

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 698 OF 2012

PATMOSE TECHNICAL SERVICES (K) LIMITED.....PLAINTIFF

-VERSUS-

RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT

J U D G M E N T

1. The Plaintiff is a Private Limited Liability Company incorporated under the Companies Act Cap 486 of the Laws of Kenya. The Plaintiff Company has been in business for 30 years. The Defendant is a Body Corporate established by the Government of Kenya under the Energy Act No. 12 of 2006. The Defendant is charged with acceleration of Rural Electrification in Rural Kenya.

BACK GROUND

2. The Defendant, through Tender Number REA/11-12/OT/002, invited suppliers to tender for supply of conductors, cables, stay wire and binding wires.

3. The Plaintiff submitted the tender documents on 7th December 2011 by letter dated 22nd February 2011. The Defendant informed the Plaintiff it had been awarded the tender to provide the supplies required by the Defendant.

4. The Plaintiff by its pleading stated that at the time of tendering the custom duty, payable to Kenya Revenue Authority (KRA), for conductors was 10% on the custom value. The Plaintiff in its pleading stated that in its tender documents it based its pricing by factoring the custom duty payable, that is at 10%.

5. The Plaintiff supplied the goods under the tender to the satisfaction of the Defendant.

6. However, that through the East African Community Gazette, dated 22nd March 2011, the custom duty payable on conductors was revised upwards from 10% of the customs value that was payable to 25%. That the Plaintiff, when it tendered on 7th December 2010, the customs duty was at 10%.

7. The Plaintiff's claim is for reimbursement, by the Defendant, of the difference in the custom duty it paid and that it had quoted in the tender.

EVIDENCE

8. The Plaintiff's evidence was tendered by Sameet Patel the Plaintiff's Sales and Marketing Director.

9. The said witness, by his evidence, supported the pleadings. He further stated that after the Plaintiff was awarded the tender a contract was signed between the parties. In his evidence, the witness stated, while being re-examined that the Plaintiff signed the contract on 22nd March 2011. On signing the contract it was forwarded to the Defendant for its signature.

10. The Plaintiff's witness stated that it was constrained to pay the increased custom duty as follows:

Date	Custom Entry No.	Duty at 10% (Kshs.)	25% Duty paid (Kshs.)	Differential (Kshs.)
31.01.2012	3280782	3,557,799/-	8,984,499/-	5,336,699/-
13.02.2012	3301014	3,517,677/-	8,794,194/-	5,276,516/-
23.03.20	3373034	4,367,685/-	10,919,213	6,551,528/-

12			/-	
06.06.20 12	3509564	1,818,592/-	4,546,482/ -	2,727,890/-
			Total	19,892,633/-

11. The Plaintiff's claim against the Defendant is for Kshs. 19,892,633 with interest at 18% per annum from 6th July 2012 and for cost of this suit.

ANALYSIS AND DETERMINATION

12. I will begin by saying that the Defendant did not tender any evidence before court. In other words the Defendant did not call a witness to testify on its behalf. It follows that its defence remains unproved and is mere allegation. This indeed was the holding in the case: **MARY NJERI MURIGI V PETER MACHARIA & ANOTHER [2016] eKLR** viz:

“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 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, that 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.....”

13. The Plaintiff's case is that it paid enhanced custom duty, for the conductors it supplied to the Plaintiff.

14. The Gazette Notice of **22nd March 2011** increased that duty from 10% to 25% retrospectively from **1st July 2010**.

15. The Plaintiff has proved, by documents, that it made the payment for the duty to KRA. In the Plaintiff's evidence it was stated that the subject contract was silent on which party would bear the burden of a budgetary adjustments on custom duty.

16. The Plaintiff relies on provisions of Section 120 of the Custom and Exercise Act Cap 472. That section provides:

“If, after a contract has been entered into for the sale or delivery of goods at a price which includes duty charged under Section 117, an alteration takes place in the rate or amount of the duty before export duty or excise duty becomes due, then, in the absence of express written provision in the contract to the contrary, the contract shall have effect as follows -

(a) In the event of the alteration being the increase of an existing duty or the imposition of a new duty, the seller, after payment of all the duty payable, may add the difference caused by the alteration to the agreed price;

(b) In the event of the alteration being the reduction or abolition of an existing duty, the purchaser may deduct the difference caused by the alteration from the agreed price;

(c) In the event of the alteration not being finally adopted, the agreed price shall be readjusted so as to allow for any resultant refund or payment of duty.”

17. The Defendant through its submission argued that as provided under section 68 (3) of the Public Procurement and Disposal Act, 2005, no contract was formed between the Plaintiff and the Defendant until the written contract was entered into. It is therefore the Defendant's argument that since the written contract was entered into on **3rd May 2011** and the Gazette Notice, increasing the duty was of **22nd March 2011** the provisions of Section 120 of the Custom and Excise Act, CAP 472, does not support the plaintiff's case.

18. I have considered the evidence adduced and the parties' submissions.

19. It is not denied that the Plaintiff paid the enhanced custom duty. It is also not denied that the Plaintiff supplied all the goods as per the contract.

20. Has the Plaintiff proved it is entitled to its prayer for reimbursement of the enhanced custom duty?

21. To analyze the above question it is necessary to examine the documents presented before court. It is necessary first to state that the contract between the parties stated that the documents, prior to that contract, constituted the contract. These documents were:

(a) General conditions of contract;

(b) Special conditions of contract;

(c) Schedule of requirement;

(d) *Technical specification;*

(e) *The tender form and price schedule; and*

(f) *The letters of Notification of Award and Acceptance.*

22. The Defendant through its submissions submitted that since the date of the contract was on **3rd May 2011**, a date after the Gazette Notice enhancing the customs duty, the Plaintiff bore the responsibility to ensure that the enhanced duty was included in the contract.

23. That argument ignores the provision of the contract which stated that other documents constituted the contract.

24. Those documents included the Defendant's letter dated **22nd February 2011**, by which letter the Defendant notified the Plaintiff the acceptance of its tender.

25. By that letter it is clear, as with other documents of the tender that the Defendant required the Plaintiff's pricing to be inclusive of custom duty. The terminology the Defendant used to express that the duty was part of the price was "*Delivered Duty Paid*" (DDP).

26. The letter of the Defendant was dated **22nd February 2011** on a date prior to the Gazette Notice.

27. The Plaintiff responded to that Defendant's letter on **3rd March 2011**.

28. Since the Defendant's letter of **22nd February 2011** was incorporated into the contract the Plaintiff was not time barred to rely on Section 120 of Cap 472. The custom duty in the Plaintiff's tender documents was made on **7th December 2010**. The Defendant accepted the offer made in that tender on **22nd February 2011**. The Gazette Notice was on **22nd March 2011**. The enhanced custom duty, in that Gazette Notice, could not have been incorporated in the price tendered by the Plaintiff and the Plaintiff, as provided under Section 120 of Cap 472 was entitled to add the difference it paid to KRA as custom duty for the goods it supplied the Defendant.

29. I therefore find that the Plaintiff is entitled to be reimbursed the increased duty it paid. The Plaintiff however failed to prove that the amount claimed should have 18% interest applied to the same. For that reason the court will only award interest at Court rate.

30. The Plaintiff having succeeded is entitled to the costs of the suit. The costs, in this case, will follow the event.

31. In the end the judgment of this Court is for the Plaintiff, against the Defendant, as follows:

(a) Judgment for Kshs. 19,892,633 with interest at Court rate from the date of filing suit until payment in full.

(b) The Plaintiff is awarded costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **Court Assistant**

..... **For the Plaintiff**

..... **For the Defendant**