



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
HIGH COURT CIVIL CASE NO. 39 OF 2006

(CORAM: J. A. MAKAU – J.)

AGROTECHNO RESOURCES (E.A.) LIMITED.....PLAINTIFF

VERSUS

RUFUS MUGAMBI.....1ST DEFENDANT

SEBASTIAN KIOGORA.....2ND DEFENDANT

FLORENCE KATHURE.....3RD DEFENDANT

JAPHET MUVAA.....4TH DEFENDANT

(Sued in their personal capacity and as officials of Lower Imenti & Naari Extension Self Help Group)

JUDGMENT

1. The plaintiff through the firm of M/s Kiage and Company Advocate through a plaint dated 24th April 2006 sued the defendant seeking judgment jointly and severally against the defendants for:-

(a) Kshs.4,544,850 plus interest thereon at commercial rates from 28.2.2006 until payment in full.

(b) A mandatory injunction compelling the Defendants and their servants, or agents to take delivery of and make payment for the 4,700 insulators ordered from and ready for delivery by the Plaintiff.

(c) A permanent injunction, ordering, receiving or paying for any and all of the fencing materials listed in L.P. O. Number 006 dated 19.01.06 and in particular 407 rolls of wire, 360 star fix warning sign and W insulators from any person or party other than the Plaintiff.

(d) Damages.

(e) Costs.

2. The Defendants through the firm of M/s. Njiru Boniface and Company Advocate appeared on 2nd May 2006 and thereafter filed defence dated 19th June 2006 denying liability.

3. The plaintiff called one (1) witness in support of its case whereas the defendants called one (1) witness in support of their defence. That as the proceedings have captured the evidence of both the plaintiff and

the defence, I do not intend to reproduce the same fully as it can easily be referred to from the proceedings but I shall make a brief summary of the case of each side.

4. The Plaintiff in support of its case called PW1 Vincent Baragu Ndirangu. The brief summary of the Plaintiff's case is that PW1 the Managing and Technical Director of the plaintiff's Company is a Wildlife Ecologist by profession trained in Wildlife Management, had worked with Gallagher Power Fence Systems and is trained in fence design specifications with the company. That the company deals with Wildlife Management Systems which include Wildlife Management Consultancy, Wildlife Elephant Control Fences and supply of wildlife fencing materials accessories.

5. That the defendants invited the plaintiff to bid and quote for supply of fencing materials for construction of Imenti Forest Solar Fence for elephant control in which the funding was coming from European Union through the Biodiversity Conservation Programme. The request for bid from the defendants to the plaintiff dated 6.6.2005 addressed to it, this request for quotation was produced as P exhibit P1 which documents had already been filled as it bore the product codes of the company called Gallagher Power Fence Systems which included items No. 5, 6 and 7 and produce Gallagher product code as P exhibit 2 stating their product is different from one of Gallagher Code and gave plaintiff specification producing the plaintiff's product catalogue P. exhibit 3. The witness explained to Mr. Ikunyua the Product Manager and Mr. Mugambi the chairman and KWS Technician Mr. Mutava at KWS Meru but they refused to change the document forcing the witness to see Programme Officer (BCP), who PW1 explained the flaw and who assured the plaintiff that change would be effected on the quotation document to have general specifications, a new quotation was issued with the flaws addressed except for the energizer which still read BI600. BCP Biodiversity Programme Officer was explained of the flaw and PW1 was assured that would be rectified but nothing was done. The Plaintiff let that pass and made the quotation on 14.6.2005, delivered it before closure on 15.6.2005 at 10.00 a.m. The Plaintiff's quotation was ordinary and it filled the bid Form plus covering letter quoting for 2.5 mm fencing wire with specification of 350g/sq and also quoted for all the 15 items on P exhibit 1. That the only item not in the first bid was W-insulators which was introduced into the 2nd quotation (item No. 4)

6. That the tender opening which was scheduled for 15.6.2005 at 10.00 a.m. was delayed to 2.30 p.m. to which the plaintiff was not given reasons. That the defendant's wanted only to record the names of the bidders and not with the winner. The plaintiff pressurized the defendants and finally opened the bids and the plaintiff's bid was Ksh.5,591,700/= as per plaintiff's letter and dated 14.6.2005, P exhibit 4 (a) and quotation P exhibit 4 (b). There were only two companies for the fencing materials, thus the plaintiff and Gallagher Fencing Systems. That Gallagher's documents arrived at 10.35 a.m. on 15.6.2005 after tender time had elapsed and its bid was KSh.6,101,908/= meaning the plaintiff was the lowest bidder by then 500,000/=. The plaintiff had been earlier on brought plain wire and U-nail staples which its submitted while Gallagher did not, which issue plaintiff raised with the chairman at the time of tender opening but the chairman and the Project Manager brushed aside the issue. That on 21.6.2015 at 1.01 p.m. PW1 received a fax dated 17.6.2005 requesting the plaintiff to send all samples of the items bid as requested earlier excluding the wire and the U-nail, the energizer, solar panel and solar battery by 25.6.2005 and signed by J.K. Ikunyua. The samples were send with a covering letter dated 23.6.2005 by Securicor Courier Services with a covering letter dated 23.5.2005 as per receipt No. 930922 as per P exhibit 5 (a) (b) and (c). The plaintiff meanwhile discovered the tender was being given to the highest bidder as opposed to the lowest bidder forcing him to write a letter of protest dated 11.7.2005 detailing how the irregular award was made as per P exhibit 6.

7. The plaintiff received a call from European Union telling it, they had released a copy of the letter and were halting the project. The plaintiff also received a reply which had been sent to Community Development Trust Funds, Mr. Miu on 20.8.2005. The defendants refuted plaintiff's allegations denying that they were corrupt or fraudulent stating their tender committee had sole discretion to determine who had succeeded in the tender. The plaintiff stated the material for Imenti First Phase 1, was largely a Gallagher Project but it had supplied 200 Proclaim strain Insulators for the project on 22.12.2004 producing a letter dated 19.7.2005 which it had received from Mr. Miu of Community Development Trust Fund, P exhibit 7 and order dated 22.12.2004 as P exhibit 8 (a), the delivery note duly signed was produced as P exhibit 8 (b). The plaintiff proceeded to Community Development Trust Fund under the

Ministry of Planning and National Development to which Bio-diversity is under that fund and under which the defendants were funded and gave its explanation to coordinator Mr. Miu who asked it to await a letter on the matter.

8. Meanwhile the plaintiff had on 4.8.2005 submitted its wires for testing by Kenya Bureau of Standards , and a report issued on 11.8.2005 No. 7983 showing that the tensile strength was 1455 newtones/sq mm. That the galvanization or zinc casting 397 gms/sqmm. While the defendants had sought 350 gms/sqmm. Report sample submissions form as well as receipt produced, report P exhibit 9 (a), receipt of payment P exhibit 9 (b), sample submissions form P exhibit 9 (c), letter dated 28.5.2005 asking the two companies thus Gallagher and the plaintiff to give further samples for testing produced as P exhibit 10 (a) and letter annexed to it dated 22.8.2005, P exhibit 10 (b). The plaintiff stated the contents of P exhibit 10 (a) were expressive and it had not received P exhibit 7, a letter dated 19.7.2005 and to which the plaintiff replied on 29.8.2005. The BCP called the plaintiff and told it that its samples were fine and defendants, were requested to give the plaintiff LPO but before they get it, Mr. Ikunyua called and stated he had sent the LPO by securicor on 7.1.2006 which the plaintiff failed to receive hence it asked them to leave it with the KWS. The plaintiff got it on 30.1.2006 being the original LPO which had a covering letter dated 19.1.2006 altered with a pen to read 30.1.2006 giving the plaintiff two 2 weeks to supply all the materials. Letter produced as P. exhibit 12 (a) and LPO as P exhibit 12 (b). That upon receipt of LPO the plaintiff delivered all the materials except W insulations and proclaim strain insulators on 15.2.2006. The plaintiff raised an invoice dated 15.2.2006 for Kshs.4,061,700/=, after delivery 406,407 rolls of 25 kg high tensile fencing wires. The plaintiff produced the invoice and delivery notes issued by Mr. J.K. Ikunyua on 16.2.2006 as P exhibit 13 (a) and P exhibit 13 (b), on undelivered items which were coming from New Zealand the plaintiff wrote to defendant for an extension of time of delivery through a letter dated 16.2.2006 P exhibit 14. The plaintiff subsequently supplied 7300 W insulators and 1550 Porcelain Strain Insulators and roll of 25 kg high tensile fencing wire accompanied by invoice dated 28.2.06 and a delivery note of the same day which was signed by Sebastian Kiogora, the 2nd defendant for a total sum of Ksh.483,150/=, produced as P exhibit 15 (a) and delivery note as P exhibit 15 (b).

9. The defendants did not pay the plaintiff but instead on 29.3.2006 wrote to the plaintiff stating as they had tested the wires and the warning signs and the W. Insulators and found them to be substandard, that the plaintiff should go and collect them. The plaintiff was also asked to amend his invoice to reflect the reduction. The Plaintiff went to Community Development Trust Fund, who informed the plaintiff that they had asked the defendants to accept the materials. The plaintiff responded and stated the zinc coating on the wires was upto the standard as they had galvanization of more than 350 gms/sq metres, that in Kenya Bureau of Standards and also Khatahi Dharamshi and Company Limited the manufacturer had given certificate dated 31.3.2001 P. exhibit 16. The plaintiff stated 8 tests were done and the galvanization in the lowest was 374.7 gms/sq metre and in another was 354.7 gms/sq meter this tests were produced and as P Exhibit 16 (a) and (b) respectively. That the Board of Development Trust Fund, wrote a letter then they addressed to the defendants dated 24.4.2006 and copied to the District Warden KWS produced as P Exhibit 17, which was asking the defendants to pay the plaintiffs pursuant to a meeting held by the trustees in response to a letter dated 19.4.2006 from to M/s Kiage and Company Advocates addressed to the defendants and copy to the chairman Board of Trustees Community Development Trust Fund and others. Letter produced as P Exhibit 18. That after filing of this suit the wire and material supplied were submitted by order of the Court for testing at the University of Nairobi College of Architecture and Engineering and Industry Research a consultancy unit. The report of the college is dated 2.11.2006 and its result of the galvanization are 374.7 gms/sqmetre at the lowest and the highest is 417 gms/sq metre as per P Exhibit 19. The Report from the Department of Chemistry Chiromo Campus, in its Chemical and Industrial Consultancy Unit is dated 2.11.2006 and its result of the galvanization at the lowest are 353.90 gm/sq metre and high if is 409.3 gn/sq m. That each had five samples and all were above specification of 350 gm/sq metre. The result from Department of Chemistry Report produced as P Exhibit 20. That prior to this testings the materials were inspected by the court and W-insulation and Warning Signs were retained. That they met the specifications in the bid. The plaintiff produced a letter of commendation from Kenya Wildlife Services dated 26.6.2006 as P exhibit 21 to show that it is not a briefcase supplier and is as pre- qualified supplier to KWS and P exhibit 22 to show it has been involved in fencing of the Aberdares in its Rhino Ark Project, and P exhibit 23 (a) to show it had done 43 km electric fence for Meru National Park for KWS as per letter dated 22.6.2006 from the main contractor

M/s. Victory Construction Co. Ltd and photograph of the fence P. exhibit 23 (b) and tax compliance certificate for the year 2005-2006, P exhibit 24 to show that the plaintiff is a bona fide tax payer. The plaintiff submitted that it is seeking justice as the company had been dubbed a supplier of sub-standard materials, damages, and Kshs.4,544,850/= plus interest at commercial bank rate as the plaintiff had borrowed the money and has been paying it at bank interest and costs of the suit. It also sought for an order to compel the defendants to take possession of all the materials.

10. PW1 on being cross-examined testified that he was issued with a tender and LPO on 19.1.2006 P exhibit 12 (b) with a caveat to subject goods to KBS test by procurement entity. The

plaintiff testified that it had not supplied all items thus "W" insulators were not supplied. That all wires were supplied and before supply the plaintiff had them tested as per P exhibit 9 dated 11.8.2005. That 407 rolls of 25 kg each had been supplied to the defendants. The plaintiff complained to the defendants because the variance on testing was too wide and as such it stated it could not have been the same wire as sample was taken in plaintiff's absence. That the order for joint testing was issued by court on defendant's application and it was not necessary both be parties be present at the time of testing.

11. On PW1 being re-examined by Mr. Ngunjiri Learned Advocate for the plaintiff, PW1 testified that "VB 8" is a laboratory test from KBS submitted by themselves and the ones shown by defence were not submitted by the plaintiff. That annexure "V.B.8" was produced as P exhibit 9 (9) and that an annexure MFI 2 he stated the advocates expressed desire to be present urging the plaintiff was not represented and that parties were not required to be present during the testing. That their manufacturer's testing was on 31.3.2006 thus two months before delivery as per P Exhibit 20.

12. The Defendants relied on evidence of DW1 Rufus Mugambi Samuel. That the summary of the defence case is that the 1st to 4th defendants are executive/officials of the 5th defendant, which was a group of community which was registered as self help group. The defendants project was initiated in 2004 for people surrounding Lower Imenti Forest, thus 5 kilometres from the forest outwards with sole purpose of preventing damages of their farms by wild animals especially elephants. That after consulting with the donor M/s. Bio diversity conservation Programme, the defendants settled on the kind of fence. The role of the defendants were to manage the funds from the donor. The community had been called and they elected group official and also incorporated KWS Officials in the Management Committee and Foresters. That the group employed Mr. Kabiru Ikunyua as Project Manager. On the issue of tender DW1 stated he knew none of the tenders nor the manufacturers. That on the day of tender all communication were made through the Project Manager and that DW1 did not know of any company but two companies responded.

13. The defence produced bundle of exhibits dated 17.3.2014 as exhibit D1, referring to a letter dated 4.7.2005 in which the Project Manager had indicated payments would be made upon testing of the supplied materials by KBS and also setting out of the process of tendering and specification of the materials as per donor's specification referring to the plaintiff's P exhibit 4 (b) as what was prescribed by the donor on the wire. The contract was based on the donor's specification. The Project included people from the Upper Imenti as their fence was recommended as the best fence put in the Republic of Kenya and as they wanted something similar. They gave them names of some tender who they stated were suitable as they wanted similar wire which made the plaintiff unhappy with the way tender was put and used the defendants to change the terms causing delay as the officials needed to meet with the members. That there was delay on tendering however, the tender was finally opened and given to the plaintiff. That LPO on page 1 of exhibit D1 is similar to the specification given to the contractor.

14. The Project Manager was to receive the materials subject to their being subjected to testing as per LPO. The quantity of goods were 407 rolls of 25 kg. about 10 tons which the defendants received and stored at KWS stores at Kithoka in a small room and which were subjected to testing as per page 6 of exhibit D 7, by cutting a metre which was taken by Project Manager for testing. That there was second testing in which parties were supposed to be present. That none of the parties attended the testing, that the court order of 16.11.2006 shows testing was done in absence of counsel and parties and as such the defendants submitted they are not sure whether it was the wire supplied that was tested. The defendants prayed to be given another chance to have the wire retested before another party and upon specification

being met the claim would be paid urging the wires were stored at KWS and are under their supervision, stating the last time DW1 was there was in 2006. The defendants averred that their accounts were frozen by the Bank leading to stalling of the project. On the court's order dated 17.10.2006 defendants stated that it confirmed 407 rolls of 25 kg each, were supplied and some samples were retained by court and as such retesting can be done urging they do not object to settle the claim on unobjected items.

15. On cross-examination of DW1, he testified that he was not an expert in the undertaking by the defendants however, they wanted to use similar material to that of Upper Imenti Forest which the defendants did not have as a sample urging he does not know who supplied the material and whether they were paid for. That the two tenderer bidded adding that they only changed the name of competitor, putting general name with specification as the donor intended to make the change and that tender was won by both tenderers. The supply of wire was won by the plaintiff. That the defendant received demand letter from M/s Kiage and Company Advocates demanding payment of tender amount which was copied to the donor. That P exhibit 22 for Ksh.4,719,850/= and other charges. DW1 referred to P exhibit 17 which ordered them to pay the plaintiff's claim, however the defendant did not pay as according to the defendants the order for payment was unconditional. That the documents on page 2 of the defence documents is an invoice dated 19.1.2006 and LPO dated 19.1.2006. which contains amount to be paid. The defendants however disputed three items namely:- 407 Rolls, W-insulators and “**Hatari**” Sign however the defendants admitted they did not give specification of “W insulator” and “Hatari” sign and insisted they rejected the two items as being brittle as advised by a technician Mutoni, who was not called as a witness. That as per proceedings of 17.10.2006 the parties were ordered to take 5 pieces of wire at random and that defendants were satisfied with the samples, which they send jointly to Nairobi for testing that the defendants tested the wire through KBS without informing the plaintiff and in its absence and without explanation or authorization from the donor. That there was no single clause in the courts order of 17.10.2006 requiring presence of parties at the time of testing at University of Nairobi. The defendants admitted they were aware of testing by Khateshi Dharamshi and Company Limited on 31.3.2006 and that of University of Nairobi and admitted as well as the ones of Khatesh Dharamshi and Company Limited are well above the defendants requirement as well as that of of University of Nairobi. The defendants referred to page 16 of defence exhibit, a letter signed by DW1 at paragraph 3 in which the samples was agreed to be taken at random. On paragraph 24 (d) he stated he was in Nairobi and saw the wire being dissolved.

17. On re-examination of DW1 he testified he went to Nairobi to ensure the wire was the same as the sample and also to have the results. He stated the letter by donor advising them to pay was not correct as they were not involved in donor's meeting and that was against what DW1 was supposed to do. That the donor was forcing them to pay against their conditions. That the LPO is for Kshs.4,667,700/= whereas the defendant's is claim Ksh.,4,719,850/=. He stated he would have liked to see the same being cut. He further stated insulators were brittle and easy to break adding that intervention of the donor affected the tender. Though the defendants did not change the whole tender, the defendants arrived there before verification was to be done by KBS.

18. I have very carefully perused the pleadings, the evidence by parties and exhibits in support of parties rival positions, the submissions by the plaintiff was filed 28th October, 2015 whereas the defendants submissions were filed on 17th April 2016. The points for determination can be summarized as follows:

(a) Whether there was a breach of contract and by which party if so?

(b) Whether the defendants are liable on their personal capacity?

(c) What reliefs if any is the plaintiff entitled to?

19. Whether there was breach of contract and by which party, if so,? In the instant case and from evidence on record there is no dispute at all of the existence of a contract between the plaintiff and the Lower Imenti Naari Extension Self-Help Group through its officials the defendants herein. Further from the pleadings of both the plaintiff and the defendants, the evidence on record and documents produced by both parties in support of their respective positions there is overwhelming evidence in support of the

existence of contract for sale of goods under the **Sale of Goods Act Cap 31 Laws of Kenya and The law of Contract Act Cap 23 of Laws of Kenya**, by having fulfilled the elements of a contract, thus money consideration, offer, acceptance and an intention to form a legal relationship.

20. The agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. The parties are therefore subject to various obligations and rights under the **Sale of Goods Act**. The seller is under obligation to deliver goods in terms of the contract whereas the buyer is under obligation to accept the goods and make payment in terms of the agreement.

21. **Section 17 of the Sale of Goods Act** provides:-

“In the case of a contract for sale by sample there is:-

(a) an implied condition that the bulk shall correspond with the sample in quality;

(b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.

22. In the present case it was provided under the LPO dated 19.1.2006 P Exhibit 2 (b) that payment was to be done after testing of the goods by Kenya Bureau of standards to confirm if the wires met the desired conditions, meaning it was a sell by descriptions. **Section 15 of the Sale of Goods Act** provides:

“Where there is a contract for the sale of goods by description – there is an implied conditions that the goods shall correspond with description; and if the sale is by sample as well as description; it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.”

23. The defendants in this case committed themselves to payment for items delivered upon conducting tests, of their suitability and upon confirmation that they met contract terms. The plaintiff according to LPO was required to supply the following items:-

(a) 2.5 mm Hts plain wire 350 gm/mg zing coating 25 kg pollowah cast given 3, 561,250/=.

(b) W. Insulators 12,000/= and 28 totalling Kshs.270,000/=.

(c) Hatari signs (yellow plastics) 360 and 500 total to Kshs.137,500/=.

The plaintiff and the defendant in their evidence agreed that the tender provided only specification for item (a) above, thus the plain wire but none for item (b) thus W-insulators and (c), Hatari sign other than their being yellow in colour.

24. The defendants submitted the samples delivered by the plaintiff did not meet the required specification and did not correspond with the descriptions urging this being a sale by sample, the sample delivered failed to correspond with the desired specification referring to **Section 17 of the Sale of Goods Act** (quoted above).

25. The Defendants submitted the wire which was subjected to a tests by Kenya Bureau of Standards, do not meet the specifications however from the evidence of DW1, it is clear that the alleged test by defendants was conducted secretly and unilaterally. The plaintiff being a key player in this contract as a supplier was not thus involve in the testing nor informed of the same nor did it participate in the alleged testing before KBS. It is of great interest to note the requirement as set regarding testing as per LPO and one has to ask the reasons and the necessity of unilateral testing and secretly. One has to peruse the

evidence to understand why the defendants acted in way they did from the time of tendering to the time of granting the tenderer to the plaintiff. One can clearly see the defendants intention was to lay basis for rejection of the items supplied by the plaintiff. The plaintiff in his evidence stated that he had the 2.5 mm Hts plain wire with line coating of 350 gm/M² tested before delivery on 11th August 2005 by Kenya Bureau of Standards whereby the content of Zinc was found to be 397 gm/M² which was way above the tender specification as per P exhibit 16 (a) and again a test by the supplier Khetishi Dharamshi and Company Limited where contents of zinc coating was found to be 357.4 gm/M² and 374.7g/M² all above the tender specification of 350 gm/M².

26. The Court ordered the 407 rolls of plain wire to be tested to allay as fears on rolls not meeting the specification requirements and proceed to KWS Kithoka where the rejected goods are stored todate. The Court in its proceedings of 17th October 2006 upon proceedings to the site confirmed indeed 407 rolls of plain wire, the "**Hatari**" signs and W. Insulators were supplied. The parties also recorded a consent order on the same day as follows:-

“(a) The samples to be placed in one bag with 2 padlocks to be supplied by both parties.

(b) The advocates for the parties will accompany the samples in the jointly sealed bag to the offices of M/s. Securicor (K) Ltd (G4S Ltd) in Meru and collected jointly in Nairobi at the same offices on 18.10.06.

(c) The samples to be tested at:-

(i) the Industrial Research and Consultancy Unit (IRCU) at the University of Nairobi and

(ii) Department of Chemistry Laboratories at Chiromo Campus.

(d) The original results from both institutions to be sent directly to the Deputy Registrar High Court of Kenya at Meru P.O.Box 118, Meru with copies to the advocates for the parties.

(e) Costs of the testing and transportation of the samples and the reports to be shared by both parties equally.”

27. It is clear from the consent order parties or their counsel were not required to be present at the time of testing. The results were to be forwarded to court directly. The two tests were conducted at college of Architecture and Engineering at Industrial Research and Consultancy Unit and results of samples on zinc content were found to be far beyond the required tender specification of 350 as it ranged between 374.7 gm/M² – 417.8 gm/M². On second test conducted at Department of Chemistry of the same University the zinc content of the wire ranged between 353.9 gm/M² – 409.35 gm/M².

28. The defendants submitted that by virtue of letter dated 4th July 2007 the condition of wire of CDTF – BCF were clearly specified under paragraphs 5 of the letter thus:-

“5. While issuing order for wire and other products the suppliers should be notified in writing that payment will only be done after the delivered products have been testified by KBS have been compiled.”

The defendants contention is that the primary conditions contained in the LPO, thus the contractual testing agency “KBS” results showed that wires did meet the required specification justifying rejection of the materials and non-payment. The test by “KBS” was carried out secretly and unilaterally and without involving the plaintiff who was the supplier of the material. There was need to involve the plaintiff to ensure the sample of wire subjected to testing by “KBS” was the same wire it had supplied that failure negated the defendants effort to have the wire tested as agreed. This failure caused same doubts whether it was the same wire which “KBS” received to carry on its tests on “KBS”. Further the parties consent of 17.10.2006 to involve other bodies to carry out tests changed the parties contractual testing by a group from “KBS” to the now consented bodies. The parties are therefore bound by their consent of 17.10.2006

as far as testing of the material is concerned and the defendants are wrong in their attempt to rely solely on the unilaterally obtained “KBS” testing and if the test of “KBS” is the ones to be relied upon the plaintiff had also 6 tests from “KBS” which he had done unilaterally, Showing the wire met the requirements set out in the LPO.

30. Having considered the evidence and various tests undertaken which confirmed that the zinc coating in the 407 rolls of wire of zinc content was over and above the tender specification of 350 gm/M² of the samples picked randomly by both the defendants and the plaintiff at KWS Kithoka station I am satisfied that the plaintiff has on balance of probability proved the materials supplied thus the 407 rolls of high tensile wire met the tender specification. I further find and hold the defendants were therefore not justified in refusing to accept the same and in refusing to honour or pay LPO. It is of significant to note the donor through BCP directed the defendants to pay the plaintiff's claim of Kshs.4,544,850/= following a demand notice by the plaintiff's counsel vide a letter date 24th April 2006, but have declined to do so even upto date. I find the plaintiff have performed his part as the contractor but the defendants in breach of the contract insists on not paying even when the donor ordered them to pay. They are in breach of the contract and I find no basis in their refusing to pay the local purchase order.

31. Whether the defendants are liable in their personal capacity? A quick perusal of the plaintiff's plaint under paragraph 2 of the plaint reveals that the defendants are sued in their personal capacities and as Chairman, vice-chairman, secretary and treasurer of Lower Imenti and Naari Fence Extension Self-Help Group, and Community-Based Organization, recognized and registered as such with the Ministry of Culture and Social Services. Further it is pleaded under paragraph 4 of the plaint that at all material times the defendant were engaged in a community-based initiative, funded by the European Union, to undertake the fencing off of community members around the Imenti Forest in Meru against elephants that stray from the aforesaid forest while also conserving the indigenous forest and diverse wildlife and ornithological species in situ. That under paragraph 5 of the plaint it is averred the funds donated by European Union for the project are disbursed to the defendants by the said European Union and Government of Kenya through the Community Developments Trust Funds, and disbursed by the Biodiversity Conservation Programme (BCP) while the defendants operate and are signatories to Bank Account No. 281667033 at the Kenya Commercial Bank, Meru Branch in which they bank the said Funds.

32. The defendants in their defence under paragraph 4 categorically averred that they represented local communities comprising of about 500,000 people, the Forest Department and Kenya Wildlife Services.

33. Upon perusal of the pleadings by both the plaintiff and the defendant it can be concluded that the defendants in their dealings with the plaintiff were not pursuing personal interest but representing the interest of the community through an incorporated association thus Lower Imenti and Naari Extension Self Help Group. The plaintiff in its evidence did not call evidence to prove that the defendants were in actual fact pursuing their personal interest and were acting in their personal capacity when dealing with the plaintiff. The evidence on record point to the fact that the tender was advertised under the name of the Lower Imenti and Naari Fence Self- Help Extension Group, that the LPO dated 19th January 2006 was issued by the same Self Help Group, that all correspondences exhibited by the plaintiff were indeed addressed to the Self- Help group that delivery notes were made to the same self help group and further that there was no direct or personal capacity between the plaintiff and the defendants as such but in their official capacity as representative of the Self-Help Group.

34. What is the law regarding the capacity to sue and to be sued by unincorporated organization? **In the case of Voi Jua Kali Association V. Sange and Other (2002) eKLR 474** it was stated thus:-

“A Society not being a legal person cannot sue or be sued or be sued at its name it has to sue or be sued through its officials and the officials have to be named.”

That position was reinforced in the case of:- **Nairobi High Court Petition No. 71 of 2016 Christine Joshi Jerome and 3 Others Vs Kenya Swimming Federation and Others (Unreported)** where the Court addressed itself thus:-

“A registered but unincorporated Society has no legal person/with capacity to sue or be sued.”

35. A Self-Help Group representing a Community through the representation by its officials remains an unincorporated organization, it is not a legal entity and as such it cannot sue or be sued, however the officials of the organization or the group may sue and be sued of the Self- Help group acts or omissions and/or properties. Any action by or against officials should be considered as a representative of the member's interests my view is that the officials of unincorporated associations or organizations are deemed to be acting in a representative capacity and as such they do not bear any personal liability. Judgment that may be entered as can only be entered against the officials as representatives of the group as the assets being protected and which can be attached or seized or realized in a judgment would be the groups or association's assets and not personal assets of the officials. The officials on the other hand cannot appropriate the group's assets for personal use but are bound to ensure the group honours its obligation such as meeting and/or paying debts and as such I find that they cannot take personal responsibility of group's liability neither can they claim they cannot meet and/or ensure the group's obligation and duties to others are not be discharged by the officials when the law so demands. I therefore find and hold advised that the defendants herein are not liable in their personal capacity either jointly or severally but rather as officials of the Self Help Group in ensuring the group honours the Court's judgment if the same is against the Self-Help Group.

36. What reliefs if any is the plaintiff entitled to? The plaintiff under prayer (a) of the plaint prayed for Ksh.4,544,850/= plus interest at commercial rates from 28.2.2006 until payment in full. The claim for Ksh.4,544,850/= was specifically pleaded as special damages but for the plaintiff to succeed it is also required to strictly prove the same. From the above it has been shown and demonstrated that on 15th February 2006, the plaintiff delivered all materials tendered for save W-Insulators and Porcelain Strain insulators, raised an invoice of Ksh.4,061,700/= and prepared a delivery note exhibit 13 (a) and 13 (b), that the plaintiff further delivered 7300w insulators and 1500 porcelain strain insulators on 28th February as per P exhibit 15 (a) and 15 (b) valued at Kshs.483,150/=. The defendants received the aforesaid goods and has since been in physical possession thereof upto and including 29th March 2006 when the defendants purported to reject the same. I therefore find that the defendants stayed with the supplied goods for a period of more than 1 ½ months before raising objection and further more on testing of the goods following a consent order of 17.10.2006, the same has been found to meet the LPO's requirements, the plaintiff is in my view entitled to be paid Ksh.4,544,850/= as per the invoices issued to the defendants. The plaintiff specifically pleaded his claim and strictly proved the same. I find for the plaintiff in respect of prayer (a) of the plaint.

37. On the issue of interest the law is that where a party has been deprived the use of money due to a wrongful act of another, he ought to be compensated by an order for interest on principal sum adjudicated. Under **Section 26 of the Civil Procedure** it is provided:-

“”

38. In the case **Jane Wanjiru Gitau Vs. Kenya Power and Lighting Company Limited (2006) eKLR** Hon. Mr. Justice J.B. Ojwang, as he then was, quoted with approval the decision of Law **J.A. in Premlata Vs Peter Musa Mbiyu [1965] EA** where he remarked:-

“In both these cases the successful party was deprived of the use of goods or money by reasons of a wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

40. In the present case the defendants received the plaintiff's goods and even after the same having been found to meet required specifications and even after the donor having advised the defendant to pay, they refused to do so for no apparent reason. The plaintiff has been deprived the use of the sum of Kshs.4544,850/= which the defendants have wrongfully required to pay. I therefore find no reasons why the plaintiff should be deprived interest. I find the plaintiff is entitled to be paid interest on that amount from the date of delivery of the items thus 28th February, 2006 until payment in full.

41. On mandatory injunction to compel the defendants and their servants agents to take delivery and make payment for the 4700 insulators ordered from and ordered for delivery by the plaintiff. The defendant through the LPO dated 19.1.2006 P exhibit 12 (b) ordered for supply of goods and the plaintiff proved delivery through delivery notes dated 15.2.2006 and 28th February 2006 P exhibit 13 (b) and P 15 (b) thus the the items which remained for delivery out of the 12000W insulators ordered were 4700W insulator worth Ksh.13,600/=. In the case of **GATTO ESTATES LIMITED Vs. ROSA VAN DYKT COMPANY LIMITED (2013) eKLR** the Court addressed itself thus:-

“Where the injury done to the Plaintiff cannot be estimated and sufficiently compensated for by damages or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, or where the injury complained is in breach of an express agreement the court will exercise its jurisdiction and grant a mandatory injunction even though the expense and trouble of obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages.”

At paragraph 950 it is stated:-

“A mandatory injunction may be granted even though the act sought to be restrained has been nearly or entirely completed before the action is begun, but it will only be granted in such cases to prevent very serious damage The court may even order a building to be pulled down even though it has been erected and completed and works carried on within it for some months without complaint, but will not readily do so.”

42. The plaintiff in its plaint avers that it was ready willing and able to delivered the 4700 W insulators worthy Kshs.131,600/= at the time the defendants rejected the goods already delivered, forcing the plaintiff not to incur costs on transportation of the goods to the defendants but preferred filing the suit for remedies for breach of contract the defendants action was in my view breach of an express agreement between themselves and the plaintiff. The express agreement consisted of placing an order of purchase and supply of goods to be paid upon delivery as is the order of business.

43. The defendants submitted that the case **Gatto Estates Limited Vs Rosa Von Dyke Company Limited** (Supra) relied upon by the plaintiff's is unrelated to the case in issue as circumstances are different in that the contract was a sale by sample agreement unlike the above quoted case. I have carefully considered the decision in the aforesaid case and do not agree that the case is unrelated as submitted by the defendants. The case deals with an issue of issuing mandatory injunction which is an issue on this matter. I find it relevant and related to the present case. I find the case to be applicable.

44. I therefore find and hold that the defendant should be compelled to complete their end of the bargain and that the plaintiff is entitled to the purchase price of the insulators ordered from by the defendants by the some of Kshs.131,600/= which the defendants wrongfully refused to pay is therefore entitled to be paid interest on the amount from the date of delivery of the items thus 28th February, 2006 until payment in full.

45. The plaintiff claims general damages on the basis that the defendants were in breach of the contract resulting from loss of business investments as well as inconvenience and damage in reputation, urging that it is the nature of business that a supplier depended on cash flow to make profit from sales. That other projects as the plaintiff stated due to lack of finances which were expected to result from payment by the defendants. That the plaintiff was also inconvenienced by the failure by the defendants to honour their word as had to recorgnize by business plans to cover the mishaps. That the plaintiff's business also suffered disrepute at the allegation of supplying substandard goods. **Section 50 of the Sale of Goods Act** provides:

“(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an acting against him damages for non-acceptance.

(2) The measure of damages I the estimated loss directly and naturally resulting, in the ordinary

course of events, form the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times where the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.”

46. Section 35 of the Sale of Goods Act provides:-

“Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.”

The defendants contend that the plaintiff is not entitled to damages as the defendants had no reasonable opportunity of examining the goods for the purpose of ascertaining whether they were in conformity with the contract, that the plaintiff did not provide proof that it is entitled to damages and urged the plaintiff was invited to take out the remedy naturally available to it under the **Sale of Goods Law**, thus to take the goods, but adamantly referred to do so. To the contrary the plaintiff gave the defendants opportunity to examine the goods supplied for the purpose of ascertaining their conformity with the contract and after consent to the testing of the good, the goods were confirmed were meeting the specification as per LPO.

47. In the case **Francis Namatoi Obongita Vs Cocker Printers and Designers Ltd [1984] eKLR**, where the court was considering a case for breach of contract, outlined the principle concerning granting of general damages for breach of contract quoting with approval the case of **V.R. Chande and Others Vs. E.A. Airway Corporation [1964] E.A. 78** where the court held thus:-

“The general rule as to the quantum of damages to be awarded for breach of contract was stated by ALDERSON, B in Hadley Baxendale (1885) 9 Ex 341 (156 E R 145 at P. 151) in the following terms:-

“Now we think a proper rule in such a case ad the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as my fairly and reasonably be considered either arising naturally i.e. according to the usual course or things from such a breach off contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it.”

48. In the case of a **Mehta and Company Limited Vs Standard Bank Limited [2014] eKLR** in which court was considering a case of breach of contract and injury to company reputation in declaring that the plaintiff had issued bouncing cheques, the court found that a global sum of Kshs.3,000,000/= is a reasonable compensation for breach of contract and disrepute to credit and reputation of the plaintiff.

49. The defendants relied on the case of **Brite Printers (K) Limited and Another Vs. Barclays Bank of Kenya Ltd [2014] eKLR** and submitted that the plaintiff failed to honour its part of agreement by delivery goods that did not match their description. I find the authority not relevant and applicable as per already found the goods mentioned the specification required. I further find that the plaintiff is entitled to be awarded general damages for breach of contract and for non acceptance of goods leading to loss of business, disrepute to the plaintiff, prayer likely to have been made and inconveniences.

50. The upshot is that the plaintiff's succeeds in this case and proceed to enter judgment in favour of the plaintiff against the Self-Help Group which is sued through the (officials) as defendants herein as follows:-

(a) The plaintiff be paid Kshs.4,544,850/= being special damages.

(b) An order mandatory injunction compelling the defendants and other agents or agent as

official of the self-help group to take delivery of and make payment for the Kshs.4700 insulators ordered from and recorded for delivery by the plaintiff monthly Ksh.131,600/=.

(c) Deliberately post-poning or delaying the opening of the quotations from 10.00 a.m. to 2.30p.m. Calculating thereby to wear the patience of the bidders and gain room for manipulation.

(d) Kshs.2,400,000/= General damages with interest from date of judgment.

(e) Costs of the suit at High Scale with interest.

(f) Interest at court rate on and (f) (a) and (b) from 28.2.2006 till payment in full.

(g) The second ground as per conservatory orders issued by this court on 15th June 2006 order was to require defendant's funds bound at Kenya Commercial Bank, Meru Branch in Account No. 281667033 pending the hearing and determination of this suit be released to the plaintiff the decretal sum awarded by the court in this matter.

DATED AND SIGNED THIS 13TH DAY OF DECEMBER, 2016.

J.A. MAKAU

JUDGE

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF DECEMBER, 2016.

IN OPEN COURT AND IN PRESENCE OF:

M/S. MURIUKI NGUNJIRI ADVOCATE FOR PLAINTIFF

M/S. MICHUKI AND MICHUKI ADVOCATE FOR DEFENDANTS.

COURT CLERK:

1.

2.

BY: (F. GIKONYO)

JUDGE

ON BEHALF OF:

J.A. MAKAU

JUDGE