



Konnexion Systems Limited & another v Independent Electoral and Boundary Commission (IEBC) (Civil Case 163 of 2014) [2024] KEHC 16308 (KLR) (Civ) (16 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE 163 OF 2014
JWW MONG'ARE, J
DECEMBER 16, 2024**

BETWEEN

KONNEXION SYSTEMS LIMITED 1ST PLAINTIFF

FRANKLINE ROBERT MATUMBI MWORIA 2ND PLAINTIFF

AND

**INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION
(IEBC) DEFENDANT**

JUDGMENT

1. The Plaintiffs filed a plaint on April 28, 2014, which has undergone several amendments: on June 14, 2022, February 29, 2024, and most recently on May 23, 2024. In the latest version of the Plaint, the Plaintiffs sought a conservatory order to prevent the Defendant or its employees from procuring, evaluating, awarding, or entering into another contract related to Tender No. IEBC/OT/22/032/2021/2022 for the supply and delivery of standalone solar photovoltaic lamps. They also requested an order for the Defendant to take delivery of the lanterns, pay Kshs 152,261,324/-, and an additional sum of Kshs. 255,500/- per month starting from December 1, 2023, until full payment is made. Additionally, they sought interest on the amount at a compounded rate of 25% per annum and costs of the suit.
2. It was asserted that at all relevant times, the 1st Plaintiff operated as a business firm through which the 2nd Plaintiff conducted its business. The 1st Plaintiff and its directors had a fiduciary duty to the 2nd Plaintiff and were obligated to account to the 2nd Plaintiff.
3. The Defendant is described as a constitutionally established body corporate with responsibilities that include, among other duties, conducting or supervising elections for any elective post.



4. The Plaintiffs' case is that they submitted a bid to supply 28,000 solar lanterns in response to a newspaper advertisement on 2nd and 3rd October 2014. They were shortlisted as responsive bidders, but despite the evaluation committee's recommendation, the Defendant awarded the contract to Solar Mark Technologies on 29th November 2012. The Plaintiffs protested and requested a review from the Public Procurement Administrative and Review Board. The Board annulled the award, directed the Defendant to re-evaluate the bids, and ordered the contract to be awarded to the lowest evaluated bidder, with an investigation. Subsequently, the Defendant awarded the tender to the Plaintiffs, confirming the award in an offer letter dated 7th February 2013.
5. A Local Purchase Order (LPO) No. 1905655 was issued on 18th February 2013. The Plaintiff notes that there were only two weeks left before the 4th March 2013 deadline.
6. The Plaintiff asserts that it proceeded to acquire and ship the lanterns. However, when the lanterns were delivered, the Defendant failed to collect them and or pay the Plaintiff. As a result, Plaintiff stored the lanterns in a warehouse, which incurs daily storage charges, and is detrimental to Plaintiff. The Plaintiffs prayed for judgment against the Defendant as set out above.
7. At the hearing, ROBERT MWORIA (also known as FRANKLINE ROBERT MATUMBI MWORIA), the 2nd Plaintiff and director of the 1st Plaintiff, testified as PW1. He adopted his witness statement and a bundle of documents dated 23/5/2024 as evidence in chief.
8. During Cross examination, MWORIA confirmed receiving the LPO on 18/2/2013, with a delivery obligation by 20/2/2013. However, he was unable to meet the two-day requirement. He argued that the tender form stated a 30-day delivery period, which he believed should have been followed. MWORIA was aware that the Solar Lanterns were intended for the 4/3/2013 elections.
9. Mr. MWORIA claimed he incurred storage charges for goods held in a warehouse since their importation. He testified that while the tender document did not specify interest payments for delayed deliveries, he requested the court to award interest at a bank rate of 25% per annum for the funds used to import the goods.
10. He referenced an anti-corruption case involving an IEBC staff member accused of procurement malpractices. He stated that the Defendant ceased engaging with solar agencies after this case. He also mentioned that the prayer for an injunction against future contracts was overtaken by events.
11. In re-examination by Counsel C. N. KIHARA, he stated that a letter of award was issued on 7/2/2013, following an appeal process at the procurement board. He also confirmed that the letter included a 14-day appeal period before the LPO was issued. He reiterated receiving the LPO on 19/2/2013 and emphasized that payment was due 30 days after delivery of the goods.

Defence Case

12. In the defense dated 22nd May 2014, the Defendant admitted to the descriptive part of the plaint but explained that the procurement of solar lanterns was intended for emergency lighting during the General Elections of March 2013, with immediate use in mind. The Defendant contends that, due to time constraints, the Plaintiff had confirmed quick delivery of the lanterns for use during the elections, prompting the Defendant to issue a Local Purchase Order (LPO) on 18th February 2013, requiring delivery by 20th February 2013.
13. The Defendant argued that there was no agreement regarding the importation or branding of the solar lanterns and claimed that the Plaintiff failed to meet the delivery deadline. The Plaintiff did not communicate until 5th June 2013, when it inquired about the delivery location. The Defendant



contended that the Plaintiff's failure to deliver on time constituted a breach of contract and that the Plaintiff could not rely on its own default to pursue the claim. Additionally, the Defendant emphasized that the Plaintiff should have mitigated its own losses and urged the Court to dismiss the suit.

14. At the hearing the defence did not call any witnesses to support its case

Analysis and Determination

15. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in *Miller v Minister Of Pensions* [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

16. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provide as follows:

107. Burden of proof.

- (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.

(Also see *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR).

17. Subsequently and flowing from the written submissions by the parties, the court is duty bound whether indeed the Plaintiff has established its claim to the required standard as set out above. The Plaintiff submitted their submissions dated 14th July 2024, while the Defendant submitted theirs dated 2nd September 2024.

18. The Plaintiff submits there exist a binding legal contract with the Defendant due to the presence of the fundamental elements of an offer, acceptance, and consideration. The Plaintiffs claim is that that Defendant breached the contract by failing to accept delivery of the goods.

19. Conversely, the Defendant contends that the Plaintiffs breached the contract due to delays in delivering the solar lanterns. The Defendant also argues that the 2nd Plaintiff lacks locus standi, to bring the instant suit in his personal capacity because he is not privy to the contract.

20. On the issue of whether there was breach of the contract and by which party. Both parties agree that a valid contract exists for the supply 28,000 solar lanterns. There is overwhelming evidence on



record adduced by the parties is in support of the existence of a contract. The contract thus met the requirement of Section 3(3) of the Contract Act which states as follows: -

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(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

a. The contract upon which the suit is founded –

i. is in writing

ii. is signed by all the parties thereto and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 5 26), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

21. In determining the present case the court is alive to the principle that parties to a contract have a duty to ensure they comply with their respective obligations set out in the agreement and that courts should not re-write contracts, as affirmed in *National Bank of Kenya Ltd v. Pipeplastics Sankolit (K) Ltd & Anor* (2001) eKLR, where the court held:

“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.”

This principle underscores that the role of the court is to interpret the terms of the contract as agreed by the parties, not to alter or create new terms based on its own judgment.”

22. From the evidence availed to the court it is clear that the offer was sent to the Plaintiff on 7th February 2013 which the Plaintiff accepted by executing the acceptance clause. The execution of the acceptance letter created a valid agreement. I thus find that there was a valid agreement between the parties.

23. Having established that there was a valid contract I note that it was the Plaintiff’s testimony that subsequently, the lanterns were procured and delivered to the Defendant as per the terms of the offer letter contained in the LPO No. 1905655 of 8/2/2013 produced in evidence as Plaintiffs’ Exhibit but the Defendant refused and or failed to take delivery of the said lanterns and therefore forcing the Plaintiff to store the same in a warehouse to which they continue to accrue storage and warehousing charges. The Plaintiff testified that they incurred huge costs in procuring the lanterns and subsequent storage charges thereafter and provided evidence to establish the same. This evidence was not rebutted and neither was an explanation offered by the Defendant as to why this happened as the Defendant did not call any witness to testify on its behalf. The same therefore remains uncontroverted.

24. It therefore follows in the absence of the evidence to the contrary, the court is satisfied that the Plaintiffs has discharged its obligation and have established their case on a balance of probabilities being the degree of proof set out by law. This court therefore finds that the plaint as filed and subsequently further amended has merit and the same is allowed with costs to the Plaintiff.



25. In addition, the court notes that among the prayers sought by the Plaintiff is an order of injunction restraining the Defendant from floating a similar tender for the supply of solar lanterns. However, the court is persuaded that the tender was specific for the election cycle of 2013 and such a relief will be of no material benefit to the Plaintiff at this point in time. The court therefore declines to issue such a relief.

Conclusion and Final Disposition

26. In conclusion, the Court finds in favour of the Plaintiff against the Defendant and enter Judgement in the following terms:-

1. The sum of Kshs 152,261,324/- with interest from the date of the judgment at court rates till payment in full.
2. Costs of this suit to be paid to the Plaintiffs by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF DECEMBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. C. N. Kihara for the Plaintiff.

Mr. Wendoh and Mr. Lubulellah for the Defendant.

Amos - Court Assistant

