



**Techno Relief Services Limited v County Government of Machakos (Civil Suit E003 of 2020) [2024] KEHC 7299 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL SUIT E003 OF 2020  
FROO OLEL, J  
JUNE 19, 2024**

**BETWEEN**

**TECHNO RELIEF SERVICES LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... DEFENDANT**

**JUDGMENT**

**A. Pleadings**

1. Vide a plaint dated 2<sup>nd</sup> October 2020 and filed in court on the same day, the plaintiff averred that they were a company specialized in General trading and supplies of goods and had previously been engaged by the defendant to supply and deliver goods/materials of various kinds on various dates from the year 2014 to 2016. They supply and delivery of goods was preceded by an open procurement process, which saw them issued with local purchase orders, to supply different goods and materials to the defendant. (The said LPO'S were particularized in paragraph 5.1 to paragraph 5.11 of the plaint)
2. By issuance of the local purchase order, the defendant expressly and firmly confirmed to the plaintiff that funds were available and committed to pay for deliveries made. The plaintiff further averred that it supplied and delivered, the right quantity and quality goods procured as per the local purchase order to the defendant's order and delivered at the designated place, where goods and material were accepted as the right quantities and quality, consequent of which partial payments were made to the plaintiff. Further, it was contended that as a term of sale or conditions for sale, it had been agreed that the plaintiff would charge monthly interest of 2% on all overdue accounts. A term/ condition of contract, which the defendant dully accepted.
3. That the total sum outstanding and due to the plaintiff for goods supplied and which they claimed was Kenya shillings twelve million, three hundred and twenty-five thousand and twenty-four shillings, seventy nine cents (Kshs.12,325,024.79) and the total accrued interest charged to date on the said sum was Kenya shillings Eight Million, seven hundred and fifteen thousand, two hundred and twenty-six



and sixty-six cents. (kshs.8,715,226.66/=). It was averred that despite the defendant being served with a demand notice, they had ignored, refused, failed and / or neglected to make good the plaintiff's demand thus necessitating this suit. The Plaintiff therefore prayed for judgment to be entered as against the Defendant for the sum of Kshs.12,325,024.79/= being the balance outstanding and Interest on (a) above charged at 2% P.M now outstanding at Kshs.8,715,226.66/=, plus interest on costs of the suit.

4. Upon service, the defendant-county Government of Machakos, did file their statement of defence dated 4<sup>th</sup> December,2020, where they denied all the averments contained in the plaint. They further averred that if the plaintiff was ever engaged to supply goods and materials to the county government, then the same was done un-procedurally and in breach of the provisions of the Public Procurement and Disposals Act, 2012 and put the plaintiff to strict proof as to advertising the tender, purchase, tender submissions, shortlisting and eventual qualification.
5. The defendant further denied issuance of any local purchase order to the plaintiff, its commitment to pay the same and that if any local purchase order was issued, the same was so issued irregularly, was unenforceable, illegal and thus null and void ab initio. The plaintiff therefore was not entitled to the reliefs sought and they prayed that the suit be dismissed with costs.

### **B. The Plaintiff's case.**

6. PW1 Ketan .K. Goswami testified that he worked for the plaintiff company as a product development manager and tender administrator. They dealt with emergency relief supplies, general trading and delivery of services. He relied on his witness statements filed together with all the documents filed, which he produced as Exhibit P1 to P82. He testified that they had successfully participated in public tender and supplied the defendant the various goods to wit; construction material/machinery, borehole casing, electrical materials and were issued with various L.P.O for the tender awarded. All the goods were delivered, and the delivery notes stamped/signed in acknowledgment.
7. The goods supplied were of good quality and in accordance with specifications. As against the supplies made, partial payment was received leaving an outstanding amount of kshs.12,325,024.79/= remaining as unpaid. This amount had attracted interest at 2% which as at the time of filing this suit had risen to kshs.8,715,226.66/= before filing the suit. They had they tried their level best to amicably solve this matter but no progress was made. Eventually they sent a demand letter, which was ignored before they filed this suit. They prayed for he reliefs sought to be granted.
8. The defendant advocates though served did not appear at trial and did not present any witness to testify in support of their case.

### **C. SUBMISSIONS**

#### **Plaintiff's Submissions**

9. The Plaintiff's filed, their submissions dated 7<sup>th</sup> December,2023 and raised the following issues;
  - a. Whether the defendant was liable to pay the plaintiff the amounts outstanding as prayed for in the plaint.
  - b. Who should bear the cost of this suit.
10. It was submitted that the defendant had refused and/or failed to attend court for the hearing of this suit and thus the plaintiff witness evidence stood uncontroverted. Reliance was made to the case of Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another {1997}e KLR and the case of Shaneebal Limited V County Government of Machakos [2018] eKLR, where the courts had



held that, where the defence had not called any evidence, their pleadings remained mere statement of facts which were not substantiated.

11. For further emphasis on the said issues, was also made on the case of Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No 1243 of 2001, Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) HCCC NO.68 of 2007 and the case of Drappery Empire vs The Attorney General HCCC No. 2666 of 1996.
12. The plaintiff further submitted that the evidence and documents (Exhibits) produced were not rebutted, and it proved beyond reasonable doubt that the plaintiff had been engaged by the defendant to supply goods and materials of various kinds. They had been issued with a local purchase orders, partial payments made after delivery and there was an outstanding balance of kshs.12,325,024.79/= plus interest of kshs.8,715,226.66/= as at the time of filing the suit. Reliance was placed on the case of Benson Kan'ara t/a Pinkstone Enterprise vs Nairobi City County (2019)eKlr and further in the case of Equip Agencies Limited v Attorney General[2011] e Klr, to emphasis that principal and interest were due and payable where proof of supplies had been proven on a balance of probability.
13. It was their final submission that they had discharged the burden of proof and the prayers sought ought to be allowed with costs. Reliance was made to the case of UAP Insurance Company vs Toiyoi Investment Limited [2020] eKLR & Orix Oil (Kenya) Limited Vs Paul Kabeu & 2 others (2014).

#### **D. Analysis & Determination**

14. The Court has considered the pleadings filed herein, evidence on record and written submissions of the plaintiff. The issues that emerge for determination is whether the plaintiff has indeed proved on a balance of probability that they supplied the goods and materials to the defendant and if so, whether they are entitled to the sums/amounts sought.
15. The evidence of PW1 Ketan.k. Goswami, was not controverted by the defendant. His evidence was that they participated in public tender and supplied the defendant with various goods to wit; construction material/machinery, borehole casing, electrical materials and were issued with various L.P.Os for the tenders awarded. All the goods were delivered, and the delivery note stamped/signed in acknowledgment.
16. The goods supplied were of good quality in accordance with specifications and as against the supplies made, partial payment was received leaving the outstanding amount of kshs.12,325,024.79/= remaining as unpaid. This amount had attracted interest at 2% per month, which as at the time of filing the suit had risen to kshs.8,715,226.66/=. They had they tried their level best to amicably resolve this matter but no progress was made, and eventually filed this suit.
17. The defendant on the other side did not avail any witnesses neither did they participate in the hearing. The affidavit of service, dated 15.06.2023, sworn by one Eric Odaso, proved that indeed service of the hearing notice had been effected through the said process server, which notice was received by stamping and signing of the front page.
18. On the question of service, this court relates with the finding in the case of Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR, where the Court of Appeal quoting Chitale and Annaji Rao; The Code of Civil Procedure Volume II page 1670 stated that:

“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the



process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

19. This matter therefore justifiably proceeded in the absence of the defendant. The legal and evidential burden of establishing the facts in support of a party’s case lies with the Applicant/plaintiff. This is determined by considering the question as to who stands to lose if the burden is not discharged.

20. Section 107 and 108 of the Evidence Act provides: -

107. Burden of proof

- (1) 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

21. The plaintiff’s evidence presented was not controverted in any manner. The plaintiff did produce copies of the LPOs, delivery notes duly stamped acknowledging receipt of goods received, VAT withholding tax certificates and invoices issued. The defendants also made part payment of the supplies made and all this uncontroverted evidence irresistibly pointed and prove that indeed there existed a business relationship between the parties, where the defendant enjoyed benefit of goods supplied but for reasons best known to them had refused and/or failed to complete paying consideration for the same.

22. The issue of uncontroverted evidence was addressed by Justice Mwongo in Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another 2019 eKLR where he stated:-

“ 22. There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of Shaneebal Limited v County Government of Machakos [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.



23. Similarly, in the case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

24. In Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

25. I find that the plaintiff through the evidence of PW1 and its bundle of documents produced in court had proved that it indeed they supplied and delivered various goods and materials to the defendant & further had not been fully paid for the said supplies made, and thus are entitled to be paid the outstanding balance as sought.

26. The plaintiff also sought for interest on the outstanding amount to be paid at 2% per month and relied on the conditions of sale as indicated on the foot note of the various invoices sent to the defendant. In the case of National Bank of Kenya Ltd v Pipe Plastic Sankolit (K) Ltd & Another [2001] Eklr, the Court of Appeal held that a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract. Further, in Danson Muriuki Kihara v Johnson Kabungo [2017] eKLR the Court relied on the case of National Bank (supra) and Ajay Indravadan Shah vs Guilders International Bank Ltd Civil Appeal No. 135/2001 [2002] 1 EA 269 stated that : -

“It is apparent from the authorities that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent.”

27. In this instance, there is no agreement produced to show that indeed the parties had agreed that interest would be charged at 2% per month on delayed payments. Further the said invoices are not counter signed by the defendant’s employees to signify acceptance of the said conditions. It follows therefore that this Court cannot rely on thee plaintiff’s assertion as regards interest rates payable on the outstanding payments.

28. In Alba Petroleum Limited v Total Marketing Kenya Limited [2019] Eklr, the Court of Appeal of Kenya relying on the Lesotho case of Boliba Multipurpose Cooperative Society vs. Ramathibeli Joseph Mpoko, CCT 37 of 2007 where it was held that if no evidence is provided regarding the rate of interest, as claimed in the plaint the claim must then fail, held as follows: -

“We have evaluated the evidence on record. The respondent did not lead any evidence to prove its claim of interest at the rate of 26% per annum. There is no evidence on record



proving the prevailing commercial rate of interest. The trial court did not give any reasons for awarding 20% rate of interest. There is no evidence on record to demonstrate 20% per annum was the prevailing commercial rate of interest. In the final analysis, this appeal is partially successful on the issue of rate of interest. Guided by case law, the respondent is entitled to the court rate of interest with effect from the date of filing suit”.

29. As none of the parties produced evidence to prove what interest rate was chargeable, and considering the provisions of Article 201(d) and Article 227(1) of *the constitution* of Kenya which, provides that public monies shall be used in a prudent and responsible way and further that public entities shall procure goods in a fair, transparent, competitive and cost effective way, as read together with various provisions of the Procurement and disposal of goods Act/*Public Finance Management Act* interest can only be chargeable at Court rates as provided under Section 26(1) of the *Civil Procedure Act* and under the Practice Note No.1 of 1982 where the then Chief Justice Simpson Ag CJ issued the following practice direction: -

“The *Civil Procedure Act* Cap 21 Laws of Kenya Section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable. In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%”.

30. The plaintiff did not specify which invoices had been completely paid and which invoices were partially paid. Interest shall therefore be chargeable at a flat rate of 12% P.A from the date of filing this suit until payment in full.
31. As to costs, the plaintiff has proved its case and as such the defendant shall be liable to costs and interest on costs at 14% in accordance with section 27(2) of the *Civil Procedure Act*

#### **E. Disposition.**

32. The upshot and having considered the evidence presented, I do enter judgment in favour of the plaintiff in the sum of Kenya shillings twelve million, three hundred and twenty-five thousand and twenty-four shillings, seventy-nine cents (Kshs.12,325,024.79/=) plus interest thereon at 12% P.A from the date of filing this suit until payment is made in full.
33. The plaintiff will also have the costs of this suit and interest on costs at 14% in accordance with section 27(2) of the *Civil Procedure Act*.
34. It is so ordered.

Judgment written, dated and signed at Machakos this 19<sup>th</sup> day of June, 2024.

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 19<sup>th</sup> day of June, 2024.**

**In the presence of;**

No appearance for Plaintiff

No appearance for Defendant

Sam Court Assistant



