

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Milimani Commercial Courts Commercial and Tax Division)

Civil Case 1244 of 2002

INTECH EAST AFRICA LTD.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

JUDGMENT

By a Plaint dated 13.12.2002, and filed on 15.12.2002, the Plaintiff Company prayed for the sum of Ksh.2,505,270/= and interest thereon at 2% per month from 10.06.2000 until payment in full, and costs of the suit. The Plaintiff's basis of the claim is set out in paragraph 4 and 5 of the Plaint. The contract was entered into pursuant to an invitation to tender floated by the Defendant as invitation No. CE7/2000 for supply and delivery of Survey Equipment. The Plaintiff responded to this invitation to tender by delivering to the Defendant his tender that he was the sole agent in Kenya for M/s Topcon Corporation, Japan, manufacturers of photogrametry equipment per his letter 19.7.2000 PW1 (Exhibit 2). The Plaintiff complied with terms of the tender including providing a "Performance Bond". On this basis the Defendant awarded the tender to the Plaintiff per the Defendant's letter dated 25.10.2000, (PW1 Exh. 4"). A Performance Bond was issued by Stanbic Bank Kenya, (PW1 Exh. 8B) for the sum of Kshs. 200,000.00

The Defendant filed a defence dated 21.01.2003 and filed on 28.01.2003. The Defendant denied the existence of the contract, receipt of the equipment or the Plaintiff's invoice for the equipment supplied and pleads in the alternative that if the equipment was supplied the same was not as per quotation specifications, and not fit for the purpose intended for and the Defendant was not therefore liable for payment thereof. Apart from the jurisdiction of the Court, and description of the parties the Defendant denies every other averment in the plaint, including notice of intention to sue. Pursuant to the Defendant's City Engineer's letter dated 6.02.2001, (Exh. 9a), the Plaintiff supplied the tendered equipment. The tender for the supply of the equipment was also approved by the Defendant's Council. The Plaintiff delivered the equipment on 11.05.2000 (PW1 Exh. 10). Thereafter the Plaintiff raised an invoice No. 5551 of 10.05.2001 (PW1 Exh. 11) and it sent to the Defendant and an interest Invoice No. 5673 of 25.02.2002 for the sum of Ksh. 400,843.20. The Plaintiff raised a further invoice No. 5680 dated 10.04.2002, for the sum of Ksh. 50,105/40, and a further interest Invoice No. 5689 of 10.05.2002 for Shs.100,210.80.

Despite the rapidity of the interest rate invoices and demands made by the Plaintiff's Counsel, the Defendant refused, failed and/or neglected to pay the said sum, that is to say, the cost of supply and delivery of the tendered equipment. The Plaintiff's sole witness was one Mr. Peter Njoroge Kangonga (PW1). His evidence was clear and well documented. There was an invitation to tender, he submitted a written tender, his tender was approved by the Defendant's Council, he was so advised of his successful tender by the Defendant's Town Clerk's letter of 25.10.2000 (PW Exh. 4). The moment the Plaintiff was so advised of tender, the Defendant had accepted his offer, and the contract had been concluded what remained was performance on the Plaintiff's part. The Plaintiff performed. He provided the Performance Bond as stated above, he was directed to deliver the equipment to the Defendant's Engineer's Department (PW Exh. 9A). By delivery note No. 3401 dated 7.05.2001, the Equipment was delivered and received by the Principal Land Surveyor, Land and Engineering Survey Section on 11.05.2001 (PW Exh. 10). PW1 (the Plaintiff's principal director), confirmed the above evidence in crossexamination by Mr. Langi Counsel for the Defendant. He also confirmed that despite supply of his invoice, he had not been paid. He

confirmed that interest rate had not been agreed upon. The rate of 2% was the cost of funds to him. The Defendant had never objected to that interest rate.

Sadly, the Defendant called no evidence. The Plaintiff's evidence therefore remains uncontroverted. In the result therefore, and on balance of probability, the Plaintiff did tender for supply of the Photogrametry Survey equipment. The Plaintiff was duly awarded tender for the supply of the equipment, the Plaintiff raised a Performance Bond to secure to the Defendant the performance of the tender for the supply and delivery of the equipment, the equipment was delivered and received. The Plaintiff raised its invoice for the contract price of Sh. 2,505,270/=. That invoice was never paid. Interest thereon was 24%. There was no objection thereto. The Defendant's defence in light of the Plaintiff's documentary evidence, stands bare and naked, and no wonder the Defendant offered to give no evidence. It had none to

deny the contract with the Plaintiff or the Plaintiff's claim arising out of that contract. In the upshot therefore, there shall be judgement for the Plaintiff for the sum of Ksh.2,505,270/= together with interest thereon @ 2% p.m. up to the date of filing suit and thereafter at Court rates until payment in full. The Plaintiff shall also have the costs of this action.

Dated and delivered at Nairobi this 6th day of December 2004.

ANYARA EMUKULE

AG. JUDGE