



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 163 OF 2014**

**KONNEXION SYSTEMS LIMITED.....PLAINTIFF**

• **VERSUS -**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....DEFENDANT**

**RULING**

1. The application before the court sought the following two substantive reliefs;

*“2. The Defendant by itself, agent, servants, employees be directed to accept delivery of 28,000 Branded Solar Lanterns supplied by the plaintiff pursuant to a Local Purchase Order issued by the Defendant on 18<sup>th</sup> February, 2013, pending the hearing and determination of this application and/or the suit.*

3. *The Defendant be ordered and/or directed to remit the storage charges of the solar lanterns so far incurred by the plaintiff and subsequently thereafter do pay the said storage charges as and when due”.*

2. It was the plaintiff’s case that the **INDEPENDENT ELECTIONS AND BOUNDARIES COMMISSION (IEBC)** advertised a Tender which entailed the delivery of 28,000 branded Solar Lanterns to the IEBC. The said lanterns were for use at the General Elections.

3. The plaintiff, **KONNEXION SYSTEMS LIMITED** was the successful applicant for the tender to supply the solar lanterns.

4. In order to be able to purchase the lanterns, and then supply the same the plaintiff procured a loan of Kshs. 107,800,000/- from a local bank.

5. Having purchased the Lanterns, the plaintiff tried to hand over the same to the IEBC. However, the IEBC had declined to take delivery of the Lanterns.

6. The plaintiff was therefore compelled to store the Lanterns at a godown. As at April 2014, the plaintiff’s bill for the storage charges at the godown, was already Kshs. 900,000/-.

7. As the Lanterns were purchased at the request of the IEBC, the plaintiff wants this court to compel the IEBC to take possession of the same.

8. The plaintiff emphasized that the Lanterns were each marked with the IEBC branding. Therefore, it was not possible for the plaintiff to mitigate their losses because the plaintiff cannot sell the Lanterns to any other person.

9. In the event that the defendant was not compelled to receive the Lanterns, the plaintiff fears that it will lead to a situation in which the plaintiff would become bankrupt. The reason why the plaintiff

- would become bankrupt is the fact that it continues to pay storage charges at the warehouse where the Lanterns were being stored.
10. Mr. C.N. Kihara, the learned advocate for the plaintiff urged the court to take into account the special circumstances prevailing in this case, and to therefore grant the reliefs sought.
  11. But Mr. Lubullelah, the learned advocate for the Defendant put forward a strong opposition.
  12. He first pointed out that the relationship between the parties herein was contractual. Therefore, in his considered view, the normal rules which govern contracts would also apply to this case.
  13. As far as the defendant was concerned, the remedies for breach of contract were well known. The defendant also made it clear that the reliefs for breach of contract were only available to the claimant at the stage when the case had been concluded.
  14. By asking the court to order the defendant to receive the lanterns at this stage, was described as the equivalent of compelling the defendant to comply with the terms of a contract whose terms had not yet been proved through evidence.
  15. The defendant submitted that the court would need to establish whether or not there had been substantial compliance with the terms of the contract.
  16. If the court came to the conclusion that one or the other party was in breach of the contract, appropriate orders and reliefs would follow.
  17. To the extent that the Local Purchase Order (LPO) was exhibited by the plaintiff, the defendant invited the court to note that the lanterns ought to have been delivered to the defendant by 20<sup>th</sup> February 2013.
  18. The defendant emphasized that the plaintiff was well aware that the lanterns were for use during the General Elections on 4<sup>th</sup> March 2013.
  19. Therefore, when the plaintiff tried to deliver the Lanterns in June 2013, they were acting in contravention of the contract.
  20. The defendant expressed the view that it cannot be compelled to accept the Lanterns long after the elections had taken place, whereas the Lanterns were supposed to be used during the elections.
  21. In effect, the defendant insisted that there were serious triable issues which arose from the Defence.
  22. The issues appertain to the question as to when title to goods pass on to a purchaser. In particular, the defendant says that when a purchaser has neither paid for nor received goods, then title cannot have passed to it.
  23. The defendant submitted that if the court were to compel it to receive the Lanterns at this stage of the case, the court would have assisted the plaintiff.
  24. Considering that ours is an adversarial legal system, the defendant told this court to desist from assisting either of the parties.
  25. In reply to the defendant's submissions, Mr. C.N. Kihara, the learned advocate for the plaintiff, submitted that if the defendant was ordered to receive the Lanterns, that would not constitute unfavourable treatment by the court.
  26. As far as the plaintiff was concerned, an order compelling the defendant to accept the Lanterns would be nothing more than telling them to conduct their affairs in a manner which did not constitute an abuse of the trust vested in them.
  27. Even though the relief being sought was unique, the plaintiff submitted that the circumstances prevailing called for it.
  28. The act of refusing to accept the goods was described as a breach of the contract between the parties.
  29. I have given due consideration to the submissions made by both parties.
  30. The starting point is that both parties acknowledge the existence of a contract between them.
  31. It was a term of that contract that the plaintiff would sell to the defendant 28,000 Solar Lanterns.
  32. Both parties appear to agree that the said Lanterns were intended for use during the General Elections that were held in Kenya on 4<sup>th</sup> March 2013.
  33. According to the defendant, the plaintiff intimated to the defendant that the Solar Lanterns would be delivered within the time stipulated on the Local Purchase Order (LPO) dated 18<sup>th</sup> February 2013.
  34. However, the two parties are not in concurrence about the requirement for the Lanterns to be branded with the initials IEBC.
  35. An initial look at the contract documents does not support the plaintiff's contention, that the Solar

- Lanterns had to be branded.
36. A perusal of the Local Purchasing Order which was exhibited by the plaintiff indicates that the 28,000 Lanterns were due to have been delivered by the 20<sup>th</sup> of February 2013.
37. On 14<sup>th</sup> August 2013, Messrs Sena & Company Advocates wrote to the defendant expressing surprise that the defendant had declined to accept delivery of the Lanterns. According to the plaintiff's lawyers, their client was well aware that the Lanterns were intended for use during the 4<sup>th</sup> March 2013 General Elections.
38. However, the plaintiff asserted that it, nonetheless, mutually agreed with the defendant that the Lanterns could still be utilized at future elections.
39. It is noteworthy that the plaintiff had written to the defendant on 5<sup>th</sup> June 2013, informing the defendant the Lanterns were ready for delivery.
40. On a *prima facie* basis, the plaintiff was ready to deliver the Solar Lanterns, more than three (3) months after the General Elections at which the Lanterns were to be used in.
41. It would therefore appear to me, at this interlocutory stage, that the onus was on the plaintiff to prove the variation of the date of delivery, from the one expressly spelt out on the Local Purchasing Order which the plaintiff has produced before this court.
42. I do appreciate that if the Lanterns are branded with the initials "IEBC", it may be almost impossible for the plaintiff to sell them to any other person or persons, with a view to mitigating their losses.
43. I also appreciate that for as long as the plaintiff continues to store the Lanterns, the plaintiff would continue to incur storage charges.
44. Considering the fact that the Lanterns were worth a tidy sum of Kshs. 107,000,000/-, the loss which the plaintiff may incur if it did not sell the Lanterns must be colossal. That is why they ask this court to tell the defendant to accept the Lanterns. Even if the defendant did not immediately pay for the lanterns, the plaintiff would then not be obliged to pay any more money for the storage of the Lanterns.
45. On the other hand, if the defendant is compelled to take delivery of Lanterns which they did not need at the moment, they would have been forced to help a party whom they deem to have failed to honour his part of the bargain.
46. Having given due consideration to both points of view, I note that the primary relief sought in the plaint is as follows;

*"(a) Permanent Mandatory Order directing that the Defendant do take delivery of all the aforesaid 28,000 branded Lanterns and to make use of them as pledged, discharging its Constitutional and Statutory duties".*

47. I have described that as the primary relief because to my mind, the prayer for the payment of Kshs. 120,710,332/- to the plaintiff would only flow from the receipt of the Lanterns by the defendant.
48. It is clear that the plaintiff is seeking, through the present interlocutory application, the final order in the plaint.
49. As this moment in time, the plaintiff has not demonstrated any reason that could warrant the grant of a final relief before the parties are accorded an opportunity to put forward their respective cases. Therefore, if this court were to compel the defendant to accept the lanterns, that may prejudice the defendant.
50. The acceptance of the lanterns would not simply be an act of the defendant conducting itself in a manner that was consistent with the trust vested in the IEBC.
51. Whilst that is a position which was arguable, it is equally possible that if IEBC accepted Lanterns now, when they had intended to use the said Lanterns at the 3<sup>rd</sup> March 2013 General Elections, that may be deemed to constitute an abuse of the resources entrusted to them by the people of Kenya.
52. In the final analysis, I hold that the Defence raises triable issues. In particular, the issue is about whether or not the plaintiff was in breach of the contract. Based on the Local Purchasing Order exhibited by the plaintiff, the onus is upon the plaintiff to prove that it performed its part of the contract. At the moment, unless other evidence is led by the plaintiff, it appears, on a *prima facie* basis, that the plaintiff did not comply with the strict time-lines for the delivery of the solar

lanterns.

53.I therefore find no merits in the Notice of Motion dated 28<sup>th</sup> April 2014. It is therefore dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this July day of 22<sup>nd</sup> 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Wilson for the Plaintiff.

Mutubwa for the Defendant.