



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**

Civil Case 159 of 2006

**EQUIP AGENCIES LIMITED.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

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

The plaintiff in this case, is a limited liability company incorporated in Kenya under the provisions of the Companies Act Cap 486 Laws of Kenya having its registered offices at Nairobi in the Republic of Kenya. On the other hand, the defendant is the Hon. Attorney General of the Government of Kenya and is being sued on behalf of the said Government of Kenya and in particular the Ministry of Health (herein after referred to as the said Ministry) under the enabling provisions of the Government Proceedings Act Cap 40 Laws of Kenya after due notice thereunder has been given. In this particular case, the plaintiff instituted this suit by way of the plaint dated 22<sup>nd</sup> July 1999, filed in the original suit, that is, HCCC No. 1459 of 1999 **Equip Agencies Limited vs. The Attorney General**, and claims against the Government of Kenya through the Attorney General, in his capacity as the legal representative of the Ministry of Health, for the sum of Kshs. 1,862,302,792/=, together with interest at 18% per annum compounded from 1<sup>st</sup> March 1999 until payment in full. This sum represents money owed to the company by the Ministry of Health on account of supply and delivery of anti-malaria equipment and drugs pursuant to two (2) contracts: **Contract Agreement S/4056** made on 15<sup>th</sup> July 1993 and **Contract Agreement No. S/4420** made on 14<sup>th</sup> July 1995 between the Government and Equip Agencies.

The Attorney General filed a defence dated 22<sup>nd</sup> November 1999 on 25<sup>th</sup> November in the aforesaid cause. During the hearing of this suit, the plaintiff availed two witnesses. These are, Divyesh Indubhai Patel and Wilfred Abincha Onono. In his evidence, PW1 Divyesh Indhubah Patel introduced himself as the Managing Director of the plaintiff's company. Besides above, the witness testified that he has prepared a witness statement that he tendered in as evidence .....P EXHIBIT 1. Apart from the above, PW1 also testified that the plaintiff company deals in industrial equipment, machineries and chemicals. In addition to the above, PW1 also testified that their claim is against the Ministry of Health for goods that they supplied for the sum of 1,100,000,000/=. Thereafter, PW1 explained that there were two contracts which were A/S/4056 which was made on 15<sup>th</sup> July 1993 and S/4420 made on 14<sup>th</sup> July 1995. PW1 also testified that initially there was a tender at the Ministry of Public Works and Housing in May 1993. Thereafter, on 15<sup>th</sup> July 1993, the plaintiff was awarded the tender by the Government of Kenya. Later, the defendant wrote a letter of acceptance. The witness also referred this court to the agreed bundle of documents which shows the contract agreement that was produced as part of P Exhibit 1. The

said agreement was signed by Mr. Lesrima who was by then the Permanent Secretary Ministry of Public Works and Housing and Mr. Koinange who was by then the Permanent Secretary Treasury. In addition to the above, the witness also referred this court to page 25 of the bundle of documents which shows a supply circular dated 21<sup>st</sup> July 1993. The said circular shows the specification and the prices of the goods. Later, the witness produced the supply circular as exhibit 3. While referring to contract No. S/4056, the witness stated that the Government has never challenged the validity of the above contract. The witness also referred to contract No. S/4420 which is shown on page 4 of the witness statement. According to the witness, the plaintiff was awarded the tender by the Central Tender Board on 14<sup>th</sup> July 1995. The said contract was signed by the then Permanent Secretary namely, Engineer A.M.H. Shalawe and the then Permanent Secretary Treasury Mr. Benjamin Kipkulei. Apart from the above, the witness also referred this court to page 28 of the bundle which shows the contract agreement exhibit 4. Thereafter, the witness also stated that there was a supply contract dated 17<sup>th</sup> July 1995 as shown on page 32 of the agreed bundle. The witness contended that the Government issued LPO No. 047169 for supply of 60 swing fogs valued at Kshs. 53,400,000/=. The second LPO was No. 07170 for 350 swing fogs for Kshs. 70,200,000/=. According to the witness, the total value of the LPOs was Kshs. 156,800,000/=. In that regard, the witness produced the LPOs which are on page 35 and 36 of the bundle of documents as exhibit 6. That apart, the witness also referred this court to paragraph 5 of his statement which shows contract No. S/4420. The witness also referred this court bundle to exhibit 7 dated 11<sup>th</sup> April 1996. In response, the plaintiff brought a letter dated 19<sup>th</sup> April 1996 and requested for an LPO. That letter has been produced as exhibit 8 and is clearly shown on page 41 of the bundle of documents. Due to the above correspondence, the plaintiff was issued with LPO No. C312204 which requested for malaria HS oil and Malaria Mosquito and Control Dirty Water LPO No. 312205 exhibits No. 9. On the other hand, PW2 Vincent Onono testified that he has prepared a witness statement which he produced as exhibit 26. Besides above, PW2 referred this court to his impeccable academic credentials which were produced as exhibit 27 appearing on page 9 to 11 of his statements. According to PW2, the principal sum of invoice goods amounted to Kshs. 1,157,846,150/=. The witness contended that the interest accumulated from 26<sup>th</sup> June 1995 to 28<sup>th</sup> February 1999 is Kshs. 715,489,730/=. Apart from the above, the witness stated that the plaintiff had to rely on facilities from Commercial Banks and hence he was justified to charge the interest of 18% per annum. In conclusion, the witness decided to adopt the summary shown in his statement.

On 6<sup>th</sup> July 2011, the matter came up for the hearing of the defence case. However, the defendant's counsel, Miss Gathagu stated that they did not have any witnesses and hence she closed the defence case. She also submitted that the parties had agreed to put in written submissions and requested the court to mention the matter on 15<sup>th</sup> July 2011 to confirm compliance. True to their words, both counsels confirmed on that date that they had already filed written submissions which clearly stated their clients' case.

This court has carefully considered the evidence which has been adduced by the two witnesses who were presented by the plaintiff together with the written submissions which have been filed. Having considered the above carefully, it is apparent that there was a business relationship between the two parties where the plaintiff supplied specific goods to the defendant. The said goods were delivered to the Ministry of health on diverse dates. The particulars of the goods that the plaintiff supplied are clearly shown hereunder:-

#### **REQUISITIONS MADE UNDER CONTRACT NO. S/4056**

- i) *Through Local Purchase Order C047169, the Ministry of Health ordered from the plaintiff company 60 swing fogs valued at Kshs. 53,400,000/=.*
- ii) *Through Local Purchase Order C 047170, the Ministry of Health ordered for the plaintiff company 360 swing fogs valued at Kshs. 70,200,000/=.*
- iii) *Through Local Purchase Order C 047172, the Ministry of Health ordered from the plaintiff company 16 litres Knapsack Sprayers valued at Kshs. 6,560,000/=.*

- iv) Through Local Purchase Order C 047173, the Ministry of Health ordered from the plaintiff company motorized Knapsack sprayers valued at Kshs. 11,520,000/=.
- v) Through Local Purchase Order C 047174, the Ministry of Health ordered from the plaintiff company protective clothing in the form of masks complete with helmets and gumboots valued at Kshs. 15,120,000/=.
- vi) The total value of goods requisitioned from Equip Agencies under Contract No. S/4056 was Kshs. 156,800,000/= as supported by copies of the aforesaid LPOs which were produced and marked as the plaintiff's exhibit 6.

#### **REQUISITIONS MADE UNDER CONTRACT NO. S/4420**

The Permanent Secretary, Ministry of Health requested for the following Anti-Mosquito Chemicals and equipment for the Ministry's use for the next three (3) years beginning April 1996:-

- i) Malaria HS Oil – 2,400,000 lts
- ii) Abate – 30,000 lts
- iii) Dursban – 10,000 lts
- iv) Malathion – 5,000 lts
- v) Ambush CY – 20,000 lts
- vi) Sharpa 5% E.C. – 10,000 lts
- vii) Protective clothing – 3,000 lts
- Vii) Knapsack sprayers (16 lts) – 1,500 (No.)

From the evidence on record, it is apparent that after the goods had been delivered and distributed to the medical supplies coordination units and invoices raised as required the plaintiff received the letter dated 19<sup>th</sup> July 1996 from the Permanent Secretary Ministry of Health informing it that it had been decided to suspend further supplies. According to the plaintiff, the reason given for suspension by the Permanent Secretary was that the suspension was to allow for stock taking and review of adequate funding for the programme and required the plaintiff to cooperate fully with the medical supplies coordinating unit. From the evidence on record, there was no dispute that the supplies made by it were pursuant to proper orders signed by authorized heads of Government Ministries, departments and institutions or by an officer authorized to sign on his behalf. Secondly, there were no queries raised by the government at this time regarding the quality and the standard/specification of the goods requested for and already delivered. The plaintiff also never received any notification of rejections or request for replacements by the Ministry. Thirdly, there were no queries raised by the Government at this time regarding the quantity of goods requested for and already delivered. Fourthly, there were no queries raised by the Government at this time regarding the pricing of the goods requested for and already delivered as there had been invoiced strictly with the pricing schedule contracted for as reflected in the supplies circulars. Following the above transactions, there were several negotiations and consultations which were done between the parties. However, as a result of the governments continued refusal to pay sums due under the foresaid contracts, the plaintiff had no option other than to commence these proceedings. Specifically on or about 29<sup>th</sup> March 1999, the plaintiff's advocate served the Attorney General with the notice of intention to sue as required under Section 13A of the Government Proceedings Act which elicited no response. After the expiry of the statutory 30 days period, the plaintiff filed this suit on 22<sup>nd</sup> July 1999 as can be seen by exhibit 20. It is the contention of the plaintiff that the cause of action arose on 23<sup>rd</sup> August 1996 upon receipt of the letter from the Permanent Secretary Ministry of Health under reference MOH/SUPP/07/59

informing the company of the immediate withdrawal and cancellation of Local Purchase Order No. C047170, Local Purchase Order No. C312204 and Local Purchase Order No. C312205. That letter was written despite the fact that the goods had already been supplied, accepted and distributed for use by the Government. *This court finds as a fact that the cause of action actually accrued on 23<sup>rd</sup> August, 1996 upon receipt of the letter from the Permanent Secretary Ministry of health under reference MOH/SUPP/07/59 informing the company of the immediate withdrawal and cancellation of Local Purchase Order No. C 047170, Local Purchase Order No. C 3/2204 and Local Purchase Order C 312205, despite the fact that goods had already been supplied, accepted and distributed for use by the Government.*

As far as the issue of interest is concerned, Section 26 (1) of the Civil Procedure Act, Cap 21, (Rev. 1998) Laws of Kenya state as follows:-

***“26 (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”***

In this particular case, the plaintiff, called PW2 Mr. Wilfred Abincha Onono, who is the Managing Consultant at Interest Rates Advisory Centre Limited. The said witness is an Accountant by profession and also a Certified Public Accountant. Apart from the above, the witness has practiced as an accountant since 1977 and has worked in both the private and public sectors. Besides the above, the Interests Rates Advisory Center Limited (*herein after referred to as IRAC*) is an independent consultancy firm which offers clients objective financial advisory services in among other areas:-

- i) *Finance Cost Assurance Services (Overdraft Interest Confirmation) for Corporates.*
- ii) *Interest Recalculation of Mortgages, Business and Personal Loans.*
- iii) *Interest Recalculation for all interest-earning accounts*
- iv) *In Duplum Check and Monitoring Services.*

Based on the information provided by the Equip Agencies, his own computations, and on his understanding of the facts, he first confirmed that the value of goods supplied and invoiced by Equip Agencies under Contract No. S/4056 was in the sum of Kshs. 156,800,000/=, while those supplied by Equip Agencies under Contract No. S/4056 was Kshs. 1,001,046,150/=. Therefore, the total value of goods supplied and invoiced under contract No. S/4056 and Contract No. S/4420 was in the sum of Kshs. 1,157,846,150/=. Secondly, the witness also made the following conclusions after considering all the facts in this case:-

- a) *There were no queries raised by the Government regarding the quality and standard/specification of the goods requested for and already delivered, in that no notification of rejections or request for replacements was issued to Equip Agencies.*
- b) *There were no queries raised by the Government regarding the quantity of goods requested for and already delivered.*
- c) *There were no queries raised by the Government regarding the pricing of the goods requested for and already delivered. His analysis of the invoices furnished to him showed that the invoices raised were in accordance with the pricing contained in the respective supply circulars furnished to me.*
- d) *At the time the Government reached a decision to withdraw and/or cancel LPO Numbers C 312206, C 312207, C 312208, C 312209, C 312201, C 312211, C 312212, C 312213, C 312214, C 312215, C*

312216, C 312217, C 312219, C 312221, C 312222, C 312223, C 312224, and C 312225, no deliveries had been made or invoiced.

e) *There was no evidence to indicate that the cancellations included any of the invoices raised under Contract No. S/4056 and Contract No. S/4420 in the sum of Kshs. 1,157,846,150/=.*

f) *The Permanent Secretary Ministry of Health cancelled Local Purchase Order No. C 047170, Local Purchase Order C 3122204 and Local Purchase Order C 312205 with immediate effect, after the goods had already been supplied and accepted.*

g) *There was no evidence to indicate that the cancellations included any of the invoices raised under Contract No. S/4056 and Contract No. S/4420, valued in the sum of Kshs. 1,157,846,150/=.*

h) *There was no evidence of cancellation of LPO C047169, LPO C0447070, LPO C047172, LPO C047173 and LPO C047174, and accordingly, I am not aware of any justifiable grounds upon which the invoices raised under Contract S/4056 remain unpaid.*

Thirdly, the witness also confirmed as correct that as at 1<sup>st</sup> March 1999, the total amount due under owing by the Government to Equip Agencies under Contract No. S/4056 and Contract No. S/4220 was Kshs. 1,873,335,880/= made up as follows:-

a) *The principal sum of invoiced goods, amounting to Kshs. 1,157,846,150/= and*

b) *Interest accumulated from 26/6/1995 to 28/02/1999 is Kshs. 715,489,730/=.*

In conclusion, the witness testified that the claim for interests at 18% compounded monthly was in his professional experience, justified and supported by the following factors:-

a) *First and from his experience, all commercial contracts contemplate the payment of damages by way of interest in the event of breach, guided by the fact that the aggrieved party has been deprived the use of money due to it by reason of the default and ought to be compensated for such deprivation by the award of interest. These were commercial contracts with the government, and as can be appreciated from Contract No. S/4056 and Contract No. S/4420, the contract prepared by the Government was a standard contract normally used, and had no room for negotiation to include adequate penalties in the event of breach. This notwithstanding, it was implicit in such a commercial contract that even where not expressly provided in the contract, interest was awardable upon breach.*

b) *Secondly, the cancellation of Local Purchase Order No. C 047170, Local Purchase Order C 312204 and Local Purchase Order C 312205, was done despite the fact that goods had already been supplied, accepted and distributed for use by the Government. Equip Agencies was thus denied or deprived the use of or opportunity to invest this money by reason of the default and ought to be compensated for such deprivation by the award of interest.*

c) *Thirdly, at the cancellation of Local Purchase Order No. C 047170, Local Purchase Order C 312204 and Local Purchase Order C 312205 it was important to note that the orders placed under Contract S/4056, specifically through LPO C047169, LPO C047170, LPO C047172, LPO C47173 and LPO C047174, were never cancelled. There was neither a response to the demands nor any explanation given by the government as to why it had refused to pay the sums invoiced, and thus, Equip Agencies was inexplicably denied or deprived the use of or opportunity to invest this money by reason of the default and ought to be compensated for such deprivation by the award of interest.*

d) *Fourthly, the witness testified that the default by the Government directly and negatively affected and continues to affect the operations of Equip Agencies as detailed in his statements:-*

i) *Some of the goods supplied by Equip Agencies to the Government had in turn been sourced abroad from Denberry Overseas Limited, and it still owed the company for these goods, as supported by*

the supply contract, invoice and demand letters received from Denberry Overseas Limited which he had considered.

ii) As required by law, the outstanding sum due and owing from the company, was reflected in the company's audited accounts as Receivables and Payments. This resulted in a tax assessment of Kshs. 50,582,604/= by the Kenya Revenue Authority on account of this unpaid income. The assessment included a 60% penalty on the tax liability assessed and for which Equip Agencies duly paid in instalments. This was as supported by the documents produced in relation to the tax assessment, which he had also considered.

iii) Equip Agencies Limited sources some of its working capital from the Bank of India in the form of overdraft facilities. Equip Agencies, for the period 1997 – 1999 was forced in the circumstances to seek for extra overdraft financial facilities to finance its working capital. The base rates of Bank of Baroda as obtained from the Central Bank of Kenya were 25%, 27%, 23%, and 21% as at 16.6.1997, 011/12/98 and 05/1/99 respectively, and therefore 18% rate was a justifiable estimate for the economic reality at the time. The schedule of base rates obtained from the Central Bank of Kenya was attached to his report and marked as the plaintiff's exhibit 31.

iv) Equip Agencies cash flow was significantly affected, to the extent that some of its imported goods were auctioned at the port of Mombasa for non-payment of duties. This is supported by copies of the relevant Gazette Notices furnished to him. The cash flow problems that Equip agencies experienced resulted in a few of its properties being attached. This was supported by copies of the relevant advertisements already produced in court. These cash flow problems could be attributed, to some extent, to the Government's default.

71. The bank's average base lending rate was 24% per annum at the time of supplying the goods in question. During the period, an estimated three quarters (3/4) of the working capital was sourced from the said bank. By taking into consideration the portion of the funds sourced from Bank of India, IRAC has deduced a rate of 18% per annum as follows:

$$\frac{3}{4} * 24\% = 18\%$$

72. Interest was calculated on daily balances and debited monthly by way of reducing balance method. Interest calculation was based on a 365 – day calendar.

73. Accordingly, he was of the opinion that in light of the above facts, he strongly believed that the claim as set out by Equip Agencies in the plaint dated 22<sup>nd</sup> July 1999 correctly reflected the principal value of goods supplied and delivered to the Government under the stated contracts. Further, the claim for interest at 18% compounded per annum was justified as supported by the mitigating factors which the court ought to take into account as set out in the foregoing paragraphs. The claim for interest at 18% interest compounded from 1<sup>st</sup> March 1999 until payment in full reflected the economic reality which Equip Agencies finds itself today due to the default by the government. Equip Agencies was denied the opportunity to interest it or had to borrow to cover some of it, in either case at compound interest.

74. According to the terms of the various offer letters by Credit Bank Limited, one of Equip Agencies' financiers interest was applied on the facilities advanced, ..... 'calculated on daily balances and debited monthly to the overdraft facility by way of compound interest.' Compound interest is the normal practice in the banking sector in the country, as evidence by **Gazette Notice No. 1617 of 1990** which provides that interest shall be applied and calculated on a reducing balance method with monthly rests. It therefore follows that simple interest cannot, in this circumstances, be relied upon to produce a just indemnity to the company for the loss occasioned by the non-payment by the Government. A copy of this gazette notice was produced and marked as the plaintiff's exhibit 32, in further justification of the compounded interest.

75. For these reasons, he determined that as at 1<sup>st</sup> March 1999, the total amount due and owing by the Government to Equip Agencies under Contract No. S/4056 and Contract No. S/4220 was Kshs. 1,873,335,880/= made up of the principal sum of invoiced goods amounting to Kshs. 1,157,846,150/=

and interest accumulated from 26/6/1995 to 28/2/1999 is Kshs. 715,489,730/=. Also for reason set out in his statement, in his professional opinion, the claim by Equip Agencies Limited for interest at 18% compounded monthly was justified and I do not believe that simple interest can, in the circumstances set out above, be relied upon to produce a just indemnity to the Company.

It is apparent that after the detailed evidence by the plaintiff's witnesses, the defendant did not offer any evidence to rebut the same. That in effect means that the evidence of the plaintiff was not challenged at all. Instead, the defendant decided to put in written submissions. From the above detailed analysis, it is crystal clear that after the plaintiff was awarded the tenders, he borrowed money from commercial banks in order to fulfill his obligations. By then, the average base lending rate was 24%. It therefore follows that the plaintiff is justified in requesting to be paid 18% interest since  $\frac{3}{4}$  of his capital was financed from commercial banks. It is my considered opinion that PW2 was an honest, analytical and professional witness who simplified the financial obligations on the parties in a graphic manner.

After carefully considering all the evidence which has been adduced before me, there is no doubt at all that the plaintiff supplied several goods which have been clearly displayed above to the Ministry of Health. After the goods were delivered to the Ministry of Health, they were distributed to various parts of the country. There is no doubt that these goods were utilized for the purpose for which they were intended for. The defendant has not adduced any evidence to contradict the facts that the goods were delivered to the Ministry. Apart from the above, there has not been any complaints whatsoever that the quantities involved were below the ones which had been ordered. In addition to the above, there has never been any complaint that the quality of the goods which were supplied did not meet the required standards. That means that the plaintiff in this case has fulfilled all the requirements that were in the contract that they had signed with the defendant. Unfortunately, the Ministry of Health for reasons better known to themselves did not meet their obligation to pay for the goods that had been delivered. The evidence on record clearly shows that the plaintiff has proved his case on a balance of probabilities. Infact, the evidence which has been adduced in this court is logical, consistent and overwhelming. On the other hand, I hereby reject the defence case. The upshot is that I hereby enter judgment in favour of the plaintiff on the following terms:-

1. ***The defendant pays the sum of Kshs. 1,862,302,792/= together with interest at 18% per annum from 1<sup>st</sup> March 1999 until payment in full.***
2. ***The defendant to bear the costs of the suit.***

Those are the orders of this court.

**MUGA APONDI  
JUDGE**

Judgment read, signed and delivered in open court in the presence of:-

..... Plaintiff's Counsel

..... Defendant's Counsel

**MUGA APONDI  
JUDGE**

**2<sup>ND</sup> DECEMBER, 2011**