herself in the finding that there was no formal documentation in the transaction between the appellant and the respondent.
5. The learned Senior Principal Magistrate erred in her finding that the appellant approached or entered the contract with Mr. Yaa in his private capacity rather than with the respondent.
6. That the learned Senior Principal Magistrate erred in law and fact in holding that the goods in question were received by Mr. Yaa in his private capacity and not in his capacity as the employee of the respondent herein.
7. That the learned Senior Principal Magistrate erred in law and fact in failing to appreciate that the respondent herein being an artificial person can only act through employees as an agent.
8. That the learned Senior Principal Magistrate erred in law and fact in holding that Mr. Yaa had no capacity to enter into an agreement on behalf of the respondent herein.

9. The learned Senior Principal Magistrate erred in law in assuming that it was absolutely necessary for every supply to a public body be preceded by a tendering process under the Public Procurement and Disposal Act.

10. The learned Senior Principal Magistrate erred and misdirected herself when she failed to appreciate the evidence of the respondent's 1st witness (DW1) to the effect that an Open Tender was only applied when the goods under the specific Order exceeded Kshs.1,000,000.00.

11. The learned Senior Principal Magistrate erred by failing to appreciate that the claim for Kshs.4,165,000.00 was not in respect of one single contract but in respect of various contracts none of which exceeded the sum of Kshs.1,000,000.00.

12. The learned Senior Principal Magistrate erred in fact in finding that the supplied goods were not used for the benefit of the respondent.

13. That the learned Senior Principal Magistrate erred in law and in fact in holding that the auditors had not seen the LPO and LSO when in fact the Auditor gave evidence admitting to have seen them.

14. That the learned Senior Principal Magistrate erred in law and fact in failing to appreciate it was the respondent duty to join Mr. Yaa in the suit if that was necessary.

15. The learned Senior Principal Magistrate erred in law in failing to have sufficient regard to the evidence and submissions given by the appellant.

16. The learned Senior Principal Magistrate erred in dismissing the appellant's suit.

Parties agreed to determine the appeal by way of written submissions. Counsels for both parties further elaborated on their submissions. I have read the respective submissions of the parties. The appellant contends that the appeal raises four issues namely: -

- a. Was the right procedure followed in the tender process?
- b. Did an officer of the respondent act on its behalf?
- c. Was there a contract between the appellant and the respondent herein?
- d. Has the respondent unjustly enriched itself?

It is submitted that the Public Procurement Act provides for direct procurement under section 74 (3) thereof. The trial court erred by holding that open tendering was required. Further, although the amount claimed was Kshs.4,165,000/=, this amount was made up of seven invoices whose individual value was below the maximum limit of Kenya shillings one million meant for open tender. None of the orders exceeded Kenya shillings one million. It was not upon the appellant to confirm that the appropriate tender process was used.

Counsel for the appellant maintains that the respondent's officer, Fredrick C. Yaa, had the capacity to act on behalf of the respondent. He was the Assistant Procurement Officer. He was the respondent's agent. The respondent confirmed that the officer was its employee. A letter dated 7.2.2012 suspending Mr. Yaa was produced reasons being that he procured various goods. The appellant is not privy to the internal dealings of the respondent.

The appellant maintains that LSOs were issued in their favour. They supplied the requested goods. That was a contract enough to bind the parties. The Black's Law Dictionary defines a Local Purchase Order as: -

“A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale.”

The respondent did not deny that the LSOs emanated from its office. There was a contract for the sale of goods between the parties. The respondent received valuable goods from the appellant. The respondent has been unjustly enriched as it received the goods but has not paid for them. It would be unjust to allow the respondent to retain the benefit. Counsel relies on the case of **EAST AFRICAN SAFARI AIR LTD V ANTHONY AMBAKA KEGODE & ANOTHER, C.A, Nairobi Civil Appeal No. 42 of 2007** and that of **KENYA COMMERCIAL BANK LTD & ANOTHER V SAMUEL KAMAU MACHARIA & 2 OTHERS [2008] eKLR**. Mr. Mayaka Advocate who appeared for the appellant reiterated that goods were supplied to the extent of the amount being claimed. Mr. Yaa did not deal with the appellant in his individual capacity.

The appeal is vehemently opposed. It is submitted that the procurement of the supplies was made by unauthorized person who lacked capacity to transact for and on behalf of the respondent. There was no lawful agreement between the parties. No tender to supply goods or services was floated. The appellant was not given any letter of award to supply the goods. The alleged goods were received by the same officer who issued the LSOs.

The counsels maintain that procurement for goods and services in County Governments and the defunct Local County and Municipal Councils is governed by the Public Procurement and Disposal Regulations, 2006. A tendering process is required. Goods and services with a quotation of less than Kenya shillings one million requires the suppliers to be prequalified. The LSOs were signed and stamped by Mr. Yaa as per the evidence of PW1. He also received and signed the delivery notes. DW1 testified that in 2011 there was no delivery of detergents to the respondent. DW2 explained the respondent's procurement process which involves various stages. DW2 investigated the invoices as an Internal auditor and found that the LSOs were not in use in 2011. At that time the respondent was using the Local Authority Integrated Financial Operation Management system (LAIFORMS) which had been introduced by the Ministry of Local government. There was also a receiving and Acceptance Committee which used to verify the supplied goods.

It is maintained that no tendering or procurement process was done. The LSOs bear no seal or official rubber stamp of the respondent. Miss Langat, counsel for the respondent submitted that DW2 saw the disputed LSOs in 2014 when he was conducting audit. There was no issue of emergency to supply the goods during the trial. Even if the LSOs were for amounts below Kenya shillings one million, one had to be prequalified before supplying goods to the respondent. The appellant supplied the goods privately to a private person.

The record of the trial court show that one witness testified for the appellant and two for the respondent. PW1 PETERSON KAMAU KIARIE is one of the appellant's directors. The appellant is a general supplier and contractor. He was issued with orders by Fredrick Yaa, the respondent's procurement officer. He was to supply detergent and cleaning materials. There were seven Local Services Orders dated 16.5.2011. He delivered the goods. Payment was to be effected within 30 days. He delivered the goods on 27.6.2011 and invoiced the respondent. The total amount for the deliveries was Kshs.4,165,000/=. No payment was made and he decided to file the case in 2012.

It is PW1's further evidence that no tender was issued to him. No letter of award was issued. The goods were supplied to the stores. Mr. Yaa received the goods. The invoices were received by the procurement officer, Mr. Yaa and another lady he did not know. Once one is issued with a Local Service Orders, the LSO becomes a valid document.

DW1, STEPHEN MWALIO MBONDO worked as the Town Clerk of Malindi Municipal Council between 2011-2013. It is his evidence that LSOs were not in use in 2011. Fredrick Yaa was not authorized to receive goods on behalf of the respondent. He was a Supplies Assistant in the Municipal Council. Goods and Services were to be received by the inspection and Acceptance Committee. What

was allegedly supplied were goods and a Local Purchase Order instead of a Local Service Order could have been used. If the required goods cost more than Kenya shillings one million, an open tender system is used. If it is below Kenya shillings one million, open quotations from suppliers are received.

According to DW1, there were no such deliveries in 2011. They did not advertise for detergents. One person could not request, procure and sign LSO. There is a division of tasks under the public Procurement and disposal Act. At that time, several companies alleged to have been requested by Mr. Yaa to supply goods. Invoices were being sent to the respondent. DW1 investigated the matter and suspended Mr. Yaa on 7.2.2012. The Inspection and Acceptance Committee comprise a minimum of three people.

DW2 JOHARI ALI KAREFU RAMBO worked as a Senior Internal auditor with the respondent. He testified that the use of LSOs was withdrawn in 2011. He was given the appellant's LSOs to investigate. By that time, the respondent was using the LIFORM System which is computerized. Mr. Yaa was the supply assistant. The LSOs were signed by Mr. Yaa. The use of LIFORMS started in 2008 on pilot basis but full operation started in 2011. If an LPO was to be issued, it had to come from the user department. The treasurer had to confirm availability of money committed to the specific procurement and the Town Clerk should approve the procurement. Once delivered, a committee confirms receipt of the goods as well as whether the goods are in order. The invoice is taken to the user department to counter sign that ordered goods have been received. The invoice is then taken to the treasurer who approves payment. DW2 did his investigations and found that no tender for supply of detergents was floated in 2010-2011.

Counsel for the appellant enumerated four issues to be determined by the court. I will take those issues as the ones forming the core of this appeal. There is the first issue as to whether the right procedure was followed to procure the goods. The trial court was guided by section 3 of the Public Procurement and disposal Act which defines procurement as the acquisition or purchase/rental/lease/licence of goods. The respondent herein was a public body falling within the provisions of that Act.

The appellant contends that there was no need for open tendering as the goods supplied were not in lots whose value exceeded Kenya shillings one million. This is quite correct. As explained by the defence evidence, goods whose value does not exceed Kenya shillings one million were to be procured through quotations. There were seven invoices whose individual values were as follows: -

1. Invoice No. 1505	Kshs.485,000/=
2. Invoice No. 1506	Kshs.550,000/=
3. Invoice No. 1502	Kshs.550,000/=
4. Invoice No. 1501	Kshs.450,000/=
5. Invoice No. 1507 (26,000 + 600,000/=)	Kshs.860,000/=
6. Invoice No. 1504	Kshs.720,000/=

The respondents did properly explain that for goods not exceeding Kenya shillings one million, quotations from prequalified service providers was to be the normal process. The appellant does not claim that it had been prequalified to supply goods to the respondent. The picture painted by the evidence on record is a one off dealing. The goods were supplied in May 2011. The LSOs were for 16.6.2011 (two) and five for 18.5.2011. All the LSOs were issued by Mr. Fredrick Yaa.

I do agree with the findings of the trial court that the proper procedure to procure the goods was not followed. Although it is not the work of a supplier to find out the internal workings of a public organization or a company as established in the Turquand's case, at least the ordinary processes have to be followed. A supplier cannot expect to receive a phone call from an assistant supply officer to supply goods and jump into the process of supplying. One has to be pre-qualified. If the supplier is one of the pre-qualified, that is, retained suppliers, that can be understandable. That would mean that the suppliers prices are known. Suppliers are pre-qualified for various goods depending on their area of specialization and prices. The unit price for the supplied detergents is not known. The quantities is quite high and it is not clear why the respondent would require over 6,000 litres of detergent in three days. According to DW2, no tender for the supply of detergents was floated in 2010-2011.

The appellant cannot hide in the contention that it was not its duty to find out whether the process was followed. There is the basic business procedures which call for minimum due diligence. The appellant's letter head as per the invoice show that it was based in Malindi. PW1 TESTIFIED THAT HE IS BASED IN Nairobi. The LSOs were addressed to the appellant's Malindi address. It was quite easy for the appellant to have found out whether the LSOs were indeed issued by the respondent and where to supply the goods.

The correct procedure was not followed. As per the defence evidence, one cannot make request for the supply of goods, receive, verify and accept the goods, receive the delivery notes and invoices and pass the document for payment. Even in private companies that cannot happen. There was need for the Inspection and Acceptance Committee to verify the goods. The user department must have made requisition for the goods. No other document other than the LSOs was produced. No minutes of the Procurement Committee to prove that the respondent required the goods were produced.

There is the issue as to whether Fredrick Yaa acted on behalf of the respondent. According to the appellant, Mr. Yaa was a Procurement Officer and he was suspended because he procured goods without authority. The suspension letter dated 7.2.2012 indicate that Mr. Fredrick Yaa Charo issued without the respondent's knowledge some handwritten Local Service Orders purporting to be from the Municipal Council of Malindi to various agencies. The letter gives the tabulation of the LSOs which brings a total of Kshs.18,910,200/=. The letter further indicates that Mr. Yaa acted unlawfully as he was not authorized to issue the LSOs. The simple question which follows is, how did the appellant know Mr. Yaa? How did Mr. Yaa know that the appellant was a supplier of detergents? How were the goods supplied to the stores without a store keeper seeing and acknowledging receipt of the goods? The evidence shows that it was a one man show. Unlawful acts of an employee cannot bind an organization. If that was to be the case, then employees would unilaterally commit companies to pay money for goods and services not required or called for by the company. The end result would be a free for all and no organization can service such system. There are procedures to be followed on public bodies. The appellant's letter head does not even indicate the building it is located. There was no previous engagement between the two parties. I do find there was no pre-qualification of the appellant. The appellant was not a registered supplier with the respondent. Mr. Yaa acted unlawfully and was driven by his own personal interest.

I will answer the issue as to whether there was a contract between the appellant and the respondent in the negative. No contract was signed. Mr. Yaa simply issued LSOs yet he was not authorized to do so. He did not bind the respondent as he was not authorized to issue the LSOs.

On whether there was unjust enrichment on the respondent, I do find that there was any enrichment on the part of the respondent. The evidence does not show that any detergents were supplied. What happened was an unlawful issue of LSOs and invoices without any goods called for or supplied. The appellant did not even bother to call Mr. Yaa as their witness. No one received the goods. This was just an unprocedural and unlawful arrangement between Mr. Yaa and the appellant.

The decision of the trial court is not based on the amount of Kshs.4,165,000/=. It is based on the entire process having been unprocedural. The trial court arrived at the correct decision and made no errors in dismissing the appellant's case. I am entirely in agreement with the findings of the trial magistrate. The procurement involved a public body and the law requires that lawful procedures must be followed. What is at stake is public money.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered in Malindi this 31st day of October, 2016.

S.J. CHITEMBWE

JUDGE