



MIG International v Ministry of Interior and Coordination of National Government & another (Civil Case E255 of 2021) [2024] KEHC 9255 (KLR) (Civ) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE E255 OF 2021
AN ONGERI, J
JULY 22, 2024**

BETWEEN

MIG INTERNATIONAL PLAINTIFF

AND

**MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 1ST DEFENDANT**

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. Mig International Limited (hereafter referred to as the plaintiff), sued the two defendants Ministry of Interior And Coordination of National Government And The Attorney General (hereafter referred to as the 1st and 2nd defendants respectively) seeking the following remedies
 - i. General damages for losses incurred by the plaintiff.
 - ii. Special damages of Euro €1,269,083.92 made up as follows
 - a. €384,520.38 being the value of what was already supplied.
 - b. €617,462 being what is already shipped into the country awaiting delivery.
 - c. €420,536 being what has been ordered awaiting shipping into the country.
 - iii. An order of specific performance compelling the defendants to order and accept delivery of the remaining consignments.
 - iv. Costs of this suit.
 - v. Interest on (i) and (ii) at court rates.



- vi. Any other relief as this court may deem fit to grant.
2. The plaintiff avers in the plaint dated 4/10/2021 that its director saw an advertisement in the East African Newspaper on 31st January to 5th February, 2015 by the Kenya Prison Services tenders no. KPS/T/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and tender no. KPS/T/10/2015-201602017 for supply and delivery of motorized vehicle number plate blanks.
 3. The plaintiff made arrangements and obtained the tender documents from the Kenya Prisons Services web site and applied for the same.
 4. The plaintiff further avers that he applied for both tenders no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and tender no. KPS/T/10/2015-2016-2017 for supply and delivery of motorized vehicle number plate blanks but was only successful in getting KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil.
 5. The plaintiff avers that after going through the bidding process not without its handles, he was informed that he had been awarded tender no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil.
 6. The plaintiff avers, that on receipt of the letter he instructed his supplier to start preparing for what he would be supplying to the procuring entity.
 7. The plaintiff avers that he was surprised when he was informed by a letter dated 25th September, 2015 which was received on the 28th September, 2015 from the Public Procurement Review Board, that a review had been lodged by a bidder at the Board and the plaintiff was to appear before the Board on the 2nd day of October, 2015 for hearing.
 8. The plaintiff avers that the board heard and determined the matter in PPARB No. 46 of 2015, the decision was appealed against and subsequently five judicial review matters over the same subject were heard and determined to wit Nairobi JR Nos. 356 of 2015, 362 of 2015, 4179 of 2016, 505 of 2016 and 506 of 2016 in which matters the plaintiff was a party.
 9. The plaintiff avers that after all the matters were concluded he was declared a winner of Tender No. KPS/OCB/T/11/2015-2017 for supply and delivery of motorized vehicle number plate hot stamping foils of sizes 305mx120mm and 305mx220mm, which was valued at 1,269,089.45 Euros.
 10. The plaintiff avers that on the 7th of November, 2017 the plaintiff and the 1st defendant through the State Correction Department entered into a contract for supply and delivery of motorized vehicle number plate hot stamping foils of sizes 305mx120mm and 305mx220mm, which was valued at 1,269,089.45 Euros running for a period of three years upto the year 2020.
 11. The plaintiff avers that he was to be paid after every thirty (30) days upon delivery of materials so delivered to the ministry of Interior and Coordination of National Government at the Department for Correction (herein referred to as the “client”).
 12. The plaintiff now armed with a binding contract engaged its supplier in Germany to manufacture the total contract supply in preparation for delivery as and when orders are placed by the client.
 13. The plaintiff avers that on diverse dates in the year 2018, the 1st defendant’s officers placed orders and deliveries were made between May and September and an invoice of Euro €384,520.38 was raised.



14. The plaintiff having been advised by the initial order shipped into the country materials worth Euro €617,462 and the said consignment is currently at the warehouse of the plaintiff awaiting orders and delivery.
15. The plaintiff avers that it has also already procured the last consignment of the contract value and is awaiting shipping from Germany and the said consignment is worth €420,536.
16. The plaintiff avers that the contract goods are specific and unique to the needs of the client and can only be used by the client for its specific need and use, thus the plaintiff cannot mitigate its losses by supplying them to any other third party.
17. The plaintiff avers that todate the 1st defendant has refused and/or neglected to settle the above mentioned invoice despite numerous reminders and demands on the same.
18. The plaintiff avers that as a result of the said breach of the tender agreement it has suffered loss and damages.
19. The defendants filed a defence dated 5/11/2021 denying the plaintiff's claim in it's entirety.
20. The plaintiff who testified as PW 1 adopted his written statement dated 4/10/2021.
21. The plaintiff said that he resides within the Republic of Uganda and that he is the Managing Director of the plaintiff company.
22. The plaintiff further said that he saw an advertisement in the East African Newspaper of 31st January to 6th February, 2015 by the Kenya Prison Services tenders no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and tender no. KPS/T/10/2015-2016-2017 for supply and delivery of motorized vehicle number plate blanks.
23. That with the mandate of the Board of directors he made arrangements and obtained the tender documents from the Kenya Prisons Services web site and applied for both tenders no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and tender no. KPS/T/10/2015-2016-2017 for supply and delivery of motorized vehicle number plate blanks.
24. That after going through the bidding process, he was informed that the company had been awarded tender no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil.
25. Upon receipt of the letter he instructed their supplier to start preparing for what would be supplied to the procuring entity.
26. That he was surprised when informed by a letter dated 25th September, 2015 which was received on the 28th September, 2015 from the Public Procurement Review Board, that a review had been lodged by a rival bidder at the Board and the plaintiff was to appear before the Board on the 2nd day of October, 2015 for hearing.
27. That the Public Procurement Review Board heard and determined the matter in PPARB No. 46 of 2015, but the decision was appealed against and subsequently five Judicial review Matters over the same subject were heard and determined to wit Nairobi JR Nos. 356 of 2015, 362 of 2015, 4179 of 2016, 505 of 2016 and 506 of 2016 in which matters the plaintiff was a party.



28. That after all the matters were concluded the plaintiff was declared a winner for Tender No. KPS/T/11/2015-2017 for supply and delivery of motorized vehicle number plate hot stamping foils of sizes 305m x 120mm and 305m x 220mm, which was valued at 1,269,089-45 Euros.
29. That on the 7th of November, 2017 the plaintiff and the 1st defendant through the State Correction Department entered into a contract for supply and delivery of motorized vehicle number plate hot stamping foils of sizes 305m x 120mm and 305m x 220mm, which was valued at 1,269,089-45 Euros running for a period of three years up to the year 2020.
30. That in the afore stated contract the plaintiff was to be paid after every thirty (30) days upon delivery of materials so delivered to the Ministry of Interior and Coordination of National Government at the Department of Correction.
31. That now armed with a binding contract we engaged our supplier in Germany to manufacture the total contract supply in preparation for delivery as and when orders are placed by the client.
32. That on diverse dates in the years 2018, the 1st Defendant's officers placed orders and deliveries were made between May and September and an invoice of Euro €384, 520.38 was raised.
33. That having been advised by the initial order they shipped into the country materials worth Euro €617, 462 and the said consignment is currently at their warehouse awaiting orders and delivery to the client.
34. That they also have already procured the last consignment of the contract value and is awaiting shipping from Germany and the said consignment is worth €420, 536.
35. That the contract goods are specific and unique to the needs of the client and can only be used by the client for its specific need and use, thus they cannot mitigate their losses by supplying them to any other third party.
36. That time and again they have written to the defendant requesting for payments and further orders but the defendant has refused and/or neglected to settle the above mentioned invoices and or place others orders in line with the contract.
37. That as a result of the said breach of the supply agreement they have and continue to suffer loss and damages.
38. That their claim against the defendants is premised on breach of contract;-

Particulars of Breach

Breach of contractual obligations by failure to honour terms of the contract

- a. Disregarding and defaulting on contract with the Plaintiff
- b. Failure to respond to notices
- c. Defaulting in settlement of agreed payments despite placing of orders and acknowledging deliveries.
- d. Total breach of the agreement by failing to pass consideration as agreed.
- e. Exposing the plaintiff to colossal loss for the goods ordered, delivered and manufactured awaiting delivery.



- f. That they are claiming from the Defendants a total sum of Euro €1,269,083.92 being the total contract value tabulated as follows €384 520.38 being the value of what is already supplied, Euro €617, 462 being what is already shipped into the country and awaiting delivery to the client €420, 536 being what has been ordered with the manufacturer awaiting shipping into the country and delivery to the client.
 - g. That they have been ready and willing to supply the remainder of the contract value but have been frustrated by failure on the part of the 1st defendant to direct when they can deliver noting that most of the contractual consignment is already in the country.
 - h. That despite numerous demands and notice of intention to sue the Defendants have neglected and or refused to meet their claim. (A copy of notice of intention to sue is hereby marked as Exhibit 11).
39. They are therefore praying for judgment against the Defendants for:
- i. General damages for loss.
 - ii. Special damages of Euro €1,269,083-92 being the contract value.
 - iii. An order for specific performance compelling the Defendant to order and accept delivery of the remaining consignments.
 - iv. Costs of this suit.
 - v. Interest on (a) and (b) above at court rates.
 - vi. Any other relief as this Honorable court may deem just to grant.
40. In cross examination, PW1 said he submitted the two tenders in 2015 but he only won one of them. He said he signed the contract on 17/11/2017.
41. PW1 said he has not submitted the tender document but he has the contract which he signed.
42. PW1 admitted that the delivery of the motorized vehicle number plates for hot stamping foil was on the basis of when orders were placed by the defendants.
43. PW1 further stated in cross-examination that one LPO was placed but they wanted three consignments whereas the payments were to be done with 30 days.
44. The defendants did not call any witnesses. The parties filed written submissions as follows;
45. On the part of the Plaintiff, counsel began his submissions by restating the events leading to the instant suit meanwhile condensed his submissions on two (2) cogent issues. Addressing the Court on whether there existed a valid contract between the parties and whether the Plaintiff's evidence was uncontroverted, counsel relied on the decision in *William Muthee Muthami v Bank of Baroda* [2014] eKLR to argue that there existed a valid contract that was binding upon the parties of which has not been impugned by any evidence by the Defendants.
46. It was further submitted that failure on the part of the Defendant to call evidence, their statement of defence remains mere allegations whereas the Plaintiff's evidence stands uncontroverted. The decisions in *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* - Nairobi Milimani HCCC No. 834 of 2002, *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* -Kisumu HCCC No. 68 of 2007, *Interchemie EA Limited v Nakuru Veterinary Centre Limited* - Nairobi Milimani HCCC



No. 165B of 2000 and *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR were relied on.

47. Concerning whether the suit is merited, counsel anchored his submissions on the decision in *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR to argue that the Plaintiff having won the tender, a binding agreement with the Defendants ensued to which the former upheld their end of the bargain however the latter displayed wanton disregard for the contractual terms thus occasioning severe loss to the Plaintiff. That the documents adduced into evidence sufficiently demonstrate that there was a valid contract between the parties with the same being performed save for the conduct of the Defendants which has frustrated the Plaintiff and incurred it loss.
48. It was further submitted that despite making deliveries to the tune of 384,520.38 Euros and invoicing the same, the Plaintiff sourced for the remainder of the goods meanwhile made a demand for payment of which the Defendants failed to settle. Counsel went on to contend that in light of the foretold the Plaintiff had discharged his burden of proof.
49. While calling to aid the decisions in *Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited* [2016] eKLR and *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242 it was argued that notwithstanding the settled position on general damages for breach of contract, the Plaintiff is entitled to nominal damages and general damages where he proves an injury flowing as a natural consequence of breach.
50. That the Plaintiff having been the successful bidder and subsequently entered into a legally binding contractual engagement, he was entitled to payment of the consideration on account of upholding his contractual obligations. Counsel went on to assert that the Defendants unwavering failure, refusal and or neglect in keeping their end of the bargain by either receiving the remaining consignment or paying for goods already supplied was vindictive and undeserving of any sympathy from this Court.
51. On special damage, it was summarily argued that the Plaintiff is entitled to a sum of 1,269,083.92 Euros having availed supporting documents buttressing each and every averment it made. Citing the of-cited decision in *Hahn v Singh* [1985] KLR, counsel asserted that the Plaintiff has specifically prayed and proven that he supplied goods forming part of the entirety of the contracted goods whereas he has since shipped goods into the country, which goods lie at a warehouse meanwhile the order in respect of the last batch of goods equally warrants payment.
52. On the claim for specific performance, counsel placed reliance on the decision in *Reliable Electrical Engineering Ltd v Mantrac Kenya Limited* [2006] eKLR to submit that the relief is an equitable remedy and discretionary meanwhile is premised on the fact that the goods already ordered and or shipped cannot be sold or offered for sale to another entity given that they were uniquely and specifically manufactured for the Defendant's needs and specification. This Court was therefore urged to allow the suit with interest and costs thereof.
53. On the part of Defendant, counsel condensed his submissions on five (5) cogent issues for this Court's consideration. On whether the Plaintiff delivered goods valued as 384,520.38 Euros, counsel relied on the decision in *Isaac Mugweru Kiraba t/a Isamu Refri-Electricals v Net Plan East Africa Limited* [2018] eKLR to assert that the Plaintiff failed to discharge his burden of proof by demonstrating that he delivered the goods ordered by the 1st Defendant by way of adducing delivery notes evincing that the goods were received.
54. That the invoices adduced before Court did not amount to delivery notes whereas acknowledging receipt of the invoice was not equivalent to receipt of goods by the 1st Defendant. The decision in *E.P Communications Limited v East Africa Courier Services Limited* [2019] eKLR was cited in the said



- regard. Counsel equally argued that the sum in the Local Purchase Order (LPO) and Invoice did not tally therefore demonstrating the fact that the Plaintiff failed to discharge his burden of proof to the required standard.
55. Submitting on whether an order for goods valued at 617,472 Euros and 420,536 Euros was placed by the Defendants, counsel asserted that on cross examination the Plaintiff confirmed that the 1st Defendant would place an order for goods under the contract by issuing an LPO and that only one was issued by the 1st Defendant.
 56. Therefore, the Plaintiff having failed to adduce LPO's for the sums of 617,472 Euros and 420,536 Euros, it can be reasonably concluded that no order was placed in respect of the sums in question and a claim for the same ought to fail. Concerning whether the Plaintiff is entitled to special damages to the tune of 1,269,089.45 Euros.
 57. Counsel placed reliance on the decisions in *Mathew Mutua Mutio v Car & General (K) Ltd* [2000] eKLR and *Kenya Power & Lighting Company Ltd v James Muli Kyalo & Another* [2020] eKLR to submit that the Plaintiff failed to specifically plead and prove his claim for special damages by adducing evidence that he has expended 1,269,089.45 Euros towards purchase of the goods to be supplied and delivered the same to the 1st Defendant.
 58. On whether an order of specific performance can issue for the sum of 617,472 Euros and 420,536 Euros, counsel anchored his submissions on the decision in *Reliable Electrical Engineering Ltd (supra)* and *Thrift Homes Limited v Kays Investments Limited* [2015] eKLR to submit that the contract has since lapsed on account of effluxion of time thus discharging the respective parties of their obligations under contract, a consequence of which there is no existing contract capable of being enforced and or performed so as to entitle the Plaintiff to an order of specific performance.
 59. Penultimately, submitting on whether there was any breach of contract, it was argued that despite adducing LPO's, the Plaintiff did not evince any delivery notes to which the Defendants may be held in breach of contract by failing to settle the invoice on received goods. That on account of the foretold claim for breach of contract cannot be sustained as against the Defendants.
 60. The decisions in *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR and *Dormakaba Limited v Architectural Supplies Kenya Limited* KEHC 210 [2021] eKLR were cited in the latter regard.
 61. The Court has considered the evidence on record alongside the rival submissions. Underlyingly, the question arising is whether on a balance of probabilities the plaintiff has established its claim and if so, whether it is entitled to the reliefs sought for in its pleadings.
 62. At the onset, it is well-trodden that it is the duty of the plaintiff to prove his case to the required standard, which is on a balance of probabilities. In the foregoing regard, the Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, stated that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It



follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

63. Further, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Meanwhile, as relates to the said burden, the Court of Appeal in *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 stated that:-

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

64. It is on the premise of the latter decision that the plaintiff’s contestation that failure on the part of the defendants to call evidence, their statement of defence remains mere allegations and its evidence stands uncontroverted, cannot sustain.

65. Notwithstanding the defendants’ failure to call evidence, the plaintiff must discharge its burden of proof by adducing material evidence, in support of the averment in its pleadings. With the foretated in reserve, the key issues crystalizing for consideration before this Court are:-

- I. Whether there is a valid contract between the parties.
- II. Whether there was performance of the contract by the Plaintiff, and if so, whether the 1st Defendant was in breach of its obligations in the contract.
- III. Whether the plaintiff is entitled to the remedies he is seeking.
- IV. Who pays the costs of this suit?

66. On the first issue, it is not in dispute that the “Form Of Agreement” the plaintiff signed with the 1st defendant for the supply and delivery of motorized vehicle number plates hot stamping foil vide tender No. KPS/T/11 2015-2016 for a period of three (3) years on 7/11/2017, the following documents were deemed to form part of the contract agreement: Form of tender and the price schedule submitted by the tenderer; The confidential business questionnaire; The technical specifications; The general conditions of contract; The special conditions of contract; The procuring entity’s letter of notification of tender award; The letter of acceptance by the tenderer/contractor.

67. Cumulatively, the Exhibits adduced by the plaintiff, with the exception of Letter of award, were wanting. The plaintiff had opportunity and failed to produce the critical documents aforementioned that formed part and parcel of the contract. Crucially in its list of documents, no letter of acceptance by the tenderer/contractor is attached.

68. It is this court’s position that the bundle of exhibits adduced by the plaintiff, fail to formulate the key tenets of a contract, of which constitute offer, consideration and acceptance. Thereby, answering the first issue on whether there was a valid contract between the parties.

69. On whether there was performance of the contract by the Plaintiff, and if so, whether the 1st Defendant was in breach of its obligations in the contract?

- i. He who alleges must prove their allegations and hence their case. Failure by the plaintiff to produce the aforementioned crucial documents that formed part and parcel of the contract, has not aided the plaintiff’s cause in this regard. Performance is pegged to the terms and conditions of the contract.



- ii. Whereas the procuring entity issued LPO's for supply specifying "pieces", the Germany source company Grewe GmbH & Co.KG shipped in "Roll" and finally MIG International Limited invoiced the defendant based "SQM" (Invoice No.222 of 22/9/2018) and not as per the unit specified in the LPO's. This conundrum relating to performance can be answered if crucial documents that formed part of the contract, (Form of tender and the price schedule submitted by the tenderer; The confidential business questionnaire; The technical specifications), were tendered in evidence by the plaintiff.
 - iii. Whereas the invoice tendered in evidence totals 384,520.38, the supporting LPO's Nos 2755410, 2755425 and 2755420 all totaling 290,729.7, a variance of 93,790.68 . Of note also is that this invoice is not backed by signed and stamped delivery notes. The court will delve a little more into this later in this ruling.
70. To answer the first limb, as earlier detailed, this was a contract stretched/staggered over three financial years whose performance was governed by orders from the procuring entity by way of LPO and delivery by the supplier to be evidenced by delivery notes. Further that only delivered orders would fall under the proviso of payment after 30 days.
71. Here, this Court will draw guidance from the dicta in *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR as role of the Court on an issue arising between contracting parties. It was observed that; -
- “A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”
72. Consequently, the plaintiff was to supply and or delivery to the 1st defendant motorized vehicle number plates hot stamping (hereinafter goods) vide a tender for a period of 3 years at a total sum of 1,269,083.92 Euros whereas the 1st defendant was to make payments upon supply and delivery of the contract goods.
73. The plaintiff has made heavy weather of the fact that it fulfilled its end of the bargain by making deliveries to the tune of 384,520.38 Euros and invoiced the same meanwhile sourced for the remainder of the goods and made demand for payment of which the 1st defendant failed to settle. As stated, the contract in question was for a total sum of 1,269,083.92 Euros and to address the first limb, the Court proposes to firstly consider the plaintiff's claim for 384,520.38 Euros (value of what was purportedly supplied) and secondly 1,037,998 Euros (comprising of 617,462 Euros being what is already shipped in to the Country and 420,536 Euros being what has been order with the manufacturer awaiting shipping into Country and delivery to the 1st defendant).
74. On the former, the plaintiff's claim for breach can only accrue where it demonstrates that it actually delivered the contracted goods to the 1st defendant.
75. PW1 was put to task on the issue during cross examination. From his evidence, particularly on delivery of the goods, he prevaricated around the issue by agreeing that there was no delivery acknowledgement by the 1st defendant on the supplied goods and at the same time attempted to justify the synonymity between the invoice - Exhibit 7 and a delivery note. That on account of the former, the 1st defendant was in breach of the contract when it failed to settle accounts on demand. It was his evidence further that the 1st defendant issued one Local Purchase Order (LPO) in respect of the goods to be supplied and maintained that he had duly delivered on the same.



76. It is confounding from PW1's evidence when he claims that he delivered goods worth 384,520.38 Euros, yet the singularly acknowledged LPO in respect of the delivery was for 86,720 Euros. Whereas the other LPO's adduced into evidence (for 173,991.10 Euros & 30,083 Euros) did not tally with the invoiced amount in Exhibit 7.
77. The latter was an issue equally assailed by counsel for the defendants wherein counsel argued that the same demonstrates the fact that the Plaintiff failed to discharge its burden of proof on the issue to the required standard.
78. To the foregoing end, this Court concurs with the rendition Gikonyo, J in *E.P Communications Limited* (*supra*) wherein she distilled the difference between an invoice, LPO and delivery note. She stated that; -

“(12) The appellant produced invoices, LPOs and delivery notes. The purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by a purchaser to the seller to confirm, order and authorize the purchase. A delivery note is proof of delivery of goods. See the *Black's Law Dictionary* Tenth Edition on of these terms below:

- a) Invoice at Page 956 is described as an itemized list of goods or services furnished by a seller to a buyer, us. Specifying the price and terms of sale; a bill of costs
- b) Receipt at page 1459 – 1460 as the act of receiving something, esp. by taking physical possession <my receipt of the document was delayed by two days>. A written acknowledgment that something has been received; esp., a piece of paper or an electronic notification that one has paid for something.

(13) Therefore, invoices and LPOs alone do not prove delivery or receipt of the goods.

79. Equally, this Court agrees with the rendition of Njoki Mwangi, J in *Lodwar Wholesalers Ltd v Commissioner of Investigation & Enforcement* (Commercial Case 1 of 2020) [2023] KEHC 24768 (KLR) wherein she opined that;

“Legally, a Local Purchase Order is not sufficient proof that supply was indeed made to the purchaser. It is not uncommon to find instances where an entity has been issued with a Local Purchase Order but the entity is incapable of making the supply/delivery for one reason or another. Local Purchase Orders are just proof of the intention to supply the items ordered for. The actual supply must however be proved. This Court holds that in order for a supplier to prove that it indeed supplied the goods ordered for, there has to be proof of issuance of invoices, delivery notes and receipts to the purchaser.”

80. Therefore, with the foregoing dicta in reserve it is difficult to see how the claim for 384,520.38 Euros is justifiable given that the plaintiff has failed to decisively prove that it delivered the goods invoiced and or evinced a tallying LPO on the same.
81. The evidence on goods purportedly contracted (LPO), invoiced and purportedly delivered is at a variance. Further there was nothing placed before this Court to actually demonstrate that goods worth 384,520.38 Euros were delivered and received by the 1st Defendant. Thus, to the foregoing end it is



difficult to see how the claim for 384,520.38 Euros can be sustained without material evidence to shore it up.

82. On the sum of 1,037,998 Euros - Exhibit 8 & Exhibit 9, firstly PW1 was at a loss to evidence the contract with his supplier to demonstrate that he had indeed placed an order and paid the manufacturer for goods awaiting shipping into the Country.
83. Secondly, the importation documents (bill of lading and waybill) equally did not offer succor to the plaintiff towards justification of intended supply given that he could not similarly demonstrate that the goods were actually imported into the Country and cleared at the port.
84. In any event, even if he did actually import the balance of the goods and or make an order on the remaining balance of the goods from his supplier, the defendant's obligation is restricted to orders made vide LPO's, and to this end the plaintiff has failed to produce evidence. Only against valid LPO's from the procuring entity and evidence of signed and stamped delivery notes could the plaintiff lay claim.
85. On whether the plaintiff is entitled to the remedies it is seeking? On general damages for breach of contract, special damages and specific performance, the law is settled.
86. The Court of Appeal in *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR held that;

“As a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi vs. Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”

87. An injured party would however be entitled to special damages in respect of actual loss suffered as a result of the breach. In *Anson's Law of Contract*, 28th Edition at Pg. 589 - 590, it is stated: -

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

88. In *Hahn* (*supra*);

“...special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves...”

89. Lastly, in *Thrift Homes Limited* (*supra*) the Court of Appeal stated inter alia, that: -

“The remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy.”



90. Here, just but to add onto the above dicta, an order by design of general damages for breach of contract, special damages and or specific performance, on a claim founded on contract, can only issue where breach of the said contract is established.
91. This Court having earlier categorically found that breach had not been established, the remedies sought cannot issue in the circumstance. Further, as at writing of this judgment the contract has since succumbed to effluxion of time given that it expired on or about 7/11/2020 and as is, the plaintiff has not demonstrated a semblance of performance of the contract on its part.
92. Having analyzed the evidence on record, under Section 107 of the *Evidence Act*, the burden of proof lay with the plaintiff and if his evidence did not support the facts pleaded, it failed as the party with the burden of proof. See the case of *Wareham t/a A.F. Wareham (supra)*. The result of the foregoing being that the Plaintiff's suit is ripe for dismissal with each party bearing their attendant costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
22ND DAY OF JULY, 2024.**

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A. N. ONGERI
JUDGE

