



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 39 OF 1999**

**PIUS NYAMBANE t/a PIMERS AGENCIES ..... PLAINTIFF**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK ..... DEFENDANT**

**JUDGMENT**

This is a claim for damages arising from an alleged unlawful cancellation of a contract between the parties to this suit.

The plaintiff is a businessman in Nairobi trading under the name of Pimers Agencies. He deals in the supply of general stationery. The defendant is a financial institution duly incorporated in Kenya and carrying on business in Nairobi and elsewhere in Kenya.

In 1996, the defendant advertised for tenders for the supply of general stationery. After showing interest in the matter, the plaintiff was provided with a form (Exh. 17) which is titled 'Form For Tender' in which the general terms and conditions of the tender are specified. One of those conditions reads:-

***“We agree to supply against an order signed by an officer authorised to do so those goods accepted in this tender.”***

Upon submission of the tender document, the plaintiff's application was duly considered by the defendant and subsequently accepted. The acceptance was communicated to him through a letter dated 3.1.1996 which in part read:-

***“Pimers Agencies,***

***P. O. Box 30694,***

***NAIROBI.***

***RE: GENERAL STATIONERY This is in reference to the 1996 Tenders.***

***We are pleased to inform you that the Bank has offered you to supply items as per attached list. Also be informed that supply will only be accepted against duly authorised Local Purchase Order which will be drawn as and when necessary. Please confirm prices and acceptance of the same on or before 24 th January, 1996.***

*Yours faithfully,*

**M. O. AMWOMA**

**For: MANAGING DIRECTOR**

**TENDER FOR SUPPLY OF GENERAL STATIONERY**

**LOWEST BIDDER**

<u>PIMERS AGENCIES</u> -----	<u>QT</u>	<u>PRIC</u>	<u>QTY/PRICE</u>
CORRECTING FLUID	30	9	270
COMP PAPER 2 PART 14.5*11	430	1300	559,000
WRAPPING PAPER BROWN	30 30	190	5,700
CARBON PAPER BLUE -KENYMAX	2300	270	621,000
PHOTOCOPYING PAPER (NOPA)	3000	270	810,000
<b>TOTAL</b>		<b><u>1,995,970/=</u></b>	

The plaintiff did not comply with the last paragraph of the above letter. His acceptance (Defendant's Exh. 11) dated 30.1.96 contained a counter-offer which though not expressly accepted by the defendant must be deemed to have been at the very least agreed by it because subsequent to the letter, both parties continued to do business with one another without any query being raised by any of them regarding the matter. Nonetheless the evidence available suggests that the list was never adjusted. This means that some of the items in respect of which the plaintiff now makes this claim e.g. computer paper 1 and Lift Off Tapes never became part of the items to be supplied under the contract.

It is the plaintiff's case that after a period of time during which several items were supplied under to the contract, the defendant suddenly cancelled the contract and refused to order any more goods from the plaintiff. He claims that between the time the contract was entered into and the date of cancellation, he had purchased several items in cash for the purpose of delivering them to the defendant and that those goods were in his stores when the contract was cancelled. By way of explanation, he said that after winning the tender, the plaintiff bought the goods in large quantities prior to receiving any orders for them from the defendant. He said that he did so because he had been warned (presumably orally) by the defendant to be ready to supply the goods at any time they were ordered. That he said was the reason he had bought them in advance. And as to why he was unable to sell the goods to other customers when the contract was cancelled despite having claimed in cross-examination that apart from the defendant, he had other individual and corporate customers, the plaintiff said that he sold some of the items at throw away prices without specifying what he had realised from the sale and at the same time gave others to friends and colleagues to be sold on his behalf.

He further claimed that those friends did not bring him anything. They instead disappeared into thin air and he was unable to recover the value of the goods. In spite of all that, which to me sounds like a cock and bull story, the plaintiff was eventually coaxed into conceding that he did make some Shs.150,000/= from the sale of some of the items he had in store for the defendant but admitted that the said sum was not reflected in the claim, meaning in my view that he is deliberately claiming more than he knows he is entitled to.

Briefly the defendant's evidence was that after the contract had been entered into, several items were

ordered from the plaintiff and paid for upon delivery but in the course of several transactions it became apparent that the plaintiff was not going to be able to meet his part of the contract; his main problem being that he was unable to supply all the items that the defendant required under the contract. For example, the defendant ordered 20 reams of photocopying paper at Shs.270/= per ream but the plaintiff was able to supply only 20 reams. And although Lift Off Tapes were not a contract item, the defendant ordered 200 pieces of the item on quotation (meaning that the defendant invited the plaintiff to supply on an urgent basis the items outside the tender contract) at Shs.230/= per piece but the plaintiff was able to supply only 67 pieces out of the order. The balance was not supplied. Even the 67 pieces supplied as aforesaid were not delivered promptly. Though the order was valid for 30 days from 4.3.96 which is the date of the LPO, only 30 pieces were supplied within that period on 30.3.96; the balance was not delivered until 8.5.96 well after the time they ought to have been supplied.

As for wrapping paper, the evidence from the defendant was that an order for 6 reams at Shs.560/= per ream, way above the tender price of Shs.190/= per ream, was made but the plaintiff never supplied any wrapping paper even at that higher price. And with regard to carbon paper the evidence was that the plaintiff was not able to supply the quantity required by the defendant at the tender price.

By reason of the plaintiff's inability to supply the items specified in the tender document as and when required his performance was found to be unsatisfactory and the tender committee of the defendant recommended that he be struck off from the list of suppliers of the defendant. The recommendation was subsequently carried out and the defendant accordingly struck off from the list thereby in effect cancelling the contract.

Having summarised the material evidence, I think I can now begin to deal with the issues which arise from the pleadings. These were framed and filed by the parties on 13.1.2000.

Issue number one does not arise and accordingly will not be dealt with.

As to whether the plaintiff was in law awarded a contract by the defendant, on the evidence before court, there clearly was a contract between the plaintiff and the defendant for the supply of the items shown in the list annexed to defence exhibit 18. The nature of that contract as specified in the exhibit was that the defendant would only deliver or supply goods against a duly authorised local purchase order drawn by the defendant as and when necessary. In other words, the plaintiff was not entitled to deliver any item to the defendant unless an order in respect thereof had been made. This form of a contract is considered in Halsburys Laws of England, 3rd Edition Volume 8 at page 71 where it is stated:-

***“An advertisement inviting tenders for the supply of goods extending over a period of time is not an offer, but an invitation for offers. A tender for the supply of such goods as may be required, no quantity being specified, is not an offer which may be accepted generally so as to form a binding contract, but is a continuing offer, which is accepted from time to time whenever an order is given for any of the goods specified in the tender. An acceptance of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified, and that it will be accepted from time to time by orders for specific quantities, and does not bind either party unless and until such orders are given.”***

Also in the case of *The Queen V. Demers* (1899) AC 103, in which the respondent had contracted with the Government to execute for a term of years the printing and binding of public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work, it was held:-

***“That the stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld.”***

Applying the law as stated above, I would say that the correct position in this matter is that there indeed was a contract between the parties but in view of the terms imposed on the contract by the defendant whereby “supply would only be accepted against a local purchase order signed by an officer

authorised to do so” the contract must be deemed to have been a continuing offer which would be accepted from time to time whenever an order was given for any of the goods specified in the tender. Accordingly neither party was bound unless and until such orders were given through the issuance of Local Purchase Order. In that respect the plaintiff was not entitled to supply any goods before an order was made and he would clearly have been entitled to no payment if he supplied without any such order.

As to whether the defendant performed his part of the contract, the answer is clear on the evidence before court. The evidence tendered on behalf of the defendant which in my view the plaintiff was not able to challenge, was that the plaintiff was unable to meet the orders made by the defendant under the contract.

By reason of the foregoing, the defendant was clearly entitled to remove the plaintiff’s name from the list of suppliers and to cancel the contract. There was therefore no breach of contract and consequently the plaintiff’s suit lacks merit and must be dismissed with costs.

However, in the event, I am wrong in the conclusion I have reached, I must now turn to consider the question of damages that would have been payable if the plaintiff had been successful. I must start by stating that the plaintiff’s evaluation of the damages he suffered is based on a misconception that the goods he had bought were a total loss to him. My view of the matter is that upon the cancellation of the contract, the plaintiff had in his possession all those goods which he claimed to have purchased. He claims to be in the business of general supplies with individual and corporate clients. Given that position, he should have had no difficulties in disposing of the limited items he claims to have purchased for the defendant. In any event the defendant did not request him to purchase those items. It is therefore my view that any damages, which I find unproved anyway, which the plaintiff might have sustained were occasioned by his unusual way of doing business by allegedly making purchases in cash and sitting back to await orders. It is also true that no attempt was made to mitigate the damages suffered. On the contrary, the plaintiff’s conduct after the cancellation of the contract indicates a desire on his part to maximise the damages allegedly occasioned; indeed by his own admission he sold the items at throw away prices and gave away to friends and colleagues the others which he could not dispose of in that manner. It would therefore appear to me that what the plaintiff says he did, amounts to an act of utmost folly and I would not have awarded him a penny even if he had succeeded in proving breach of contract by the defendant.

In the event the plaintiff’s suit fails and is dismissed with costs.

**Dated at Nairobi this 27th day of April, 2001.**

**T. MBALUTO**

**JUDGE**