



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 361 OF 2018

SIMBA CORPORATION LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

JUDGMENT

1. The Plaintiff (herein “**Simba Corporation Limited**”) trading as Motor Car dealer, instituted a suit against the Defendant (**herein “County Government of Machakos**) by a Plaint dated 6th September 2018.

Pursuant to a Supply Circular **No. R04/2015 – 2016** for supply of Motor Vehicles dated 16th June 2015, and an Award of Tender **No. GM/42/2015-2016** for the supply and delivery of 21 Number **4x4** Double Cab pickups to the Plaintiff vide Notification of Award dated 20th August 2015, the Defendant sought and the Plaintiff accepted to undertake the supply and delivery of the vehicles.

2. The Plaintiff averred that the terms and condition of the supply, delivery and payment of the purchase price for the Vehicles were set out under the Supply Circular and Special Conditions of Contract attendant to the Tender and stated *inter alia*:

- a) The Plaintiff was required to submit detailed specifications, drawings, catalogues etc for the products intended for supply;
- b) The Plaintiff was required to indicate on the specifications sheets whether the equipment offered complied with each specified requirement;
- c) The Defendant reserved the right to reject products, if deviations were found critical to their use and operations.
- d) The Plaintiff was to deliver motor vehicle as per the agreement; upon each delivery, handling over certificates were issued to signify the same; and
- e) The purchase price was to be settled within one month upon delivery of each Motor Vehicle.

3. The Plaintiff averred that 22/11/2015 the Defendant issued the plaintiff with an LPO No 2373622 under Tender GMC/42/2015-2016 for supply of 7 4x4 double Cab Pickup vehicle at a total Purchase Price for the supply and delivery of the Motor Vehicles was Ksh 25,337,858/- and were all invoiced and delivered on diverse dates.

4. The Defendant paid for the vehicles on diverse dates Ksh 21,718,694.00/- in respect of 6 vehicles and the balance for 1 vehicle is Ksh 3,619,694/-for Motor vehicle Chassis MMBJNKB70FD062461 as per Invoice No 174415 & handing over Certificate No 007422 of 22/1/2016.

5. The Plaintiff averred that sometimes around 13th October 2016, it received from the Defendant Ksh 13,336,931.03 as part payment in respect of the purchase price of four motor vehicles namely;

- a) Motor vehicle chassis No. MMBJNKB70FD062486
- b) Motor vehicle chassis No. MMBJNKB70FD062756
- c) Motor vehicle chassis No. MMBJNKB70FD062544

d) Motor vehicle chassis No. MMBJNKB70FD062605

6. The Plaintiff further averred that on 11th November 2016 the Defendant paid Ksh 686,493.70 towards settlement of the Purchase price.

7. On 22nd March 2018, the Defendant paid the Plaintiff Ksh 5, 473,543.10 towards settlement of the Purchase Price for Station Wagon Pajero, Chassis No. JMYLNV96WFJ000388 and Engine No. 4M40-HP1405 in respect of which, Invoice No. 186332 dated 7th April 2016 had been issued.

8. As at 1st August 2018, the Plaintiff averred that the total outstanding balance owing from the Defendant amounted to Ksh 28,844,269.31 which amount is made out as follows;

a) The sum of Ksh 27,038,610.66 being the balance of the purchase price;

b) Withholding Value Added Tax amounting to Ksh 1,805,658.65 made out as follows;

i) The sum of Ksh 727,468.95 due as at 13th October 2016 for the part payment of Ksh 13,336,931.05 received from the Defendant on 13th October 2016.

ii) The sum of Ksh 779,632.70 due as at 15th March 2016 for the payment of Ksh 7,238,000 received from the Defendant on 13th January 2016 with respect to the supply and Delivery of Motor vehicles Chassis No. MMBJNKB70FD062505 and MMBJNKB70FD062824 delivered under LPO No. 2373622 and Invoice No. 178140 and 174418 respectively; and

iii) The sum of Ksh 298,557.00 due from the payment of Ksh 5,473,543.10 received on 22nd March 2018 with respect to the Supply and Delivery of Station Wagon Pajero, Chassis No. JMYLNV96WFJ000388 and Engine No. 4M40-HP1405 vide Handing Over Certificate No. 008033 dated 28th April 2016 and invoiced under invoice No. 186332

c) The sum of Ksh 155,300.04 due as maintenance charges for service rendered on motor vehicles Registration numbers 16CG 019A, 16CG 016A, 16CG 014A, 16CG018A and 16CG 059A.

9. The Plaintiff averred that that the sale and delivery of the Motor Vehicles to the Defendants was pursuant to the Supply Circular No. R04/2015-2016 and Tender No. GMC/42/2015-2016 that constituted a Contract between the Plaintiff and the Defendant. Therefore, the actions of the Defendant amount to a breach of contract.

STATEMENT OF DEFENCE

10. The Defendant in its statement of defence dated 16th October 2018, admitted having ordered and received an assortment of motor vehicles from the Plaintiff but averred that the same were fully paid for as agreed between the parties and puts the Plaintiff to strict proof.

11. The Defendant averred that the suit is a non-starter as most of the documents annexed to the suit indicate supply of motor vehicles to different entities other than the Defendant as the official purchase order and Local Purchase Order in support of the suit show that most of the dealings were with other entities.

12. The Defendant without prejudice reiterates that full payment has been made to the Plaintiff as required and shall put the Plaintiff to strict proof.

13. The Defendant stated that it shall at the very onset raise a preliminary objection that the suit is incompetent as the Plaintiff has not annexed any company resolution authorizing Dinesh Kotecha to act on its behalf.

RESPONSE TO STATEMENT OF DEFENCE

14. The Plaintiff in its response to statement of defence dated 25th October 2018, reiterated each and every averment in the Plaintiff as if the same were set out herein verbatim and averred seriatim.

15. In response to paragraph 3 and 4 of the statement of defence the Plaintiff averred that the impugned documents formed an integral part of the tender documents during the bidding process as they were an expression of capacity and competence by the Plaintiff to perform its obligations under the subject contract with the Defendant. The Plaintiff's claim is thus properly directed, and the averments in paragraph 3 and 4 of the statement of defence can only stem from a limited understanding or disingenuousness by the Defendant with regards to general tendering and bidding procedures/processes.

PLAINTIFF'S SUBMISSIONS

16. The Plaintiff submitted the Defendant failed to settle various invoices raised for the purchase price of some of the motor vehicles. While testifying, the Plaintiff's witness particularized the pending invoices to wit;

a) Invoice No. 174415 (page 48) for motor vehicle Chassis No. MMBJNKB70FD062461- Pg 47 of the Plaintiff's bundle of documents.

- b) Invoice No.174806 (page 51) for motor vehicle Chassis No. MMBJNKB70FD062921 – certificate of warranty at page 50.
- c) Invoice No. 178138 (page 53) for motor vehicle Chassis No. MMBJNKB70FD062936 – Handing Over Certificate page 52.
- d) Invoice No. 187241 (page 56) for motor vehicle Chassis No. MMBJNKB70FD062721 – Handing over certificate at page 55.
- e) Invoice No. 187235 (page 58) for motor vehicle Chassis No. MMBJNKB70FD062729 – Handing Over Certificate at page 57.
- f) Invoice No. 186337 (page 64) for motor vehicle Chassis No. MMBJNKB70FD032708 – Handing Over Certificate at page 63.
- g) Invoice No. 186373 (page 66) for motor vehicle Chassis No. MMBJNKB70FD062965 – Handing Over Certificate at page 65.
- h) Invoice No. 186355 (page 76) for motor vehicle Chassis No. MMBJNKB70FD062894 – Handing Over Certificate at page 75.

17. The Plaintiff submitted that the Defendant did not adduce any evidence to controvert the evidence by the Plaintiff/. This is despite the contention that it fully paid for the motor vehicles. No evidence whatsoever has been adduced in support of this contention. As such, the Defendants contentions are unsubstantiated.

In Mary Njeri Murigi vs Peter Macharia & another [2016]eKLR, R.E Aburili J, expressed herself as follows on the consequences of not adducing evidence;

“...Her witness evidence of PW2 on how the accident occurred was never controverted and in my humble view, answers in cross examination could not support or build the defence case. Neither are strong submissions by defence counsel evidence for the defence in support of their allegations of contributory negligence on the part of the deceased pedestrian. I am in total agreement with the decision by my learned brother Judge G.V. Odunga J. in Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu [2012]eKLR, on the consequences of a party failing to call evidence wherein he stated;

“...in the case of Motex Knitwear Mills Limited Milimani HCCC 834/2002 Hon. Lessit J. citing Autar Singh Bahra & Another vs Raju Govindji HCC 548 of 1998 stated;

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail.....” where a party fails to call evidence in support of its case, the 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.....”

DEFENDANT’S SUBMISSIONS

18. It was the Defendant’s submission that the only evidence the Plaintiff adduced before the Court is Handing Over Certificates. The Plaintiff has not shown how the five (5) motor vehicles were paid for. The Plaintiff’s witness during hearing only stated that the invoices raised were settled. As regards Withholding Tax (VAT), The Defendant submitted that the Plaintiff is the proper person to claim a refund from Kenya Revenue Authority. The Plaintiff made a claim of Ksh 1,805, 658.65 citing it as withholding VAT for services done to the motor vehicles. In this case, the Defendants contends it is upto the Plaintiff to claim it as provided for in terms of **Section 47 (1) of the Tax Procedure Act, 2015**.

The Defendant relied in Civil Case Number 8 of 2018, Shaneebal Ltd vs County Government of Narok, Where it was held that;

“the Defendant as a VAT withholding agent was entitled to deduct and remit to KRA the VAT in the sum of Ksh 8,358,620.70, which is 16% on the heavy equipment supplied by the Plaintiff to the Defendant – the VAT paid to KRA is to credit of the Plaintiff and that money may be refunded to the Plaintiff if it proves that the goods are exempt from VAT. “

19. The Defendant submits, as indicated in paragraph 10 of their defence, this suit is incompetent as the Plaintiff has not and did not annex a company resolution authorizing the witness to testify on their behalf.

DETERMINATION

20. The Issues for determination after perusing pleadings, submissions and taking evidence are;

- a) Has the Plaintiff proved its claim that it delivered motor vehicles according to Specifications by the Defendant and received Part payment with a balance of Ksh 27,038,610/-due from the Defendant?
- b) As a Withholding Tax Agent did the Plaintiff withhold and remit to KRA the VAT from the motor vehicles purchased and paid for so as to deduct VAT from the Purchase price due and owing?
- c) Did the Plaintiff provide repair and maintenance services of their vehicles purchased and used by the Defendant worth

Ksh 155,300.04 which is an Outstanding debt?

d) Has the Defendant proved that it paid full purchase price for the motor vehicles delivered, VAT and repair costs?

PURCHASE PRICE

21. The Plaintiff testified through PW1 Silverius Bukhala Credit Control Manager of Plaintiff Company and relied on his Witness Statement and bundle of documents annexed with the Plaintiff Pg 12-18. He relied on the claim as outlined in the Plaintiff and cited above.

The Plaintiff did not need to produce Plaintiff Company's Resolution, he testified as the employee of the Company who dealt with finances of the Company.

21. PW1 testified on 3rd February 2020, that they won bids in the Defendant's tenders to supply motor vehicles. They supplied vehicles as per the Defendant's prescription. Out of 21 vehicles supplied 13 vehicles were paid for and 8 vehicles purchase prices remain due and owing.

22. The Defendant Paid

a) Ksh 21,718,164 for 6 vehicles on diverse dates in 2015 for delivery of 6 of the 7 vehicles delivered on diverse dates vide LPO 2373622, paid for 6 vehicles and remained a balance of Ksh 3,619,694/-

b) Ksh 13,336,931.05 was paid on 13th October 2016 by Defendant.

c) Ksh 686,493.70/- was paid on 11th November 2016 by Defendant.

d) Ksh 5,473,543,10/- was paid on 22nd March 2018 by Defendant and the amount due and owing remains at Ksh 46,975,701.05/-

23. For each vehicle delivered they issued the Invoice with Chassis number and details of the motor vehicles indicated and Handing Over Certificate. The 8 Vehicles not paid for are as per;

a) Invoice 174415 pg 48 of the Plaintiff's bundle

b) Invoice 174806 pg 51

c) Invoice 178138 pg 53

d) Invoice 187241 pg 56

e) Invoice 187235 pg 58

f) Invoice 186337 pg 64

g) Invoice 186373 pg 66

h) Invoice 186355 pg 76

24. These are the amounts claimed from vehicles delivered to the Defendant and they reconciled Accounts amounts as outlined at Pg 7 of the Plaintiff. They tried to reach contact the Machakos County Legal Department and they did not come through. This debt accrued in 2016 when the County stated they did not have funds.

25. From the evidence by the Plaintiff, the plaintiff proved on a balance of probabilities that they contracted and delivered specified motor vehicles by the Defendant, the Defendant made payments but remained with a balance of Ksh 27,038,610.66/-

26. The Defendant vide Defence of 17th October 2013 stated that the Defendant admitted that it ordered and received an assortment of motor vehicles from the Plaintiff and the same were fully paid for and put the Plaintiff on strict proof thereof.

27. This Court found the Invoices and Handing over Certificates annexed to Plaintiff's bundle of documents duly endorsed in the Defendant's name. The Invoices contain the details of the vehicle and price and is signed by the named Salesperson. The Handing Over Certificate also contains names and signatures of handing over person and receiving person, again with corresponding motor vehicle details. The Motor vehicles were delivered to the Defendant and part payment made by the Defendant. The Defendant failed to file its bundle of documents during Case Management, failed to call any witness to testify and/or produce documents of proof of Payment of ALL vehicles delivered by the Plaintiff. He who alleges must prove as required by **Sections 109 & 112 of Evidence Act**. In the absence of any controverting evidence to the Plaintiff's claim the Court finds this claim pleaded and proved. In *Mary Njeri Murigi vs Peter Macharia & another [2016]eKLR* (supra) confirms the import of adducing evidence apart from pleadings and tendering strong and detailed submissions; without evidence one cannot effectively deny liability as the Plaintiff's case remains unchallenged and uncontroverted.

28. The Handing Over Certificates alleged to have been in other Institutions names were not confirmed from the Plaintiff bundle and are not the basis of the claim.

VALUE ADDED TAX

29. Payment of tax is mandatory statutory duty. **Section 5 & 8 of V.A.T ACT 2018** prescribes payment of 16% on taxable supply made by a registered person in Kenya at the place of business.

30. The Plaintiff claimed Ksh 1,805,658.65/- due and owing in respect of purchases already paid to the Plaintiff. The Defendant referred to the case of ***Shaneebal Ltd vs County Government of Narok HCCC No 8 of 2018***, where the Plaintiff therein paid Ksh 8,358,620.70/- and claimed refund from the Defendant with outstanding debt. The Court held that the Plaintiff ought to claim refund from KRA and not the Defendant.

31. In the instant case, the amount claimed as V.A.T is not paid for motor vehicles purchased by the Defendant. The V.A.T is included in the purchase price and tax is withheld by the Plaintiff to remit to KRA. Therefore, either the Plaintiff received purchase price for the 21 motor vehicles and remitted the V.A.T or it was not included in the purchase and remains due and owing or the Purchase of motor vehicles was tax exempt. Unless the claim is proved on any of the above grounds it is not granted as it is subject to proof by the Plaintiff.

REPAIR & MAINTENANCE

32. PW1 confirmed that the Plaintiff had a contract of service with the County to repair their motor vehicles. The debt of Ksh 155,300.04/-

Arose from the following Invoices;

- a) Invoice 192532 pg 81 of Plaintiff's bundle
- b) Invoice 193613 pg 63
- c) Invoice193638 pg 83
- d) Invoice 193631 pg 84

33. For motor vehicles Motor Vehicles Registration Numbers 16 CG 019A, 16 CG 016A, 16 CG 014A, 16 CG 018A and 16 CG 059A; the Invoices indicate the date, Defendant as owner of the vehicle, the vehicle details, the labour value and total charges.

Again, these are not contested or controverted by any evidence by the Defendant in the absence of which the Court finds the claim is proved on balance of probabilities.

DISPOSITION

32. Judgment is entered for the Plaintiff against the Defendant for ;

- a) Ksh 27,038,610.66 being balance of Purchase price of 21 Vehicles, 13 paid for a balance of 8 vehicles.**
- b) Ksh 1,805,658.65/- is not granted because, the Plaintiff did not prove whether the amount accrues from outstanding debt and/or from payments made or whether VAT was remitted for payments made for purchase of motor vehicles and VAT is due only for the outstanding amount.**
- c) Ksh 155,300.04 as repair and maintenance charges to the Defendant's motor vehicles.**
- d) Interest and Costs at Court Rates.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH MAY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MAHMOUD AND GITAU ADVOCATES FOR PLAINTIFF – N/A

MR. J. M. MUOKI & CO. ADVOCATES FOR DEFENDANT – N/A

COURT ASSISTANT: GRACE