



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 103 OF 2017**

**TANATHI WATER SERVICES BOARD.....APPELLANT**

**VERSUS**

**PASHA ENTERPRISES LTD.....RESPONDENT**

***(Being an appeal from the entire judgement of the Honorable C.A. Ocharo in Machakos CMCC 96 of 2016 delivered on 13.7.2017)***

***BETWEEN***

**PASHA ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**TANATHI WATER SERVICES BOARD.....DEFENDANT**

**JUDGEMENT**

1. The Respondent in the trial commenced a suit by filing a Plaint dated 26<sup>th</sup> August, 2015 seeking judgement against the appellant for:-

- i. Kshs. 8,129,940/- together with interest from 11.3.2010 till payment in full.***
- ii. The Costs of the suit plus interest.***
- iii. Any other or further relief that this Honorable court deems fit and just to grant.***

2. The background facts of the Respondent's case are that, vide local purchase orders dated 12.8.2009 and 9.3.2010 the appellant requested the respondent to supply them various water pipes and water tanks for Kshs 3,928,940/- and Kshs 6,201,000/- respectively making a total of Kshs 10,129,940/-. It was pleaded that the respondent delivered the requested items vide delivery notes dated 22.12.2009 and 11.3.2010 respectively and the appellant acknowledged receipt of the same and that out of the value of goods supplied of Kshs 10,129,940/-, the appellant paid Kshs 2,000,000/- leaving a balance of Kshs 8,129,940/-. It was pleaded that the respondent demanded for payment of the balance vide demand letters dated 3.11.2014, 11.11.2014, 22.1.2015, 27.1.2015 and 19.5.2015. However payment was not forthcoming hence the suit was filed to recover the said balance of Kshs 8,129,940/- together with interest from 11.3.2010 till payment in full. The supplementary list contained a bank statement confirming payment of Kshs 2m/- by the appellant into the respondent's account. Another supplementary list contained a letter dated 5.10.2010 from the ministry of Agriculture, Water and Irrigation acknowledging delivery of water pipes to Ngiluni Water Project by Pasha Enterprises. It was signed by the District water officer.

3. The Respondent filed a list of documents that contained local purchase orders dated 12.8.2009 and 9.3.2010; Delivery notes dated 22.12.2009 and 11.3.2010; invoices dated 22.12.2009 for Kshs 3,928,940/- and dated 11.3.2010 for Kshs 6,201,000/- and demand letters dated 3.11.2014, 11.11.2014, 22.1.2015, 27.1.2015 and 19.5.2015.

4. The Appellant filed a statement of Defense dated 21.9.2015 in which it denied all the claims by the Respondent.

5. The appellant averred that the respondent was not entitled to the claim and without prejudice that the claim was fraudulent as per particulars in paragraph 8 of the defence. It was pleaded that the delivery note and local purchase order were fraudulent; that no water pipes were supplied; that the contract entered into was contrary to the Public Procurement Disposal Act; that the respondent was not a pre-qualified supplier and had never supplied water tanks to the appellant. It was averred that the suit was bad in law and that the respondent was not entitled to the reliefs sought and as such, the claim by the respondent should be dismissed. The list of documents filed by the appellant were

Delivery Notes No 24343 and dated 11.3.2010 received by the water officer Mukaa District and No 23112 dated 22.12.2009 that was received by the Appellant.

6. During trial, Pw1 was Samuel Kimondo Theuri, the director of the Respondent. He testified that on 12.8.2009 he was issued with an LPO to supply items worth Kshs 3,929,940/- and that he supplied the items on 22.9.2009 and raised an invoice for the same. It was his testimony that on 9.3.2010 he received another LPO to supply water tanks for Kshs 6,201,000/- and the same were supplied as per delivery note of 11.3.2010 and an invoice raised. He testified that the appellant paid Kshs 2,000,000/- via RTGS to A/c No 1106345673 and that he had a letter from the District Water officer of Kitui confirming the receipt of the items delivered. It was his testimony that there remained an unpaid amount and that the appellant had no reason not to pay. On cross examination, he testified that the other directors were aware that he was in court. He told the court that he was prequalified and that he could not remember when he received the LPO's. He told the court that the order was given by word of mouth and that the LPO came later. He testified that the delivery notes did not indicate where the items were delivered. On reexamination, he testified that the delivery note of 22.12.2009 showed that the goods were received by Tanathi whereas the tanks were received by the Water officer Sultan Hamud. He told the court that the appellant could not have paid Kshs 2m/- if the respondent had not delivered and that they had never denied that the respondent supplied the goods. That was the close of the respondent's case and the appellant was put on the witness stand.

7. The Respondent's evidence was given by Dw1-Alex Nyamai, the head of internal Audit at Tana-Athi Water Services Board. He testified that the LPO that was issued on 22.12.2009 was issued after confirmation by the accountant of the availability of funds. He testified that the appellant operated through written instructions and one could only supply after receiving confirmation of funds through the LPO and therefore it was not possible for the respondent to have received the LPO before confirmation of availability of funds. It was his testimony that once goods were received in the stores, the storekeeper issued an S13 to confirm receipt and in the absence of the S13 it was difficult to ascertain the delivery. He testified that an LPO was issued on 10.6.2010 and that the delivery note did not indicate where the goods were delivered. He told the court that Sultan Hamud was within TANATHI which was in Makueni and that there was no way that deliveries could be made in Makueni and an officer in Kitui confirmed receipt. He testified that the headquarters of Tanathi were in Kitui and that the audit report showed the payment as pending until confirmation of supply was given either through an S13 or in writing from the District Water officer upon confirmation of funds. On cross examination, he testified that TANATHI is a parastatal under Ministry of Water and that in 2009 the District Water officers were in charge of the districts. He testified that he was not the one who issued the LPO, neither was he in the procurement department. He testified that the payment of Kshs 2m/- was not clear and was under investigations. He told the court that the money could not be paid because the forensic audit report had put the same on hold. He told the court that he did not put the issue of the S.13 in his statement neither was it captured in his defence. On re-examination, he testified that the bank statement did not indicate what the payment was for. That it could be for a different supply. The appellant closed their case and a judgement was rendered by the court. The trial court found that the respondent could not explain the manner that the deliveries were made and this cast doubt on whether the deliveries were made. It found that the appellant did not prove fraud on the part of the respondent and that the documentation bore the stamp of the appellant and therefore it could be safe to presume that the same originated from the appellant. The court found that the respondent proved its case on a balance of probabilities and found the appellant liable to settle the claim as prayed.

8. The decision prompted the instant appeal that bears no court stamp receipt date but however there is a receipt dated 26.7.2017 and it can be taken that the appeal was filed on 26.7.2017. The memorandum of appeal raised 13 grounds as follows;

- a. The learned trial magistrate misdirected herself by shifting the burden of proof upon the Appellant to prove the Respondent's claim;*
- b. The learned trial magistrate erred in law and fact and misdirected herself by failing to consider that the plaintiff had failed to discharge his burden of proof in support of the claim;*
- c. The learned trial magistrate erred both in fact and in law in failing to hold that the appellant had proved that the Respondent's claim was a fraudulent and corrupt scheme intended to defraud the Appellant;*
- d. The learned magistrate erred in law and in fact in failing to consider that the Respondent's witness Pw1 admitted that they did not rely on the LPO Number 0370 to deliver the alleged one hundred tanks yet proceeded to allow the claim based on the same document that had already been disowned;*
- e. The learned trial magistrate after finding that the respondent was unable to explain the manner in which the deliveries were made erred in law and fact and misdirected herself by holding that the respondent had proved her claim;*
- f. The learned trial magistrate erred in law and fact by failing to find that the respondent's evidence was inconsistent and contradictory*
- g. The learned trial magistrate erred by ignoring the pleadings and the evidence adduced by the appellant and thereby substituting her own position and thus arrived at a wrong decision;*
- h. The learned magistrate erred in law and fact by failing to totally address her mind as regards the gravity of the issues raised by the appellant and the totality of evidence adduced by the appellant;*
- i. The learned trial magistrate erred in law and fact by considering the issues arising from the suit*
- j. The learned trial magistrate misdirected herself by holding the appellant liable to pay interest for the period prior to filing*
- k. The judgement and order of the trial magistrate is against the evidence before her*

*1. The learned magistrate erred in law and in fact in taking into account extraneous factors in arriving at her decision.*

9. The appellant prayed that the appeal be allowed, the judgement and decree of the trial court be set aside and discharged and that the costs of the appeal be borne by the respondent.

10. The parties canvassed the appeal vide written submissions. Learned counsel for the appellant submitted on three issues that were framed for consideration. Firstly, whether the appellant is a public body and therefore regulated by the Public Procurement and Assets Disposal Act of 2015 in its procurement process; Secondly if yes, did the Respondent supply any goods and if yes did the alleged supply of goods meet the requirements set by the PPDA; Thirdly, is the respondent entitled to any remedies?

11. On the 1<sup>st</sup> issue, it was submitted that the appellant is a state corporation under the Ministry of Water and Irrigation created under Section 51 of the Water Act, 2002 vide legal notice 69 of 4<sup>th</sup> June, 2008. It was submitted that section 2 of the Public Procurement and Asset Disposal Act, 2015 (PPDA) enlists public entities to include state corporations within the meaning of the State Corporations Act. It was therefore counsel's argument that the appellant is a state corporation. Learned counsel cited the provisions of Article 227(1) of the Constitution and submitted that the Public Procurement and Asset Disposal Act, 2015 gave effect to Article 227 (1) of the Constitution and in placing reliance on the case of **Githunguri Dairy Farmers Co-operative Society Ltd v A.G. & 2 Others (2016) eKLR** submitted that the appellant is a public entity and urged the court to find that there was a set procedure for procurement that was to be followed when the public entity was involved.

12. On the second issue, counsel cited the provisions of Section 2 of the PPDA that defined a procurement contract and submitted that in the instant case there was no procurement contract neither was there any compliance with the tendering process. Learned counsel submitted that the PPDA made provision to ouster the need for a contract where there was an urgent need as per Section 2 of the same Act and argued that there was need for proof of circumstances that made it impracticable to engage in the tendering process or the procurement methods. In placing reliance on Section 103 and 104 of the PPDA, counsel submitted that the Appellant's accounting officer was not aware of the existence of a contract between the Appellant and the Respondent for supply of pipes and water tanks. Counsel cited the case of **Multi-Line Motors (K) Ltd v Migori County Government (2019) eKLR** where there was non-compliance with the procurement process as provided for in the repealed Public Procurement Act 2005 and the court held that there was no valid contract.

13. On the 3<sup>rd</sup> issue, it was submitted that the court could not be used to enforce an illegality especially where the illegality was brought to the notice of the court. Reliance was placed on the case of **Teknical Equipment International Limited v National Water Conservation and Pipeline Corporation (2013) eKLR**. It was therefore counsel's argument that the trial court misdirected itself in enforcing a non-existent contract that did not meet the procedural requirements as per the law; counsel urged the court to allow the appeal.

14. In reply, learned counsel for the respondent submitted that the respondent's claim was a liquidated one of Kshs 8,129,940/- which amount was proved by documentary evidence that the appellant had not disowned and hence the trial court did not err in any way in arriving at the decision that it did. Counsel urged the court to dismiss the appeal with costs.

15. I have considered the pleadings herein and the evidence adduced in the trial court. I have also considered the submissions filed by the respective parties. I find the following issues have arisen for consideration:-

*i. Whether there was a contract between the parties;*

*ii. Is the Appellant entitled to the orders sought for herein?*

16. Before I delve into the scrutiny of the evidence of the trial court in resolving the issues raised by the appeal, I consider it necessary to state the law on some aspects of this case.

First, the burden of proof. In law a fact is said to be proved when the court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such a person adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities. Relating the above principle to this case, the respondent has alleged that the appellant owed him a liquidated sum of money based on a request that the appellant made to the respondent to supply it with pipes and water tanks. The burden rests on it to prove that allegation.

17. Second, the parole evidence rule. This rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it. Where, however, there is a dispute as to what transpired between the parties, as in the instant case, evidence can be admitted to show what transpired. I now turn to the issues.

18. As to whether there was a contract between the appellant and the respondent, the question that comes to one's mind is, which contract? In **Mamta Peesh Mahajan [Suing on behalf of the estate of the late Peesh Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR**, Justice Onguto observed that "I start by quoting the very relevant words of Steyn LJ in *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 .Lord Steyn said:

*"...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible*

businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden –v- Metropolitan Railway* [1877] 2 AC 666; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd.* [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v. Novinex* [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.* [1963] 1 WLR 333.”

75. The Supreme Court of the United Kingdom later stated as follows in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14,[45] :

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

19. A contract is an agreement between parties with intention to create legal relations and the terms are binding on the parties. Every contract has an effective date. A Contract is a result of an agreement between the Parties, although for a contract to be enforceable there must be an intention to create legal relations. In commercial or business agreements, it is generally presumed by the courts that there is an intention to create legal relations, unless the parties insert a clause that their agreement shall not be binding in law but shall be binding in honour only. (see the case of *Jones vs Verrions Pools Ltd 1938, and Rose Franck v Crompton, 1925*). In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract. (**Karmali Tarmohammed & Another v I.H Lakhm & Company** [1958] EA 567.

20. It was the appellant's case that there could be no procurement without an LPO or executed agreement. For purposes of clarity, LPO stands for local purchase order. The Black's Law Dictionary defines a Local Purchase Order as: “A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale.”

21. There is no agreement that has been availed to the court and therefore the terms of the transaction can only be deduced from the LPO. Where parties rely on a series of documents as in the present case, the contract between the parties is to be deduced from those set of documents and according to the principle established by case law “it is necessary to look into the whole of the correspondences between the parties to see if they have come to a binding agreement”- See **Bristol Cardiff and Swansea Aerated Bread Co. Ltd Vs Maggs (11890) 44 Ch. Div 616** In the instant case, what is in issue is the element of intention to contract, consensus ad idem, and certainty of terms. The respondent's case is in two batches and it refers to the LPO's dated 12.8.2009 and the one dated 9.3.2010. The respondent's claim seemed to be premised on the said LPO's and he sought that this court does find that there were contractual obligations to pay the amounts indicated in the LPO's pursuant to the LPO's deliveries made on 22.3.2010 and 11.3.2010. On the part of the appellant, they note that there was an LPO dated 10.6.2010 and that the delivery note was dated 11.3.2010 meaning delivery was effected before the issue of the LPO.

22. Having looked at the LPO, It can be deduced from the same that one of the terms was that the LPO was not valid unless funds were confirmed and hence the question of validity arises. In my view, this terms meant that the appellant was expected to have paid the amounts payable under the LPO when they became due as from the date when funds were confirmed as available. I note that there is an LPO for supply of water tanks at a cost of Kshs 6,201,000/- that indicated on 10.6.2010 that funds were available whereas the delivery note for delivery of tanks is dated 11.3.2010. There is also another LPO for supply of pipes at the cost of Kshs 3,929,940/- that indicated that as of 22.12.2009, the funds were available. The delivery notes for delivery of pipes is dated 22.12.2009. From this evidence, it is clear that the supply of water tanks at a cost of 6,201,000/- was based on an invalid LPO as it was effected before funds were confirmed as available. If there was supply on the basis of an invalid LPO, then the appellant was not to blame.

23. The other question that arises is on the effective date of the transaction and that would be when the respondent accepted the LPO and accepted to be bound by the terms thereof hence imposing on it the duty to deliver the pipes and tanks in consideration for the amount paid. Acceptance of the offer means acceptance of the conditions thereto. In **Brodgen v Metropolitan Railway Company [1876-77] L.R 2 App Cas 666**, it was proposed that a contract can be accepted by the conduct of parties. This means that where the offer is accepted, and the offeror, by conduct does any act to imply the acceptance is complete, then the offeror, is bound to honour the contractual terms and will be estopped from denying that there was no valid contract between the parties. Normally, the effective date of the contract is either the date the contract states as the effective date, or if no specific effective date is set forth, then the date the last party accepts the terms by signing is the date of execution. If a contract does not specify its effective date, it goes into effect on the date it was signed by the person to whom the contract was offered for signature (see **Williston on Contracts § 6:1 (4th ed. 2009-2010)**). Since the terms of a contract only become binding when the party offered the contract signs it, the contract is not effective until the last of the parties has signed it. From the evidence on record, it is only the signatures of the issuers of the LPO that are on the LPO and it was the evidence of Pw1 that he got the LPO's in August. However I wonder why he did not append his signature to the same. This means that there was no consensus or even an intention between

the parties as to the delivery of the pipes and the tanks.

24. In the instant case, when the appellant issued the LPO, it gave an undertaking to pay for delivery done and committed itself to honour the payment. By the respondent making a supply three months before the issue of the LPO, It was clear that the offer was accepted after the obligation under the contract had already been performed.

25. I noted these preliminary requirements because from the evidence on record, it is not clear how the transaction came about.

26. On record are several reminders for payment that are unanswered by the appellant. This reaction in itself raises eyebrows as one wonders if the appellant was aware of the transaction that it was being asked to pay and the evidence of the appellant's accountant speaks to this.

27. In light of my analysis above, the question then would be, should the appellant pay the amounts claimed by the respondent? The answer is a resounding no because supply of water tanks at a cost of Kshs 6,201,000/- was made on an invalid LPO and secondly there is no indication when the LPO's were received, signed and accepted by the respondent and therefore the same were not valid for want of acceptance. From the evidence of the respondent, I am not satisfied that the appellant made a requisition for supply of pipes from the respondent, that prompted the issue of the LPO's. It is my finding that the elements of a valid contract were lacking in the transaction that the respondent sought to enforce against the appellant. No valid contract existed between the parties. The trial court therefore erred in allowing the claim as prayed and yet the respondent had not met its burden of proof. It is noted from the evidence of the respondent that it received the orders from the appellant's agents by word of mouth and then proceeded to issue the LPOs. The appellant's auditor indicated that had deliveries been made then the stores clerk would have issued an S13 document to confirm the same. Again some of the deliveries were allegedly done even before the LPOs were issued. The documents relied upon by the respondent appear to be questionable and the trial court ought not to have sanctioned them. The decision by the trial court was thus arrived at in error and must be set aside.

28. In the result it is my finding that the appeal has merit. The same is allowed. The judgement of the trial court is hereby set aside and substituted with an order dismissing the respondent's suit in the lower court with costs. The costs of the appeal are awarded to the appellant.

Orders accordingly

Dated and delivered at **Machakos** this 5<sup>th</sup> day of **May, 2020**.

**D.K.Kemei**

**Judge**