



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 391 OF 2015
INDIGO TELECOM LIMITED.....PLAINTIFF
VERSUS
INDEPENDENT ELECTORAL AND
BOUNDARY COMMISSION LIMITED..DEFENDANT
RULING

1. The Application before the Court is brought by the Plaintiff. It seeks an Order for the Defence to be struck out and Judgment entered for the Plaintiff in the full sum of the claim.

2. By way of Background, the Plaintiff is a limited liability company incorporated under the Laws of Kenya. In fact, the Plaintiff is a satellite-based telecommunications service provider which offers satellite services to various clients, including government agencies including the Defendant, the Department of Defence and the Kenya Police. The Defendant is described as a Constitutional commission established under *Article 88* of *The Constitution of Kenya 2010*

(“*CoK 2010*”).

3. The Plaintiff filed a Plaint on 11th August 2015 seeking payment of its Invoice No.066620 for the supply of equipment pursuant to Local Purchase Order No. 1905534 in the sum of Kshs.39,364,273.30 dated 21st February 2013. The equipment alleged to have been supplied comprises:

- a. Five hundred (500) SG 2520 Thuraya Gen II Sat/GSM Phones at KShs.62,722.50;
- b. Five hundred (500) Cassic Prepaid Sim cards each at KShs5,608.32;
- c. Seven hundred and fifty (750) 20 units Thuraya airtime vouchers each at KShs.1,927.86;
- d. Two hundred & Fifty (250) GenII Thuraya Car Chargers each at KShs.6,221.73. The Invoice was payable on or before 31st March 2013.

4. The Order was said to have been made on short notice, however it seems to have been preceded by

a quotation in the sum of US\$449,210 (US\$) dated 21st February 2013. A copy of the Quotation appears as **JWM-1**. The proximity between the two events (being the quotation and the Local Purchase Order (“LPO”)) suggests that there is more than a passing connection between the two.

5. The Complaint was filed on 11th August 2015, that is, during the vacation as then was. The Summons was dated 8th September 2015. The Defendant’s Advocates entered appearance by a Memorandum filed on 25th September 2015. The Defence was filed on 9th October 2015. The Defence contains a number of denials, it inter alia denies paragraph 3 of the Complaint. In effect that is denying the Plaintiff’s description of itself and also the fact that a quotation was provided. Paragraph 4 of the Complaint is also denied. That is the averment that an LPO was issued. The Defence then goes on to contradict itself and state *“That the Local Purchase Order was issued illegally and/or unlawfully and in blatant, flagrant and arbitrary violation of the provisions of the Constitution.”*

6. Paragraphs 8 and 9 of the Defence raise interesting and intriguing issues in the face of the documents exhibited to the Complaint. It is worthwhile setting them out verbatim;

“8. The Defendant denies the contents of Paragraph 8 of the Complaint and puts the Plaintiff to strict proof thereof. The Defendant specifically denies having promised to pay for any sum allegedly owing to the Plaintiff. The Defendant states that in any event using public resources to settle unlawful payments constitutes bad governance, abuse of office, misuse of taxpayers resources and/or breach of public trust, public duty and public power.

9. The Defendant further states that it would be against public policy to settle the amount claimed in the Complaint.”

7. Receipt of the Letter of Demand and Notice of Intention to Sue is also denied. However at page 14 of the Documents is a copy of that Letter and at page 15 there is a response supposedly from the Defendant.

8. Faced with the Defence containing blanket denials, the Plaintiff filed the aforesaid application for judgment. The Application is brought by a Notice of Motion dated 16th February 2016. It is brought **under Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya) and Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules and all enabling Provisions of the law.** The Application prays for the following Orders:

“1. THAT the Defendant’s Statement of Defence dated and filed herein on 9th October 2015 be and is hereby struck out.

2. That judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs.39,364,272.30 together with interest of 2% per month from 31st March 2013 when the said amounts became due and payable until payment in full.”

The Grounds relied upon are:

1. The Defendant is well and truly indebted to the Plaintiff for the sum of Kshs.39,364,272.30 together with interest thereon as more particularly set out in the Complaint, and was so indebted from 31st March 2013;

2. The Plaintiff’s claim herein is for a liquidated sum.

3. The Defendant does not have any reasonable defence to this suit.

4. The Defendant’s Statement of Defence dated and filed herein on 9th October 2015 is a bare denial and a sham and does not disclose any genuine or proper triable issues to warrant a hearing.

5. *The Defendant is truly and justly indebted to the Plaintiff.*”

9. The Supporting Affidavit is sworn by a Julius Waita Mwatu, the Chief Finance Officer of the Plaintiff Company. At paragraph 4 he states that “*the Plaintiff is licenced by the Communications Authority of Kenya and was at the time of this transaction the only appointed National Service Providers (sic) of Thuraya in Kenya*”.

“The Affidavit repeats the evidence of the dealings between the Plaintiff and Defendant from the Plaintiff’s perspective only paragraphs 13-15 relate specifically to the Application. The Deponent complains that the Statement of Defence is illusionary, a sham and aimed at delaying the course of Justice. He also says the he is advised by his Advocate that “*this is a plain and obvious and proper case for the exercise of the honourable court’s discretion in the Plaintiff’s favour*”. He also asserts that the Defendant is truly and justly indebted to the Plaintiff and it is in the interests of justice that judgment be entered against the Defendant summarily.

10. The Defendant has filed a Replying Affidavit sworn by its Senior Legal Officer Secretary, a Moses Kipkogei. The Replying Affidavit contains very little factual content that has any bearing on the issues before the Court. The Affidavit presumes to repeat vaste tranches of Statues, a function more appropriate to Legal argument. The Affidavit also contains legal argument on the interpretation of the Pleadings before the Court. Clearly, the deponent has lost sight of the demarcation between fact, law and argument. It is also interesting to note that he is not one of the Defendant’s intended witnesses and therefore may have very little personal knowledge of the underlying facts.

11. The Admissions that the Deponent does make are at paragraph 13 of the Replying Affidavit. In that paragraph it is admitted that:

- i. The Local Purchase Order sent to the Plaintiff was not grounded on a legitimate procurement process;
- ii. The recognized procedures for open tendering, restrictive tendering etc with the requisite approvals were not complied with by the Defendant and
- iii. That equates to misuse and/or abuse of taxpayer’s resources.

12. Although there is no mention of the public interest or protection of the taxpayer referred to in the Statement of Defence, the Affidavit at paragraph 14 interpretes the Defence as “*an invitation*” to the Court to determine what is in the public interest and not enforce a transaction that is in contravention of the Act and supposedly defeats the Administration of Justice.

13. The Replying Affidavit does deal with the substantive issues raised by the Application in paragraph 16 onwards. The Issues which are raised and are completely valid are:

1. Whether the Court has the power to, or should enforce an “illegal contract”;
2. Whether there are good reasons e.g. the so called “weighty issues” that require consideration and scrutiny and /or airing at trial;
3. Whether the Application is an abuse of process.
4. Whether the Application *pre-empts* the parties putting their respective cases.

14. The issues, therefore, for the Court to determine are;

1. Should the Court strike out the Defence?

2. Should the Court order Summary Judgment in favour of the Plaintiff?

3. Are there any overriding reasons that militate against a summary procedure and require a full trial in the interest of Justice.

15. Starting with the issue of striking out the Defence. Striking out a Defence can have far reaching implications for access to Justice and as such is considered a draconian remedy. There is ample judicial authority for the proposition, that it should only be exercised in the clearest of cases (***DT Dobie -vs- Muchina & Another***). In this case the Plaintiff's relies heavily on the argument that the Defence contains bare denials. In fact, that is not the case. At paragraph 4 of the Statement of Defence the Defendant alleges that the "contract or agreement to supply was illegal." That contradicts earlier parts of the Pleading and the Replying Affidavit which assert that

a. there was no agreement and

b. nothing was supplied.

16. The argument that the agreement was illegal presupposes a completed agreement which is then enforceable. From the evidence before the Court, the Plaintiff and its Advocates have failed to go through the step of a reference to the Procurement Oversight Authority in relation to the supplies in question. The Plaintiff does however raise the issue of unjust enrichment in submission. The flip side of goods allegedly supplied and received under an unenforceable contract is the question of restitution and unjust enrichment. Although the Plaintiff seeks a strike out of the Defence, on the face of the aforesaid admissions, it is questionable whether such an order is in fact in the best interests of the Plaintiff.

17. Dealing with the issue of Summary Judgment, the Defendant raises issues of enforceability of the contract it hitherto denied existed at all. The Defendant is a Constitutional body created under **Article 88 Constitution of Kenya 2010**, with all the rights and obligations/ responsibilities that implies.

18. However, that is not the end of the matter. The Defendant operates through the actions of its officers and staff. That is readily apparent from the evidence already filed by the Plaintiff. For example page 15 of the Plaintiff's Bundle is a letter from the Defendant to the Plaintiff's Advocates. It is dated 22nd June, 2015.

It is in reply to a letter dated 9th June, 2015. It creates the impression that the relevant officer will deal with "it". The "It" being referred to was the demand for payment. It is signed by the Manager Legal Services for the Commission Secretary / Chief Executive Officer.

19. Twelve months later the Defendant is saying the Letter of 9th June was never received. Both of those statements cannot be true. At the very least the litigation conduct of the Defendant and its Officers raises the risk of a deliberate intention to mislead not only the Plaintiff but the Court as well.

20. The Parties filed written Submissions and their lists of Authorities. (The Defendant has not filed its documents nor Witness Statements contrary to **CPR Order 7**). The Court has considered the documents and arguments placed before it. In particular this Court takes note of the Ruling of Hon. Lady Justice Aburilli Judge in **Transcend Media Group Limited -vs- I.E.B.C HCC. No. 618 of 2012**.

Apart from the reasoning of the Learned Judge that decision demonstrates that the Defendant and its officers were fully aware of the correct procurement procedures. In that case they were not followed. In that case liability was being evaded. That is the same in this case. For the Court to leave the matter with a declaration of unenforceability would be to allow a party to benefit from its own wrongdoing.

21. The Defendant is tasked with specific tasks under the Constitution that can be paraphrased as ensuring that the process of general elections is run smoothly, efficiently and in a way that inspires the Confidence of the public at large. On aspect of that is dealing with suppliers in effect on behalf of the Public in a fair and transparent way that will stand up to the demands of transparency and accountability.

22. The Court Takes Judicial Notice of the fact that the Commissioners of the Defendant were required to attend a meeting by the Public Accounts Committee in May 2016 and issues raised there concerned procurement of equipment, specifically voter kits, during the 2013 Elections. That is the same period as the items the Plaintiff claims to have supplied. The Court also takes Judicial Notice of the fact that the commissioners and officers of the Defendant are, or were public officials at the time of the facts and matters in dispute as well as when the Defence was filed. That implies that what did or did not transpire took place “on their watch” and at the very least with their knowledge and/or concurrence, in the “worst case scenario”. However, they pray in their aid “public interest and public policy” to prevent “misuse and/ or abuse of taxpayers resources”.

23. In the circumstances, it is in the interests of justice and in the interests of the public at large for the dealings of these parties to be aired in a full trial. The Court takes cognisance of the fact that in such an organisation the individuals may change roles or move on. The Court is of the view that it is in the interests of justice that the Officers of the Defendant involved in the matters giving rise to these proceedings are given an adequate opportunity to explain their conduct to the Court and the Plaintiff, in order to effectively address the issues in dispute.

24. In the Circumstances the application is dismissed, both for striking out the Defence and summary judgment.

25. It is further ordered that all and each Officer of the IEBC in office between 1st February 2015 and 6th May, 2016 be personally joined as parties to this suit. This will include, but not be limited to, the Chief Executive Officer, the Legal officers and the Procurement Officer.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 23rd DAY OF NOVEMBER 2016.

In the Presence of;

Court Assistant: Otieno

Mr. Kotanya holding brief for Mr. Muthui: For Plaintiff/ Applicant.

Mr. Lawi holding brief for Mr. Mukele: For Defendant/ Respondent.