



Spero Africa Limited v Independent Electoral and Boundaries Commission (Civil Suit 56 of 2016) [2024] KEHC 5928 (KLR) (Commercial and Tax) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 56 OF 2016
FG MUGAMBI, J
MAY 24, 2024**

BETWEEN

SPERO AFRICA LIMITED PLAINTIFF

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION DEFENDANT**

JUDGMENT

Background

1. By a plaint dated 23rd February 2016, the plaintiff instituted the present suit seeking from the defendant the sum of Kshs.99,033,376/=, together with interest at prevailing commercial rates from 21st March 2023 until payment in full, and costs of this suit together with interest.
2. The undisputed facts are that the parties herein entered into an agreement for the transportation of ballot papers for the general election held on 4th March 2013. This followed the advertisement, award, and acceptance of a tender No. IEBC/03/2012-2013 for transport services (the tender). Under this agreement the defendant agreed to pay and did in fact pay the plaintiff Kshs.24,758,344/=.
3. The plaintiff claims they availed 84 trucks together with crew as per the specifications set out in the contract. The plaintiff understood that the trucks, which were to be under the supervision of the defendant, were to be dispatched immediately. However, the plaintiff asserts that it was apparent the defendant was not ready to dispatch election materials when the trucks were delivered.
4. This resulted in the 84 trucks being retained with their crew for more than seven days, causing financial losses to the plaintiff. The plaintiff was forced to file a complaint demanding extra payment



for the delayed seven days at the rate of Kshs.17,684,531.40 per day for the 84 trucks, totaling Kshs.123,791,720/=.

5. The plaintiff confirms that the defendant called for a meeting on 21st March 2014. The plaintiff attended the meeting along with four other companies, and after negotiations, the defendant convinced all four suppliers to accept payment for four days only instead of seven, thus reducing the plaintiff's claim to Kshs.99,033,376/=.
6. The plaintiff later learned that all the other suppliers were paid their dues, yet the defendant provided no explanation for the refusal to pay the plaintiff's dues. It was on this basis that the present claim was filed against the defendant for compensation for the four days due to the delay in dispatching the ballot papers.

The Defendant's Case

7. The defendant opposed the claim and filed an Amended Statement of Defence dated 17th May 2017 in response to the plaint. The defendant denied any material alteration to the terms of engagement between the parties and began by pointing out that the plaintiff had not laid out the contractual terms before the court.
8. The defendant argued that in any case, as a public entity, the contract between the parties could only be interpreted in line with the provisions of the Public Procurement and Disposal Act No. 3 of 2005 (the Act), which was in force at the time.
9. The defendant asked the court to strictly construe the contract between the parties, since the plaintiff had not provided evidence of any contract altering the original contract. The defendant contended there was no indication from the contract that the trucks would be loaded as soon as they were availed at the defendant's warehouse.
10. The contractual sum had already been paid to the plaintiff, and the additional claim sought had no basis and had not been proved. The defendant denied detaining the vehicles and crew as alleged, noting that the plaintiff had the option of withdrawing the trucks at any time.
11. The plaintiff called two witnesses. PW1 was ANTONY KARIMI, the Managing Director of the plaintiff and PW2, was HUSSEIN ABDI OSMAN an employee of the plaintiff. PATRICK NYAKIRA testified as DW1 on behalf of the defendant. I shall not regurgitate the testimonies of these witnesses, which essentially support the parties' cases as laid out, except to refer to their testimonies in my analysis where necessary.

Analysis and Determination

12. I have carefully considered the pleadings, submissions and evidence presented by the parties. I believe that the issues that fall for determination are whether there was an alteration of the terms between the parties in the agreement for the transportation of ballot papers and whether the plaintiff is entitled to the claim against the defendant arising from the delay in dispatching the ballot papers.
13. What is concerning is that besides the notification for the award of the tender and the acceptance of the award, no signed contract has been placed before this court to confirm the terms between the parties. It is unclear why this was not produced despite being central to the plaintiff's claim. Without belaboring the impact this has on proving the plaintiff's claim, the court proceeds, albeit blindly, based on the admission between the parties that such an agreement was entered into, and on the existing documents that presuppose the terms.



Was there delay in the dispatch of ballot papers?

14. The plaintiff persisted that the basis of their claim was an unforeseeable delay that had been caused out of no fault of the plaintiff and for which the defendant ought to be liable. The defendant denied this, confirming instead that the tender for the transport of ballot papers was awarded per trip as the procurement process envisaged payment for each specific trip undertaken and upon delivery of the ballot papers by each truck.
15. The record confirms the assertion by the plaintiffs. The minutes of the meeting held between the defendant and various suppliers on 21st March 2014, among them the plaintiff indicates that the defendant acknowledged there was a delay in dispatching the ballot papers. A section of the minutes reads as follows:

“It is true that trucks reported for loading on 24th February 2013 for various destinations. The delay, as the Directorate of Voter Registration and Electoral Operations stated, was caused by the late delivery of County Assembly Ward (CAW) ballot papers from the UK, of which the last batch arrived at Jomo Kenyatta International Airport, Kenya, on 28th February 2013, and two days of clearing and loading. There were six seats of contests during the General elections, and there was no way the hired lorries could be released without the County Assembly Ward (CAW) seat ballot papers as the process of hiring new trucks would not have been possible because of the time limit.”

16. Having established that there was a delay in loading and dispatching the ballot papers, the next question is whether there had been a material alteration to the parties’ engagement under which the plaintiff was entitled to compensation.

Alteration of the contract legality of the payment for four extra days:

17. The plaintiffs contended that as a result of the delay, there was an alteration of the terms of the contract so that the contractual period increased by seven days following the meeting of 21st March 2014. The minutes produced by the plaintiff show that PW1 was present alongside other transporters and officers of the defendant company.
18. Minute 2/3/2014 was titled Negotiations on extra days claim on hired transport charges: It reads in part as follows:

“According to the Manager Electoral Planning and Logistics, who coordinated the transportation of the materials, there was a delay of at least four days. After a long discussion, it was amicably agreed to share the losses as stakeholders in the transport business, reducing the claim from seven days to four days.”

19. The minutes are signed by the Manager Transport and Security, Manager Finance, and Manager Procurement. The court must ascertain whether the resolutions made almost one year after the contract had been completed can override the express provisions in the Act, notwithstanding that the agreement between the parties was not produced before this court.
20. Section 4 of the Act is clear that all state organs and public entities must comply with the Act in their public procurement processes. Even without the express terms of the agreement between the parties, regulation 31 of the Public Procurement Disposal Regulations (the Regulations) clearly state that variation quantities must not exceed 10% of the original contract quantity. The variance of 48 trips revised to 84 trips so as to account for the delay and compensate the plaintiff exceeded this threshold.



21. Of importance is the further requirement under regulation 31 that:
- “The price or quantity variation is to be executed within the period of the contract.” (emphasis mine).
22. It is not in dispute that at the time that the meeting of 21st March 2014 was taking place, the contract had been performed and full payment under the Local Purchase Order made by the defendant. It was therefore not possible to even purport to vary the contract at this stage.
23. The court’s attention was further drawn to section 47 of the 2005 Act which provides that:
- “An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if:
- a. the amendment has been approved in writing by the tender committee of the procuring entity; and
 - b. any contract variations are based on the prescribed price or quantity variations for goods, works, and services.”
24. A similar dispute was the subject of judicial discussion in the case of Hezekiah Adala T/A Hezekiah Engineering Services V Tana Teachers Sacco Society Limited, [2018] eKLR, cited by the defendant. The court reiterated the need for parties alleging variation of public procurement contracts to provide sufficient evidence. This is by way of evidence of approval by the Tender Committee and issuance of a letter notifying a party of the said approval and the costs of the variation of contract.
25. The plaintiff did not produce a written approval by the Tender Committee of the alleged variations. When pressed further in cross-examination, PW1 confirmed this by stating at different points of his testimony:
- “I don’t have any document to confirm that there was a material alteration of the contract or for extension of the contractual period...I don’t know the tender committee. I don’t know whether this was placed before the tender committee.”
26. For these reasons, just as the court found in the Hezekiah Adala case (supra), it is also my finding that a very important aspect of evidence in the allegation of contract variation was missing from the plaintiff’s evidence. This ground of the claim therefore fails. It hence follows that the defendant cannot sustain the claim for compensation.
27. While the court sympathizes with the plaintiff, it cannot disregard the law to permit an illegality. The fact that other entities were compensated for similar losses, if indeed true, does not justify the court bending the rules of public procurement. This court has consistently maintained that parties involved in public procurement processes must exercise extra caution. Ignorance of the law cannot be a defense in matters involving public resources.
28. The testimony of PW2 that he understood the public procurement process due to his many years of working with government proves that the plaintiff is not entirely blameless in this scenario. The allegations of nepotism and discrimination vis-à-vis the other suppliers have not been proven and remain mere allegations.



29. I align myself with the observation of the court in *Centurion Engineers & Builders Limited V Kenya Bureau of Standards*, [2017] eKLR, thus:

“The contractor cannot play ignorance because the law is clear regarding variations. The contractor should insist on compliance with the law and refuse to carry out any extra works requested without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The contractor must be as vigilant as the public entity in observing the law.”

30. Equally reflective of this position is the case of *Royal Media Services V Independent Electoral and Boundaries Commission & 3 Others*, [2019] eKLR, with which I again subscribe to, particularly on the duty of the court in safeguarding the law by declining to enforce transactions that are contra statute. The court noted as follows:

“An argument had been made that not to allow the claim would hurt RMS and let IEBC get away with services without paying for them. This Court is not unsympathetic to this argument, yet there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *ex turpi causa non oritur actio*, that is, from a dishonorable cause, an action does not arise. There may be good reason not to resolve such argument in favor of a contractor or supplier who is partly to blame or who is not entirely blameless.”

Disposition

31. For all the reasons that I have stated, this suit is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

