



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

HIGH COURT CIVIL CASE NO. 8 OF 2018

SHANEEBAL LTDPLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAROKDEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff's claim against the defendant is for the unpaid balance of the local purchase orders in the sum of Kshs. 202,688,008.65, arising out of a tender that was awarded by the defendant to the plaintiff. The tender was for the supply of heavy machinery equipment including excavators, wheel loaders and bulldozers.
2. Additionally, the plaintiff also claims a sum of Kshs. 38,510,721.64 being accrued interest at the prevailing rates of interest as at 06/07/2018 till payment in full.
3. The plaintiff also claims costs of the suit together with interest at court rates.
4. In its statement of defence, the defendant has denied the claim. Additionally, the defendant has averred that it is a stranger to the claims that the plaintiff has suffered economic loss and damage as it has failed to meet its various financial obligations and commitments due to the defendant's breach.

The case for the plaintiff

5. The plaintiff called Labal Kassam Ali Omari (PW1), being its only witness in support of its case. It was the evidence of PW 1 that he is a business man, who supplies heavy equipment.
6. PW 1 adopted his witness statement dated 13/7/2018 as his evidence in chief. He also adopted his bundle of documents as his evidence. Furthermore, he testified that he claims interest as at 6/7/2018 in respect of the money he borrowed from the bank for the purchases.
7. Furthermore, PW 1 testified that they delivered all the equipment as per the contract, which they did on time.
8. It was also his testimony that they have not been paid the full amount. In the meantime, the bank is charging them interest at the rate of twenty per cent (20%) and the due interest is compounded.
9. PW 1 further testified that they have paid the bank fifty two million shillings (Shs.52,000,000/=) as interest.
10. As a result, they cannot do any business since the bank stopped advancing credit to them.
11. PW 1 further testified that the outstanding unpaid amount due to it from the defendant is Kshs. 8,358,620.70, being tax which it paid. This is in addition to the unpaid balance of Kshs. 42,170,767.25/-
12. PW 1 while under cross examination admitted that there is no clause in the agreement that the defendant is liable to pay interest charged by the bank. PW 1 further admitted that there is no default clause in respect of the defendant if it failed in its obligations.
13. Furthermore, PW 1 admitted that there was a default clause against the plaintiff if it delayed to supply the goods. PW 1 also admitted that the defendant is not party to the borrowing from the bank by the plaintiff. PW 1 in cross examination admitted that the plaintiff is the proper person to claim a refund from KRA with respect to the withholding VAT as the same is a credit in the plaintiff's account.

The submissions of the plaintiff

14. Counsel for the plaintiff submitted that the equipment supplied by the plaintiff is exempt from VAT and therefore the equipment was not subject to withholding tax.
15. Counsel submitted that based on section 140 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the defendant is liable to pay interest in respect of overdue amounts owed by a procuring entity.
16. Counsel cited *Basco Products Kenya Ltd v. Machakos County Government* (2018) eKLR in which the court (Sewe, J) held that unless the contract provides otherwise, the procuring entity is under an obligation to pay interest on overdue amounts at the prevailing commercial bank rates.
17. Finally, counsel therefore prayed that judgement be entered for the plaintiff with costs and interest.

The case for the defendant

18. The defendant called Walter Chanua (DW 1) in support of its case. DW 1 was an accountant with the defendant, who was an assistant finance director. DW 1 adopted his witness statement dated 18/3/2019 as his evidence. DW 1 produced, the four contracts as defence exhibit 1, the four LPOS as exhibit 2, and the payment vouchers as exhibit 3. While under cross examination DW 1 admitted that there was nowhere in the contracts that it is stated that interest will not be paid.

19. The submissions of the defendant

- 20 Counsel for the defendant submitted that the defendant as a withholding VAT agent properly withheld and paid to KRA the 16% VAT on the equipment. The 16% VAT which the defendant deducted and remitted to KRA was in the sum of Shs. 8,358,620.70.
21. Counsel therefore submitted that the sum of Shs. 8,358,620.70 being the VAT that the defendant deducted and remitted is to the credit of the plaintiff. It is therefore up to the plaintiff to claim it in terms of section 47 (i) of the Tax Procedures Act, 2015. On the issue as to whether interest is payable on the outstanding amounts owed to the plaintiff, counsel submitted that by virtue of clause 4 (iv) of the four subject contracts between the plaintiff and the defendant, the defendant is not liable to pay interest. Clause 4(iv) reads as follows:

“The Narok County Government shall not bear any costs above the contract price including letters of credit, bank charges which shall be borne by the contractor supplier”

It is on the basis of the foregoing clause 4 (iv), that counsel submitted that the issue of accrual of interest as pleaded is inapplicable in the instant case.

22. Counsel also submitted that *Basco Products Lt v. Machakos County Government, supra*, it distinguishable from the instant case. In the instant case, clause 4(iv) of the four subject contracts ousts the provisions of section 140 of the Public Procurement and Assets Disposal Act, 2015.

23. Furthermore, Counsel for the defendant submitted that general damages are not awardable for breach of contract. In this regard, he cited *Kenya Breweries Ltd v. Kiambu General Transport Agency Ltd, Civil Appeal No. 9 of 2000 (2000) eKLR*, in which the Court of Appeal held that no general damages can lie for breach of contract.

Issues for determination

24. I have considered the evidence of both parties, their submissions and the authorities they cited. As a result, I find the following to be the issues for determination.

1. whether or not VAT is payable on the goods supplied by the plaintiff to the defendant.
2. Whether or not the defendant is liable to pay interest on the outstanding balance of money owed to the plaintiff.
3. Whether general damages are awardable.
4. Who bears the costs of this suit?

Issue 1

25. According to the first schedule section A and paragraph 27 to the Value Added Tax (VAT) 2013, the following goods are VAT exempt. *“plants and machinery of chapter 84 and 85.”*

In the light of the foregoing provisions of the VAT, it is clear that the goods supplied by the plaintiff are not exempt from VAT.

26. It also therefore follows the defendant as a VAT withholding agent was entitled to deduct and remit to KRA the VAT in the sum of Shs. 8,358,620.70, which is 16% tax on the heavy equipment supplied by the plaintiff to the defendant. The VAT paid to KRA is to the credit of

the plaintiff and that money may be refunded to the plaintiff if it proves that the goods are exempt from VAT.

Issue 2

27. As regards the payment of interest, on the outstanding balance of the money owed to the plaintiff, it is the submission of counsel for the plaintiff that interest is payable.

28. Counsel for the defendant contends that interest is not payable by virtue of the exemption clause 4(iv) of the four subject contracts.

29. Clause 4 (iv) of those contracts reads: *“The Narok County Government shall not bear any costs above the contract price including letters of credit, bank charges which shall be borne by the contractor supplier.”*

30. The issue that arises is whether this exemption clause frees the defendant from paying interest. While under cross examination, DW 1 testified that there was nothing in the four subject contracts that exempted it from paying interest.

31. The term interest is not used in the exemption namely clause 4 (iv). The said clause refers to bank charges. I find that reference to bank charges is vague. If the defendant had intended to be exempted from paying interest, the exemption clause should have stated so. The bank has many charges in loan transactions including ledger and mobilization fees.

32. Because the exemption clause is vague, I am bound to construe it in accordance with the contra proferentum rule. By virtue of this rule, I am bound to construe it against the defendant: see generally ***United Millers Limited V. Nairobi Java House Limited (2019) eKLR***.

33. I therefore find that the defendant was not exempt from paying interest on the outstanding unpaid amount of money. To hold that the defendant is exempt would amount to according judicial approval to the wrongdoing of the defendant in failing to pay the balance of the outstanding money timeously.

Issue 3

General damages are not awardable for breach of contract: See *Kenya Breweries Ltd. V. Kiambu General Transport Agency Ltd*, Civil Appeal No. 9 of 2000 (2000) eKLR

Issue 4

34. As regards costs, the law as set out in section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya is that costs follow the event.

In this regard, I find that the plaintiff has partially succeeded in its claim against the defendant. It has succeeded in its claim that the defendant is liable to pay interest on the outstanding balance of the unpaid money.

35. Furthermore, I find that defendant has succeeded in its defence that the plaintiff is liable to pay VAT on the heavy machinery (goods) that it supplied to the defendant. It therefore follows that each party has to bear for its own costs.

36. In the premises, I hereby make the following final orders.

- a) Judgement is entered for the plaintiff in the sum of Kshs. 202,688,008.65.
- b) The claim for general damages is hereby dismissed
- c) The Defendant is liable to pay interest on the unpaid balance of the principal sum at the current market rates until payment in full.
- d) The claim for VAT is hereby dismissed.

Judgement delivered in open court this 5th day of March, 2020

in the presence of Mr. Migosi Ogamba for the Plaintiff and Mr. Kere holding brief Mr. Kemboi for the defendant.

J.M. Bwonwonga

Judge

5/3/2020