



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 187 OF 2015**

**BASCO PRODUCTS KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT.....DEFENDANT**

**JUDGMENT**

[1] The Plaintiff herein, **Basco Products Kenya Limited**, sued the Defendant, **Machakos County Government**, vide the Plaint dated **8 April 2015**, praying that judgment be entered herein against the Defendant, for:

[a] The principal sum of **Kshs. 11,453,868/=** together with interest thereon at the prevailing court rates from the respective due dates of the invoices until payment in full;

[b] Costs of this suit with interest thereon at such rate and for such period as the Court may deem fit;

[c] Any such and further relief as the Court may deem fit to grant.

[2] It was the contention of the Plaintiff that the aforesaid sum of **Kshs. 11,453,868/=** is what is due to it in respect of goods sold and delivered to the Defendant at its request and at agreed rates pursuant to its Local Purchase Order Number 2128814 dated **21 May 2014**; and that in spite of demand and notice of intention to sue having been given, the Defendant has refused, failed and/or neglected to pay the aforesaid sum of money. The Plaintiff relied on the evidence of its director, **Anilkumar Amratlal Tarachand Shah (PW1)**, who testified herein on **19 June 2017**. His testimony was that the Plaintiff, as a manufacturer of decorative and road-marking paints, was approached by the Defendant with a request to supply it with various products, most of which were road-marking paints. An agreement was accordingly reached and a Local Purchase Order (LPO) issued to the Plaintiff by the Defendant for the sum of **Kshs. 22,632,905/=**. A copy of the LPO was produced herein at page 10 of the Plaintiff's Bundle of Documents marked the **Plaintiff's Exhibit No. 1)**.

[3] It was further the evidence of **PW1** that the Plaintiff honoured the LPO and supplied the Defendant with goods worth **Kshs. 11,453,868/=** in the period between **May and June 2014**; and in proof of the supply and delivery, **PW1** produced copies of the Delivery Notes and Invoices as well as the Statement of Account as part of the Plaintiff's Bundle of Documents. He added that it was agreed between the parties that the goods would be paid within 30 days of delivery; but that in breach of that term, the Defendant failed to pay for the supplied goods. **PW1** also produced email correspondence by which the Defendant, through its agents, acknowledged the debt and made promises to pay. He urged the Court, in the circumstances, to enter judgment in the Plaintiff's favour in terms of the prayers in the Plaint.

[4] The claim was denied by the Defendant vide the Defence filed herein on **12 June 2015**. In that Defence, the Defendant denied knowledge of the facts set out in the Plaint and put the Plaintiff to strict proof thereof. In particular, the Defendant denied the averments in paragraphs 3 and 4 of the Plaint, in connection with the issuance of the LPO and the deliveries allegedly made by the Plaintiff in respect thereof. It was on account of those denials that the Plaintiff made an application dated **14 September 2015** for the striking out of the Plaint under **Order 2 rule 15(1)(a)** of the **Civil Procedure Rules**. The application was however resolved in the Defendant's favour and directions given that the matter be heard and determined on the merits. The Defendant however opted not to adduce any evidence, an option that it was entitled to in law.

[5] At the close of the trial, the Learned Counsel for the parties made written submissions herein. Counsel for the Plaintiff, **Mr. Kang'ethe**, urged the Court to rely on the Plaintiff's uncontroverted evidence and find that there was a valid contract between the parties which the Plaintiff complied with by delivering goods to the Defendant worth **Kshs. 11,453,868/=** pursuant to the **LPO No. 2128814** dated **21 May 2014**; and that the goods are yet to be paid for by the Defendant. **Mr. Kang'ethe** relied on **HCCC No. 159 of 2006: Equip Agencies**

**Limited vs. The Attorney General**, for the holding that failure by the Defendant to adduce evidence to rebut the Plaintiff's evidence means that the evidence of the Plaintiff was not challenged at all. On that basis, Counsel urged the Court to find that the Plaintiff has proved its case on a balance of probabilities.

[6] Counsel for the Defendant, **Mr. Muoki**, filed his written submissions herein on **18 December 2017**, contending that the Plaintiff's case must fail for failure to discharge the burden of proof on it. He reiterated the Defendant's contention that while the goods were supplied, the same were sub-standard and therefore were supplied in contravention of **Section 16 of the Sale of Goods Act, Chapter 31 of the Laws of Kenya**. He further argued that a Local Purchase Order is insufficient to create a contractual relationship, as it is simply an offer. He accordingly argued that the Plaintiff had failed to make out a good case against the Defendant.

[7] In the light of the foregoing, there can be no dispute that the Plaintiff was indeed issued, by the Defendant, with **LPO No. 2128814** dated **21 May 2014**, by which the Plaintiff was instructed to deliver white and yellow road-marking paints and glass beads worth **Kshs. 22,632,705** to the Defendant. A copy of the LPO was exhibited at page 10 of the Plaintiff's Bundle of Documents marked **Plaintiff's Exhibit No. 1** herein. The correspondence at pages 24-25 of Plaintiff's Exhibit No. 1 and pages 27-29 of the Plaintiff's Supplementary Bundle of Documents, marked Plaintiff's Exhibit No. 2 confirm that the LPO was issued in favour of the Plaintiff. There is further no dispute that the Plaintiff acted on the order and supplied goods to the Defendant to the tune of **Kshs. 11,453,868/=** as demonstrated by the Invoices exhibited at pages 11-22 of the **Plaintiff's Exhibit No. 1**. The Plaintiff further exhibited a Statement of Account at page 23 to confirm that none of the invoices issued to the Defendant in respect of this transaction was honoured; and that the total amount due and outstanding in respect thereof, as at **11 March 2015** was **Kshs. 11,453,868/=**. In the premises, the only issues arising for the Court's consideration are:

[a] Whether there was a valid contract between the Plaintiff and the Defendant;

[b] Whether the Plaintiff has good cause for not paying for the goods.

[a] **On whether there was a valid contract:**

[8] The Defendant took the curious posturing that the LPO that it issued to the Plaintiff was simply an offer and therefore could not constitute an enforceable contract. Curious because it is elementary that a contract is formed when the offer is accepted and acted upon and valuable consideration given. Indeed, **Section 3(1) of the Sale of Goods Act, Chapter 16 of the Laws of Kenya**, recognizes that:

**"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."**

[9] And in **An Introduction to the Law of Contract, P.S. Atiyah, (3<sup>rd</sup> Edition)** the following view is propounded, which I find persuasive:

**"[A]n offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer. The price, of course, need not be a monetary one. In fact, in bilateral contracts, ... the mere promise of payment of the price suffices to conclude the contract..."**

Thus, having acted on the LPO and supplied valuable consideration in the form of goods that were duly delivered to the Defendant, there can be no doubt that a valid and binding contract was thus created. This is why **Section 100 of the Evidence Act, Chapter 80 of the Laws of Kenya** is provides that:

**"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

[10] Thus, I take the view that, in the circumstances, the doctrine of equitable estoppel would come into play to prevent the Defendant from disowning the express terms of their Agreement with the Plaintiff. In this respect, it was held to be the case in **Nurdin Bandali vs. Lombank [1963] EA 304**, that:

**"The precise limits of an equitable estoppel are however by no means clear. It is clear however that before it can arise one party may have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it be acted upon and the other party in the belief of the truth of the representation acted upon it."**

[11] Moreover, it is recognized by dint of **Article 227 of the Constitution as read with Section 121 of the Public Finance Management Act and the Public Procurement and Disposal Act (Chapter 412C of the Laws of Kenya)** (which was then the applicable law at the time material to this procurement) that the responsibility to draw the formal contract was the Defendant's. Having failed to comply with the requirements of the law, it would be untenable for the Defendant to purport to rely on its own omission to avoid the lawful obligations it created for itself. Accordingly, **Lord Diplock in Cheall vs. Association of Professional Executive Clerical and Computer Staff (1983) 1 ALL ER** expressed the view that:

**"This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as "A man cannot be permitted to take advantage of his own wrong."**

[b] **Whether the Plaintiff has good cause for not paying for the goods.**

[12] Section 35 of the Sale of Goods Act provides that:

**(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.**

**(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.**

[13] Thus, the Defendant, having alleged that the goods it was supplied with by the Plaintiff were not of good quality, was under duty to prove that it availed itself of the provision aforementioned to express its dissatisfaction with the quality of the goods, or its contention that were supplied in contravention of **Section 16 of the Sale of Goods Act, Chapter 31 of the Laws of Kenya. Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya**, recognizes that:

***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.***

[14] In the same vein, **Sections 109 and 112 of the Evidence Act** provide that:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

...

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[15] It was especially within the knowledge of the Defendant to demonstrate the quality of products it required for its particular purpose of road-marking. It was therefore imperative that it adduces evidence to show in what way the Plaintiff's goods missed the mark. It opted not to; and the inference to be made is that there was no fault with the goods, and I so find. Thus, I would agree with and adopt the expressions of **Mabeja J. in Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, that:

**"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."**

[16] There being no evidence of deficiency in the quality of the goods supplied by the Plaintiff, I would be of the view that no justification has been made by the Defendant as to why it did not pay for the goods within 30 days of invoicing as agreed between the parties. Accordingly, it is my finding that the Plaintiff has proved its case on a balance of probabilities and would accordingly enter Judgment in its favour for the sum of **Kshs. 11,453,868/=** as prayed for in the Plaintiff.

[17] In his written submissions, Counsel for the Plaintiff urged for Judgment on interest at commercial rates, compounded monthly. His justification for this was that the Plaintiff has been deprived of the use of the monies due to it by reason of flagrant default on the part of the Defendant, and therefore ought to be compensated for such deprivation by way of compound interest, this having been a commercial transaction. In **Lata vs. Mbiyu [1965] EA 392** it was held that:

**"The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."**

Moreover, **Section 48 of the Public Procurement and Disposal Act**, and **Section 140 of the current Public Procurement and Asset Disposal Act, No. 33 of 2015** both recognize that unless the contract provides otherwise, the procuring entity is under obligation to pay interest on overdue amount at the prevailing commercial bank rates.

[18] There is every justification therefore for payment of pre-judgment interest herein. It is noteworthy however that, in the Plaintiff, interest was prayed for, not at commercial rates compounded monthly, but at prevailing court rates from the respective due dates of the invoices until payment in full. Thus, I would award the Plaintiff interest on the principal sum of **Kshs. 11,453,868/=** at the prevailing court rates from **6 July 2014**, (being the due date for the last invoice) until payment in full.

[19] In the result, Judgment is hereby entered for the Plaintiff against the Defendant for:

**[a] The principal sum of Kshs. 11,453,868/=;**

**[b] Interest on the principal sum at the prevailing court rates from 6 July 2014 until payment in full;**

**[c] Costs of the suit together with interest thereon from the date of ascertainment, either by consent or taxation, till**

**payment in full.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF APRIL, 2018**

**OLGA SEWE**

**JUDGE**