



**Panafrican Equipment (Kenya) Limited v Principal Secretary Ministry of Transport, Infrastructure, Housing and Urban Development (State Department for Public Works – Supplies Branch) & 2 others (Commercial Case E550 of 2020) [2024] KEHC 2887 (KLR) (Commercial and Tax) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E550 OF 2020  
JWW MONG'ARE, J  
MARCH 14, 2024**

**BETWEEN**

**PANAFRICAN EQUIPMENT (KENYA) LIMITED ..... PLAINTIFF**

**AND**

**THE PRINCIPAL SECRETARY MINISTRY OF TRANSPORT,  
INFRASTRUCTURE, HOUSING AND URBAN DEVELOPMENT  
(STATE DEPARTMENT FOR PUBLIC WORKS – SUPPLIES  
BRANCH) ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Pan African Equipment (Kenya) Limited, the plaintiff, have sued the defendants herein through a plaint dated December 18, 2020, amended on October 12, 2021 and further amended on 10<sup>th</sup> August 2022 and seeks judgment against the defendants jointly and severally for:-
  - a. A declaration that the defendants are liable for the loss and damage incurred by the Plaintiff because of their failure to pay the equipment as agreed as follows:
    - i. Late payment interest at the rate of 12% p.a due in the sum of Kshs.12,610,989.48/= computed from March 29, 2019 when the payment was due until January 31, 2022 when the equipment was resold.



- ii. Resale loss due in the sum of Kshs.3,402,429.98/= computed as Kshs. 573,359.98 on the resale of the 2 HAMM Rollers 3411 and Kshs.2,829,070.001/= on the resale of the grader GD 663A-2
  - iii. Auctioneers' costs specifically pleaded at Kshs.190,000/=
  - iv. Costs of the suit
  - v. Interest on (i), (ii), and (iii) above from the date of filing until payment in full
  - vi. Any other relief that the court deems fit in the interest of justice.
2. The plaintiff claim is that *vide* contracts No. SB/161/2017 and SB 179/2017 entered on January 20, 2017 between the Plaintiff and the Ministry of Transport, infrastructure, Housing and Urban Development (State Department for Public Works-Supplies Branch) the Plaintiff agreed to supply graders and rollers, respectively to Government Departments and institutions as and when required for a period of Two (2) years effective from the date of the agreement.
3. Pursuant to the agreements and in accordance to the local purchase orders Nos. 2955940, 29555939 and 2955640, on March 29, 2019 under delivery note numbers 5202, 5204 and 5205 the Plaintiff supplied the following equipment's to the 2<sup>nd</sup> defendant Two (2) Hamm 3411 Rollers with serial numbers WGH0H217AHAA01240 & WGH0H217JHAA01234 at Kshs.17,988,220/= and One (1) Komatsu Motor Grader GD663A-2 with serial number 1968 at Kshs.26,967,000/=.
4. The plaintiff further stated that *vide* the court order of March 2021 the 2<sup>nd</sup> defendant allowed it to take possession of the equipment. The plaintiff's claim therefore is for the loss suffered due to the default on the part of the defendant including lost premium that would have accrued if payment had been made as agreed as well as interest.
5. The defendants were served with the plaint and the summons to enter appearance. The Attorney General filed a memorandum of appearance for the 1<sup>st</sup> and 3<sup>rd</sup> defendant and subsequently filed a defence dated March 3, 2021 in which it denied that there was a contract entered into between the Plaintiff and the 1<sup>st</sup> defendant for the supply of equipment's to the 2<sup>nd</sup> defendant. The goods supplied to the 1<sup>st</sup> defendant are distinct from the goods listed at paragraph 8 of the Plaint.
6. The 1<sup>st</sup> and 3<sup>rd</sup> defendant avers the contracts nos. SB 161/2017 and SB 179/2017 were not in any way meant for application and /or use by the County Government due to separation of roles and mandate. It was argued that the 1<sup>st</sup> Defendant does not procure for the County Government as there is the rule of separation of powers between the two levels of government when it comes to matters procurement. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant stated that the goods supplied to the 2<sup>nd</sup> Defendant were pursuant to a separate contractual argument between the Plaintiff and the 2<sup>nd</sup> Defendant in exclusion of the 1<sup>st</sup> Defendant.
7. The 2<sup>nd</sup> Defendant filed a statement of defence dated 15<sup>th</sup> November 2021 in which it stated that the 1<sup>st</sup> Defendant was the procuring entity and that it was the mandate of the 1<sup>st</sup> Defendant to procure the equipment's and supply the items to the various government institutions including the 2<sup>nd</sup> Defendant for use in its various duties. It denied liability for any loss or damage on the basis that it was not privy to the contract. The 2<sup>nd</sup> Defendant claims that there is no cause of action against it as the equipment's were released to the Plaintiff *vide* the court order of 1<sup>st</sup> March 2021.



8. At the hearing the Plaintiff called one witness Philip Stander (PW1), the General Manager of the Plaintiff. PW1 testified the contract dated January 20, 2017 were for a period of 2 years which were to lapse on 30<sup>th</sup> January 2019. He testified that the salient features of the contract No. SB/161/2027 included motor Grade,180-200hp Komatsu GD663A-2-15 Turbo japan and Motor Grade 155-175hp Komatsu GD663A-2-15(natural) Japan each at a unit price of Kshs.26,967,000/=, while contract no. SB/179/2017 was for Drum Roller vibratory, self-propelled, 10 Ton, Hamm 3410, Germany at a unit price of Kshs.8,999,110/=, Drum Roller vibratory, Self-propelled, 12 Ton, Hamm 3412 Germany at the unit price of Kshs.10,027,050/= Pneumatic Tyred Roller, 10 Ton HAMM GRW15 Germany at a unit price of Kshs.10,104,300/= and a Smooth Drum Roller with pad foot Attachment, vibratory, self-propelled 10, ton Hamm 3410 Germany at a unit price of 9,558,400.
9. That the Plaintiff supplied the following equipment's to the 2<sup>nd</sup> Defendant Two (2) Hamm 3411 Rollers with serial numbers WGHOH217AHAA01240 & WGHOH217JHAA01234 at Kshs.17,988,220/= and One (1) Komatsu Motor Grader GD663A-2 with serial number 1968 at Kshs.26,967,000/= and were received by the Chief Officer- RTPW & U, Eng. Lucas Wahinya.
10. PW1 testified that the rollers and graders were delivered on the outside the scope of the subject contracts that is in March, 2019. The payment of the equipment's supplied was not done which prompted the Plaintiff to seek for the repossession of the goods. PW1 urged the court to find in its favour.
11. DW1 Chrispine Opondo the procuring specialist testified on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Defendant. He stated that the First Defendant is mandated to consolidate common user items for the larger National Government. The first Defendant enters into framework contracts with various suppliers and contractors to coordinate the procurement of common user items for the purpose of not only ensuring uniformity across National Government entities, but also for the purpose of obtaining a fixed price for the said items.
12. He explained to the court that the procurement is achieved through the issue local purchase order. He stated that at no particular point would the said framework agreements be applicable to County Governments owing to the separation of roles and mandates across the two levels of Government. He confirmed that there existed no contract between the Plaintiff and the First Defendant for the supply of rollers and graders to the Second Defendant.
13. Nancy Wambugu (DW2) testified as the in charge of Transport, in the department of Roads, Transport, Public Works & Utilities with the County government of Kiambu, as the 2<sup>nd</sup> Defendant witness. She testified the contract No. SB/161/2017 and SB/179/2017 dated January 20, 2021 was entered into between the Plaintiff and the 1<sup>st</sup> defendant. On the strength of the said agreement on 29<sup>th</sup> March 2019 the 2<sup>nd</sup> defendant was supplied with two HAMM 3411 rollers and 1 Komatsu motor grader GD663A-2. The condition of supply was that the equipment would not be put to use until full payment was done, as a consequence the equipment's were released to the Plaintiff on March 24, 2021 on the strength of a consent order of the court and therefore the prayer for late payment on interest on resale after repossession cannot stand.
14. She further testified that the 1<sup>st</sup> Defendant being the procuring entity no liability can pass to the 2<sup>nd</sup> Defendant. She pleaded with the court to dismiss the suit against the 2<sup>nd</sup> Defendant as there is no demonstratable cause of action against the 2<sup>nd</sup> Defendant in regard to the existing contract.
15. At the close of the trial, the parties filed written submissions in support of their respective arguments. The Plaintiff filed submissions dated October 27, 2023 while the 1<sup>st</sup> and 3<sup>rd</sup> defendant filed submissions dated November 15, 2023.



16. The Plaintiff submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendant contracted the Plaintiff for the supply of equipment's and the 2<sup>nd</sup> Defendant utilized the said contract to procure goods from the Plaintiff and by the agreement of the parties, payment was supposed to be made within 45 days and that the failure to pay by the Defendants incapacitated and kept the Plaintiff out of its money. That the court cannot re-write parties contract citing the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2001) e KLR.
17. The Plaintiff further submitted that where a party is deprived of the use of his money he must be compensated by an award of interest.
18. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant submitted that the 1<sup>st</sup> defendant did not enter into an agreement with the Plaintiff for the supply of graders and rollers to the 2<sup>nd</sup> Defendant. It was their further submissions that the subject contracts although entered between the 1<sup>st</sup> Defendant and the Plaintiff, the contract was limited in applicability to National Government Ministries, Departments and Agencies.
19. It was submitted that on the strength of the letter dated March 26, 2019 there was a separate contractual agreement between the Plaintiff and the 2<sup>nd</sup> Defendant and therefore the 2<sup>nd</sup> defendant was liable to pay the Plaintiff for the supplied equipment. The 2<sup>nd</sup> defendant issued Local Purchase Orders (LPOs) numbers, 2955640, 2955939 and 2955940 to the Plaintiff on diverse dates requisitioning for the supply of two Hamm rollers and one Motor Grader and the Plaintiff was directed to deliver the goods to the 2<sup>nd</sup> Defendant.
20. Upon the issuance of the LPOs, on the 26th of March, 2019, the Second Defendant's Eng. Lucas Wahinya wrote to the Chief Mechanical & Transport Engineer at the Ministry of Transport and Infrastructure confirming that the Second Defendant had entered into a contract with the Plaintiff and requested for pre-delivery inspection of the requisitioned goods. The goods were supplied on 29<sup>th</sup> March 2019. The existence of an offer and acceptance and subsequent supply of goods signifies there was a contract between the Plaintiff and the 2<sup>nd</sup> Defendant.
21. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant placed reliance on the case of *Basco Products Kenya Limited v Machakos County Government* [2018] eKLR where it was held as follows: -
 

“It is elementary that a contract is formed when the offer is accepted and acted upon and valuable consideration given. Indeed, section 3(1) of the *Sale of Goods Act*, chapter 16 of the Laws of Kenya, recognizes that: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”

(9) And in an Introduction to the Law of Contract, P.S. Atiyah, (3rd Edition) the following view is propounded, which I find persuasive: "[A]n offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer. The price, of course, need not be a monetary one. In fact, in bilateral contracts, ... the mere promise of payment of the price suffices to conclude the contract...”
22. The letter dated 21<sup>st</sup> July 2020 by the 2<sup>nd</sup> Defendant was an acknowledgement of the debt of Kshs.44,965,220/= but the same was not honored. It was further submitted that the Second Defendant having accepted delivery of the goods and having thereafter made a promise to pay is estopped from renouncing its payment obligation.



23. It was further submitted that evidence having been tendered to demonstrate that the 2<sup>nd</sup> Defendant was liable to pay the goods delivered to the Plaintiff and the plaintiff was not entitled to any reliefs from the 1<sup>st</sup> Defendant as it has failed to prove its case against the 1<sup>st</sup> and 3<sup>rd</sup> Defendant on a balance of probability.

#### **ANALYSIS AND DETERMINATION**

24. I have considered carefully the pleadings and the evidence on record as outlined above. I find and frame the issue for determination by this court is whether the Plaintiff is entitled to interest for the loss of use of its money as.
25. It is not in dispute that the Plaintiff delivered the equipment's to the 2<sup>nd</sup> Defendant on the strength of the contract dated January 20, 2017 between the Ministry of Transport Infrastructure, Housing and Urban Development, State department Public Works – Supplies Branch and Pan African equipment Limited for the supply of graders – *vide* tender no. SB/19/2016-2017, the second agreement was for the supply of Rollers *vide* Tender No. SB/21/2016-20178 to the government department and institutions as and when required for a period of Two(2) years. Both agreements were executed on January 30, 2017.
26. It is also not in dispute that on the strength of the said contracts the Plaintiff on 29<sup>th</sup> March 2019 supplied the 2<sup>nd</sup> Defendant with two HAMM 3411 rollers and 1 Komatsu motor grader GD663A-2. which were not paid for and the Plaintiff applied to repossess the same from the premises of the 2<sup>nd</sup> Defendant.
27. The 2<sup>nd</sup> defendant submitted it was not privy to the contract between the Plaintiff and the 1<sup>st</sup> Defendant as the procuring entity, therefore, not liable to the actions of the 1<sup>st</sup> Defendant.
28. The Plaintiff confirmed that the delivery of the equipment was done outside the scope of the tender. The issue in dispute is who is entitled to pay the Plaintiff interest for the period it failed to use its money. I have perused the contracts and note that there are no express provisions on the payment of interest.
29. The parties agree that the period of honoring the contract was within 45 days from the date of supply. It is evident that the equipment's supplied to the 2<sup>nd</sup> Defendant on 29<sup>th</sup> March 2019 were not paid for which prompted the Plaintiff to file the instant suit seeking repossession of the equipment. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant stated the delivery was outside the tender period and as such there was no existing contract between the Plaintiff and the 1<sup>st</sup> Defendant and that the acceptance having been acknowledged by the 2<sup>nd</sup> Defendant the 2<sup>nd</sup> Defendant ought to pay for the equipment.
30. The Plaintiff argued that it later sold the equipment's at a loss. The 2<sup>nd</sup> Defendant despite committing to pay a sum of Kshs.44,965,220/= for the equipment by the letter dated 21<sup>st</sup> July 2020 failed to. In the said letter the 2<sup>nd</sup> Defendant wrote:-

“reference is made to your letter dated 17<sup>th</sup> July 2020 contents which are well noted. our proposal to settle the outstanding balance sums of Kshs.44,965,220/= in the next two weeks still stands. in that event we continue to seek your indulgence.

We do indeed acknowledge that this has been long drawn out and we wish to reassure you of our commitment to resolving this matter timeously in the interest of all parties.

We look forward to a seamless settlement”

31. Having considered the evidence placed before it by the parties, this court finds the 2<sup>nd</sup> Defendant acknowledged receipt of the equipment and committed to make the payment. At no point did the



2<sup>nd</sup> infer that the payment would be made by the 1<sup>st</sup> Defendant as the procuring entity even in its documentation. The Second Defendant committed to make the payments timely to bring the matter to a close as per the correspondence reproduced above. The initial contract between the Plaintiff and the 1<sup>st</sup> Defendant was for a period of 2 years while the equipment was delivered to the 2<sup>nd</sup> Defendant in March 2019 way after the framework contract between the Plaintiff and the 1<sup>st</sup> Defendant had expired. This position is not disputed by the parties.

32. The Plaintiff made several demands and notified the 3<sup>rd</sup> Defendant of its intention to institute legal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. It is evident the Plaintiff was denied the use of its money by the Defendants herein by its failure to honour its obligations upon delivery of the procured equipment.
33. Common law offers a remedy to the Plaintiff for the delayed payment in form of interest on the outstanding payments. This position was reinforced by the court in the English case of; Crookes Brothers Limited v Regional Land Claims Commission & Others Case No. 590/2011, as cited with approval in the case of *Ramji Ratma & Company Limited v Attorney General* [2020] eKLR the Supreme court of South Africa, held that:-
  - “(14) 14 Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date”.
34. Also in the case of *Lata v Mbiyu* [1965] EA 592 it was held as follows:- “The justification for an award of interest on the principal sum is, generally speaking to compensate a Plaintiff for the deprivation of any money or specific goods through the wrong act of a Defendant.”
35. It is trite law that where a party has been deprived of movable property and the court awards monetary compensation for the loss interest ought to be awarded from the date of such deprivation. Thus, taking into account the undisputed delay in payment for the equipment’s, this court finds it’s in the interest of justice that the Plaintiff be awarded interest for the deprivation of the use of its money.
36. The upshot of the above finding is that the Plaintiff suit is merited as against the 2<sup>nd</sup> Defendant and as a consequence make a declaration that the 2<sup>nd</sup> Defendant is liable for the loss and damage incurred by the Plaintiff because of their failure to pay for the equipment as agreed. the Claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendant was not proved to the required standard and is therefore dismissed.
37. In the circumstances the court finds and holds the 2<sup>nd</sup> Defendant liable to pay the Plaintiff as follows:-
  - a. late payment interest at the rate of 12% p.a due in the sum of Kshs.12,610,989.48/= computed from 29<sup>th</sup> march 2019 when the payment was due until 31<sup>st</sup> January 2022 when the equipment was resold.
  - b. Resale loss due in the sum of Kshs. 3,402,429.98 computed as  
Kshs.573,359.98/= on the resale of the 2 HAMM Rollers 3411 and Kshs.2,829,070.001/= on the resale of the grader GD 663A-2
  - c. Auctioneers costs specifically pleaded at Kshs.190,000/=
  - d. Costs of the suit



- e. Interest on (a), (b), and (c) above from the date of filing until payment in full at court rates.

It is so ordered.

## CONCLUSION

\*\*\*\*

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 14<sup>th</sup> DAY of MARCH, 2024**

.....

J.W.W. MONG'ARE

JUDGE

### **In the Presence of:-**

1. Ms. Mutisya holding brief for Ms. Otieno for the Plaintiff.
2. N/A for the 1<sup>st</sup> and 3rd Defendant.
3. N/A for the 2<sup>nd</sup> Defendant.
4. Amos- Court Assistant

**PAGE 4 OF 4 MONG'ARE, J.**

