



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)**

**Civil Case 416 of 2010**

**TEKNICAL EQUIPMENT**

**INTERNATIONAL LIMITED.....PLAINTIFF**

**V**

**NATIONAL WATER CONSERVATION &**

**PIPELINE CORPORATION.....DEFENDANT**

**J U D G E M E N T**

**1.** The Plaintiff is a Limited Liability Company incorporated in the Republic of Kenya under the Companies Act (Cap 48 Laws of Kenya) while the Defendant is a State Corporation established under the State Corporation's Act (Cap 446) by legal Notice, Number 270 of 1998.

**2.** The Plaintiff instituted this suit by way of a Plaint dated **14<sup>th</sup> June 2010** and filed in Court on the following day. The Plaintiff prays for judgment against the Defendant for the sum of Kshs. 7,174,000/= plus interest at commercial rates.

**3.** The background of the matter is that on 21<sup>st</sup> April 2008, the defendant through their Managing Director is alleged to have ordered for 6,600 square meters of heavy duty Telford Liner material for emergency

dam lining, valued at Kshs. 5,874,000/= together with a welding machine worth Kshs.300,000/=. On that very day, the Plaintiff alleges to have delivered the aforesaid goods and the Defendant duly signed receipt vide Delivery Note Number 0201.

4. The Plaintiff vide an Invoice Number 0019 dated the 3<sup>rd</sup> day of September 2008 invoiced the Defendant for the sum of Kshs. 7,161,840/= (VAT Inclusive) which invoice has not been settled to date.

5. The Defendant controverted the Plaintiff's claim by filing a Defence dated **12<sup>th</sup> July 2012** and filed in Court on even date. The Defendant denies the Plaintiff's claim that its Managing Director ordered a heavy duty Teflon bed liner of 6,600 square meters valued at Kshs. 5,874,000/= together with a welding machine worth Kshs. 300,000/=.

6. According to the Defendant, if there was an emergency to warrant a direct sourcing of the dam liner, the same would have been done with the approval of the tender committee in line with the provisions of the Public Procurement and Disposal Act. The Defendant avers that the approval was never sought and that there was no emergency that would have dictated the use of the method of procurement alleged to have been used.

7. The Defendant contends that since the Plaintiff was not shortlisted as a supplier in the year 2007/08, then the Plaintiff was not capable of entering into any contract with the Defendant. If any contract was entered into then the same was void for want of compliance with the mandatory provisions of the Public Procurement & Disposal Act 2005. The Defendant further contends that in the absence of a formal contract in the form of an LPO, it follows that there was no valid contract between the parties

8. The hearing commenced on 21<sup>st</sup> February 2013 with the Plaintiff calling one witness, Mr. Michael Muthee, the Managing Director of the Plaintiff Company. He relied on his witness statement filed in Court on 30<sup>th</sup> July 2012. He reiterated the claim in the Plaint that on 21<sup>st</sup> April 2008, the Managing Director of the Defendant asked for the delivery of 6,600 square meters of heavy duty Telford Liner material urgently. PW 1 testified that when he asked the Managing Director about the Local Purchase Order he was told it would be processed later. The Plaintiff delivered the goods on the same day and the Defendant accepted delivery. On the issue of the Local Purchase Order, it was PW 1's testimony that he accepted to deliver the goods without a Local Purchase Order due to the Plaintiff's long association with the Defendant.

9. On cross-examination, the Plaintiff testified that he was aware that he should have followed a better channel in regard to the delivery of the goods, but the time was not available. However, it was also PW 1's testimony that there was evidence that the supply was made since the delivery was received. On the

issue of whether the Plaintiff was pre-qualified as a supplier at the material time, PW 1 testified that he was not sure about the same. PW 1 further testified that the Plaintiff did not give a quotation because they had supplied to the Defendant several times and the Defendant knew their rates.

**10.** PW 1 was referred to the delivery note dated 21<sup>st</sup> April 2008 which he clarified was not stamped but that the delivery note stated that the goods were received in good condition. PW 1 concluded by stating that the managing Director of the Defendant asked for materials which the Plaintiff supplied and that he was not aware where the Defendant took the goods and what they were used for.

**11.** On re-examination, PW 1 testified that the Plaintiff must have been pre-qualified to supply the materials in question and that no issue was ever raised about the Plaintiff's qualification as a supplier. He further testified that when the Plaintiff demanded the claim herein the Defendant replied that they owed the Plaintiff **Kshs. 425,209/=**.

**12.** The hearing proceeded on **12<sup>th</sup> March 2013** with the Defendant opening its case. The Defendant called four witnesses. The first witness, DW 1, was the Chief Procurement Officer, John Musyoka. He adopted his witness statement filed on 12<sup>th</sup> July 2012. He testified that where there was an emergency procurement, there had to be an approval of the tender committee. He also testified that in such a case it had to be shown that the urgency was such that no other option for sourcing the goods could be used. He further testified that in the present case, the procedures as required by law were not followed. It was DW 1's testimony that there had to be a contract either by way of Local Purchase Order or an agreement. It was also his testimony that the procedures were necessary for the purposes of processing payment.

**13.** It was further DW 1's testimony that the Plaintiff's name did not appear in the Defendant's pre-qualification list of 2007/08. He testified that the only time the Defendant could use unprequalified contractors was when such names had been proposed and the same had to be approved.

**14.** On cross-examination, DW 1 testified that he was not working with the Defendant at the time the current procurement was done. He confirmed that Engineer Muchemi was the Managing Director at the material time. He further testified that he had no problem with the delivery note and the invoice save that it was suspicious that the delivery could have been made on the same day as the order.

**15.** On re-examination the witness testified that the delivery note was suspicious as it was not stamped. It was his testimony that he had not seen any documents that could be used to support the Plaintiff's claim.

**16.** DW 2 was Patricia Mumo kimuli, an accountant with the Defendant for the last thirteen (13) years. She adopted her witness Statement filed in Court on 12<sup>th</sup> July 2012. She testified that in December 2009 the Defendant's administration block was gutted down by fire and the Defendant lost all its records. Thereafter, the Minister for water called all suppliers with pending bills. It was DW 2's testimony that she was not aware of any document received from the Plaintiff. In her opinion, the Plaintiff's letter of demand dated 11<sup>th</sup> December 2009 was just a general letter.

**17.** DW 2 further testified that vital to any payment, an Local Purchase Order must have been given to the supplier of goods. She stated that if the Plaintiff had made a claim supported with documents she would have paid without question. It was her testimony that an Local Purchase Order would have authenticated the claim. She also testified that as an accountant she had to follow procedure even where there was an emergency.

**18.** On cross-examination, DW 2 testified that she was not aware how the procurement was made but that it was possible for an emergency procurement to happen. She further testified that even in the case of emergency procurement, documents had to be provided. DW 2 acknowledged the letter written by Lydia Wanja, admitting that the Defendant owed the Plaintiff a certain sum of money. She testified that the information therein must have come from the records and that the letter was a response to the demand letter dated 7<sup>th</sup> December 2009.

**19.** On re-examination, DW 2 clarified that the response to the demand letter was a general response and not specific to the letter of demand. DW 2 went ahead and testified that it was mandatory for an invoice to refer to the order number which was not the case in the current matter. It was also mandatory for a delivery note to bear the corporation's stamp and the same be received by an officer of the corporation. In the current case, DW 2 testified that the delivery note was not stamped and the signatory was not clear.

**20.** The third witness was Engineer Joseph Kariuki Ngare. He testified that he had worked with the Defendant for over seven (7) years and was in charge of dams. He further testified that there could be no emergency requirement for dam liners unless the dam was endangering lives. He also testified that there would be no emergency for a welding machine.

**21.** It was DW 3's testimony that in the event that there was an emergency for the said materials, due process had to be followed and the supplier had to be pre-qualified. It was further his testimony that at the material time, the Defendant had dams in Mandera District; Guba and Chiroko. DW 3 inspected the dam in Chiroko when it was complete and it was his testimony that there was no need for an emergency. He testified that he was never faced with a situation where he would require a welding machine and a dam liner.

**22.** On cross-examination, DW 3 testified that he did not know how the procurement was carried out. He clarified that there was no emergency requiring the supply of a welding machine or the dam liners. He testified that in 2007 to 2008, the Defendant did 54 projects, all co-ordinated by him.

**23.** The fourth and last witness was Joseph Gitonga. He relied on his statement dated 4<sup>th</sup> December 2012. He testified that there was no emergency since everything was planned. He explained that by the time a project was commissioned every detail had been taken care of so that there could be no emergency need to supply any further materials.

**24.** The parties filed their written submissions which I have considered in light of the claim and evidence.

**25.** The Parties filed a lengthy statement of agreed issues containing fourteen issues for the Court's determination. However, having carefully considered the pleadings this Court has come to the conclusion that the only issue for determination is whether the Plaintiff has proven its claim on a balance of probability.

**26.** The Plaintiff avers that the basis for the delivery of the materials was an urgent phone call from the then Managing Director of the Defendant Corporation. The said Managing Director was not cross-examined at least for purposes of verifying that there was such a call. How then can this Court ascertain the truth of the same? The money involved is colossal and a mere phone call is not sufficient to lay the basis of such a claim.

**27.** On the other hand, the Defendant has contended that there was no emergency to warrant the supply of the said materials. The Defendant further contended that there was no formal contract between the parties and that the Plaintiff was not a pre-qualified supplier in the financial year of 2007/08 as contemplated in the Public Procurement and Disposal Act.

**28.** From his testimony, PW 1 was not sure whether the Plaintiff was pre-qualified or not. He also admitted that he was not issued with the Local Purchase Order and therefore there was no formal contract. It was testified on behalf of the Defendant that no payments could be made without supporting documentation.

**29.** The above notwithstanding, it is my considered view that if the Plaintiff proves that an order was made and there was delivery, the aforesaid contentions would not negate its claim. The Defendant would still be liable. Instead, in the event that the Defendant did not follow proper procurement procedures, the

Defendant would have recourse against the responsible officers.

**30.** While the Plaintiff maintains that the materials were indeed supplied on the same day they were ordered, no substantial evidence has been tendered to prove delivery. The Defendant's witnesses seemed not to be aware of the procurement in question. They also could not confirm that the materials were delivered.

**31.** The Plaintiff's case is that there was delivery by virtue of delivery note number 0201 dated 21<sup>st</sup> April 2008. The said delivery note is disputed by the Defendant as suspicious for reasons that it was not stamped and the signatory was not clear. I have looked at the said document and indeed it is not stamped.

**32.** In addition the signatories of the said document cannot be ascertained. In the circumstances, the authenticity of the said delivery note is questionable and cannot be admitted as evidence before this Court.

**33.** In my very carefully considered Judgment, the claim by the Plaintiff is not for a small sum of money. It is for over Kshs.7.0 million. Both parties understand that a contract securing that kind of money cannot in any way be vague. Such kind of contract must be clearly evidenced by either one or all of the following factors:-

*(i) An Local Purchase Order,*

*(ii) An Agreement,*

*(iii) A clear discernible pattern of customary trade practice between the parties.*

*(iv) Clear witnesses from both parties to the oral arrangement.*

**34.** In this case the alleged agreement is only evidenced by a delivery note which is not stamped by the Defendant and whose signatories are not clear, and which, in any event, is disputed by the Defendant. There is actually no valid document before the court to support the Plaintiff's claim.

**35.** I believe the Defendant's four witnesses. All the witnesses are clear that there was no emergency to warrant a verbal contract over the telephone for a sum of over Kshs.7.0 million. I also agree with the defence witnesses that even in emergency situations documents are necessary to sustain a claim. I particularly accept the testimony of D.W. 3 Engineer Joseph Kariuki Ngare who testified that there could be no emergency requirements for dam liners unless the dam was endangering lives. There was even less emergency for the supply of a welding machine. In my view, the Plaintiff has not proved the allegations of the Plaintiff and the claim.

**36.** I must note for the record that the Defendant is a public body obligated to follow the law – in this case – Procurement Laws and Procedures. Any procurement for goods and services must follow the law and the due process. Even the very urgent situations require an urgent process. It is hardly convincing that a public body can procure goods worth over Kshs.7.0 million over a phone, which leaves absolutely no trace, and that on such no trace record, the officers of that public body would process a claim of that magnitude.

In my view the acknowledgment by the Defendant that it owed the Plaintiff Kshs.429,209/= was in response to any other claim but which is not before the court. The alleged Kshs.425,209/= has no bearing to the claim before the court.

**37.** It is for the Plaintiff to discharge the burden of proof by providing substantial evidence to support its claim of Kshs.7,174,000/= from the Defendant. It is trite law that he who alleges must prove. See **Section 107** of the **Evidence Act (Cap 80)** Laws of Kenya. See also **CMC AVIATION LTD VS CRUSSAIR LTD (NO. 1) [1978] KLR 103at page 104** where the Court stated that proof is the foundation of evidence.

**38.** From the foregoing, it is plain that the Plaintiff has failed to prove that there was an order and that indeed the said materials were delivered. In the circumstances, the Plaintiff has failed to discharge the burden of proof and has not proven its case on a balance of probability.

**39.** In the upshot, the Plaintiff's suit herein is dismissed with costs to the Defendant.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30<sup>TH</sup> DAY OF MAY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Kimathi for the Plaintiffs

Odhiambo for the Defendants

Teresia – Court Clerk