



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 25 OF 2016**

**SHANEEBAL LIMITED.....PLAINTIFF**

**VERSUS**

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

**JUDGEMENT**

1. This suit, from the Plaintiff's pleadings, arose from an order made by the Defendant, a County Government established under the Constitution of Kenya and is also a body corporate exercising its constitutional authority pursuant to the *County Governments Act* of 2012, to the Plaintiff, a limited liability company duly incorporated and registered pursuant to the provisions of the *Companies Act*, Chapter 486 Laws of Kenya, for the latter to supply the former with mechanical equipment on diverse dates against four Local Purchase Orders (LPOs). According to the Plaintiff, under the terms of the said LPOs, the Defendant was under an obligation to pay the Plaintiff a total sum of Kshs 260,601,000/= in respect of the purchase and delivery of the aforesaid equipments. It was the Plaintiff's case that defendant indicated in the LPOs to the plaintiff the type of machinery required, the quantities and the agreed prices for the deliverables. On or about 17<sup>th</sup> December 2013 the defendant issued LPO No. 2024991 for the supply of 5 Bulldozers at a unit cost of Kshs. 17,850,000/=. Pursuant thereto, delivered to the defendant the deliverables mentioned in paragraph 9 above as follows:

- a. On 22<sup>nd</sup> July, 2015 vide delivery note No. 218 two excavators of chassis No. PP220E-XI118111132 and PP220E-XI118111133 respectively and one wheel loader of chassis PP966T-V3281010100.
- b. On 7<sup>th</sup> August, 2015 vide delivery note No. 223, one lowbed loader of chassis No. RTA3A1299.
- c. On 27<sup>th</sup> January, 2016 vide delivery note No. 244, one wheel loader of chassis No. PP966T-V3281010102.

2. It was further pleaded that on or about 26<sup>th</sup> March, 2014 the defendant issue LPO No. 2126388 for the supply of two wheel loaders at a unit cost of Kshs. 6,758,000/=:, two excavators at a unit cost of Kshs. 11,500,000/= and one lowbed boarder with horse at a unit cost of Kshs. 8,500,000/=. Pursuant thereto the plaintiff delivered to the defendant the said deliverables as follows:

- a. On 22-7-2015 vide delivery note No. 218 two excavators of chassis No. PP220E-XI118111132 and PP220E-XI118111133 respectively and one wheel loader of chassis PP966T-V3281010100.
- b. On 7-8-2015 vide delivery note No. 223, one lowbed loader of chassis No. RTA3A1299.
- c. On 27-1-2016 vide delivery note No. 244, one wheel loader of chassis No. PP966T-V3281010102.

3. In addition, it was pleaded that on or about 28<sup>th</sup> March, 2014 the defendant issued LPO No. 2126169 for the supply of three excavators at a unit cost of Kshs. 11,500,000/= and one lowbed boarder at a unit cost of Kshs. 8,500,000/= and pursuant thereto the plaintiff delivered to the defendant the aforementioned deliverables as follows:

- a. On 22-7-2015 vide delivery note No. 245, two excavators of chassis No. 118811131 and 118811132 respectively.
- b. On 21-7-2015 vide delivery No., one excavator of chassis No. 118811134.

4. It was the plaintiff's pleading that it supplied all the machinery as per the LPOs in the require conditions as set out in the LPOs and issued invoices once the same were delivered.

5. According to the Plaintiff, pursuant to the terms in the LPOs the defendant was under an obligation to pay the plaintiff for purchase and delivery of the goods under the LPOs as and when they fell due. It was its case that the total amount raised and payable from the LPOs to the

plaintiff was Kshs. 260,601,000.00/=. However, on or about the month of March 2016, the defendant made payment to the plaintiff leaving the outstanding balance of Kshs. 53,479,600/=. Again on or about May 2016 the defendant made a further payment of Kshs. 9,482,758/= leaving an outstanding balance of Kshs. 43,996,842/= which sum remains unpaid as the defendant has refused, ignored and neglected to remit the same.

6. It was the Plaintiff's case that the said balance has accrued an interest of Kshs. 10,700,000/= as at 31st March 2016 at the prevailing commercial rates.

7. The plaintiff's claim against the defendant therefore was for the balance arising out of the unpaid LPOs of Kshs. 43,996,842= and the interest accrued of Kshs. 10,700,000/= which the Plaintiff claimed resulted from the actions of the defendant which amounted to a breach of the LPOs whose particulars were given as hereunder:

- a. Failing to pay the balance of Kshs. 43,996,842/= in due time.
- b. Receiving goods with the intention of not paying.
- c. Failing to respond to the plaintiff's inquiries on the status of payments of the balance

8. As a result, it was the plaintiff's case that it had suffered and continued to suffer economic loss and prejudice because of the defendant's breach of the LPOs. Further, the plaintiff also suffered loss and damage as it failed to meet its various financial obligations and commitments due to the defendant's refusal, neglect and/or otherwise failure to settle the amount due and owing to the plaintiff breach of the terms of LPOs despite demand having been made and notice of intention to sue given.

9. The Plaintiff therefore sought for:

- a. The said sum of Kshs. 43,996,842/= being the balance of the LPOs.**
- b. The sum of Kshs. 10,700,000/= being accrued interest at the prevailing rates of interest as at 31st March 2016.**
- c. General damages.**
- d. Interest on (a) and (b) above at the prevailing rates interest until payment is made in full.**
- e. Costs of this suit together with the interest thereon at court rates.**
- f. Any such other or further relief as this honourable court may deem appropriate.**

10. As part of its examination in chief the Plaintiff filed witness statement made by its Director, one **Iqbal K. Omar**, who averred that on diverse dates, the Defendants issued 4 Local Purchase Orders to the Plaintiff indicating types, quantities and agreed prices for certain deliverables to the Defendant.

11. According to him, on or about 17<sup>th</sup> December, 2013 the Defendant issue LPO No. 2024991 for the supply of five bulldozers at a unit cost of Kshs. 17,850,000/= and the witness annexed a copy of the said LPO. Pursuant thereto on 2<sup>nd</sup> April, 2014 vide delivery note No. 059 the plaintiff delivered two bulldozers of chassis No. CCND85-EX118101174 and CCND85-EX118101170 and he annexed a copy of the delivery note. He further stated that on 3<sup>rd</sup> April, 2014 vide delivery note No. 062 the plaintiff delivered 1 bulldozer of chassis No. CCND85EX118101171 while on 23<sup>rd</sup> April, 2014 vide delivery note No. 060 the plaintiff delivered two bulldozers of chassis Nos CCND85EX118101172 and CCND85EX118101171 and the witness annexed copies of the said delivery notes.

12. The witness further stated that on or about 31<sup>st</sup> December, 2013 the defendant issued LPO No. 2106269 for the supply of 11 Motor Graders at a unit cost of Kshs. 91,850,000/=. The said LPO was duly attached. Pursuant to the foregoing on 26<sup>th</sup> April, 2014, vide delivery note No. 071, the plaintiff delivered six motor graders of chassis numbers PP14G-VI-1181010166, PP14D-VI-1181010169, PPIG14-VI-1181010174, PPIG4-VI-1181010173, PPI4G-VI-1181010172, and PPI4G-VI-1181010168 as per the attached copies of the delivery notes. Further, on 3<sup>rd</sup> March, 2015 vide delivery note No. 164 the plaintiff delivered one motor grader of chassis No. PP14G-VI-1181010104 and on 6-8-2015 vide delivery note No. 222 it delivered one motor grader of chassis No. PP14G-VII-1181010117. Attached to the statement were copies of the respective delivery notes.

13. In the same statement it was stated that on or about 26<sup>th</sup> March, 2014 the defendant issue LPO No. 2126388 for the supply of two wheel loaders at a unit costs of Kshs. 6,758,000/=. two excavators at a unit cost of Kshs. 8,500,000/= and to prove this the witness attached a copy the delivery note. According to the statement on 7<sup>th</sup> August, 2015 vide delivery note No. 223 the plaintiff delivered one lowbed loader of chassis No. RTEA3A 1299 and on 27-1-2016 vide delivery note No. 244 it delivered one loader of chassis No. PP966T-V3281010102. Accordingly, the statement had attached to it a copy of the relevant delivery notes.

14. It was further disclosed that on or 28<sup>th</sup> March, 2014 the defendant issued LPO No. 2126169 for the supply of three excavators at a unit cost of Kshs. 11,500,000/= and a lowbed boarder at a unit cost of Kshs. 8,500,000/=. A copy of the LPO was attached. Pursuant thereto, on 21<sup>st</sup> July, 2015 vide delivery note No. 217, the plaintiff delivered one excavator of chassis No. 1188111334 while on 22<sup>nd</sup> July, 2015 vide delivery note No. 245 the plaintiff delivered two excavators of chassis Nos. 11811131 and 11881132 and copies of the relevant delivery

notes were similarly attached. It was further averred that on 22<sup>nd</sup> July, 2015 vide delivery note No. 245 the plaintiff delivered two excavators of chassis No. 118111131 and 118811132 and to the statement was attached a copy of the relevant delivery note.

15. It was the Plaintiff's case that it performed and completed its obligation of purchase and supply of all the deliverables ordered by the defendant to it. It was its case that the total amount of LPOs issued to the plaintiff was Kshs. 260,601,000.00/= and the plaintiff performed the said LPOs and issued the defendant with invoices to that effect. The Plaintiff however acknowledged receipt from the defendant of Kshs. 216,604,158/= and contended that a balance of Kshs. 43,996,842/= still remains unpaid and the defendant had refused, ignored and neglected to remit this said balance and held the defendant solely liable for the breach. It was further stated that the said balance had accrued an interest of Kshs. 10,700,000/= as at 31<sup>st</sup> March 2016 at the prevailing commercial rates and which sum continued to accumulate interest until payment in full. Consequently and due to the actions of the defendant, the plaintiff had suffered economic loss and prejudice by being denied the use of monies which loss it also held the defendant liable.

16. It was averred that though the plaintiff through its advocates, Migos-Ogamba & Co. Advocates on 11<sup>th</sup> March 2016 demanded for the same and sent a further reminder on 30<sup>th</sup> March 2016, the said sum remained unsettled. He attached copies of the said letters. However, on 12<sup>th</sup> May 2016 the defendant through the chief officer-transport and roads wrote a memorandum to the plaintiff asking that the Plaintiff issues the defendant with an invoice of Kshs. 10,000,000/= (ten million) being part payment for the total bill which the Defendant owed the plaintiff of Kshs. 53,479,600.00 for equipments which were supplied to the county. From the witnesses' view, this was clear admission that defendant owed the plaintiff the claimed amount. Pursuant thereto the Plaintiff issued an invoice to the defendant and indeed they paid Kenya Shillings Nine Million, Four hundred and Eighty Two Thousand, Seven Hundred and Fifty Eight (Kshs. 9,482,758/=) which the plaintiff's advocates acknowledged receipt of on 20<sup>th</sup> May 2016 and a copy of the acknowledgement letter was attached. In the same letter the plaintiff's advocates demanded for the balance. However the defendant has refused, neglected and/or ignored to make good the plaintiff's claims.

17. In his testimony, PW1, the said **Iqbal K. Omar** reiterated the facts in his witness statement and produced the documents referred thereto as exhibits. He added that the Defendant wrote a letter promising to pay Kshs 10 million every month until payment in full. He accordingly exhibited the said letter as evidence. However the Defendant did not fulfil this promise hence this suit. After the payment of Kshs 9,482,758.60, it was the Plaintiff's case that the balance due was Kshs 34,514,083.40. However on 17<sup>th</sup> February, 2017 a further payment towards the said settlement was made in the sum of Kshs 4,741,379.00 leaving an outstanding balance of Kshs 29,772,704.00.

18. It was averred that as a result of the foregoing the Plaintiff had lost a lot of money in interest as it had borrowed money to supply the said equipments to the Plaintiff. He disclosed that before the interest rates were regulated the defendant was paying interest at the rate of 19%. As a result, it was averred that the Defendant's business came to a standstill as it could no longer obtain bank facilities to deliver to supply new clients. It was averred that the equipments were supplied to the Defendant in 2014 and 2015. While the Plaintiff showed willingness to accept payment in instalments, it insisted on payment of the accrued interest in the sum of Kshs 10.7 million as at 31<sup>st</sup> March, 2016. However the Plaintiff stopped charging interest when the Defendant promised to settle the sum by instalments of Kshs 10 million per month.

19. In cross examination the witness explained that though the Plaintiff in the plaint claimed Kshs 43,996,842.00 the Defendant had since been paid some further sums leaving an outstanding sum of Kshs 29,772,704.10. While he admitted that there was no contract between the Defendant and the Plaintiff, it was only fair that the Defendant pays the loss incurred as interest. While stating that the Defendant had the working out on interest which was compounded at 14%, PW1 stated that he did not have that workout in Court.

20. At the close of the Plaintiff's case the Defendant opted not to call any rebuttal evidence.

### **Determinations**

21. I have considered the pleadings, the evidence adduced as well as the submissions filed in this case.

22. Having considered the pleadings, the evidence on record and the submissions filed, it is my view that the following are the issues for determination.

- 1. Whether there was a contract for sale of mechanical equipments between the Plaintiff and the Defendant.**
- 2. Whether the Plaintiff fulfilled its part of the contract.**
- 3. Whether the Defendant fulfilled its part of the contract.**
- 4. Whether the Plaintiff is entitled to the award of damages and if so what is the quantum.**
- 5. Who should bear the costs of the suit?**

23. In this case the Plaintiff's uncontroverted evidence was that pursuant to various LPOs issued by the Defendant to the Plaintiff for the supply of mechanical equipments, the Plaintiff did supply the same to the Defendant who only made part payment of the same. This evidence was supported by both the oral testimony of PW1 and the documentary evidence in form of the LPOs, Delivery Notes and correspondences between the parties. Although there was clear evidence of admission of the contract and proposals from the Defendant to make good the default, the Defendant did not adduce any evidence in support of its pleadings. That averments in pleadings are not evidence was appreciated in **Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara [1972] E.A 166** where that the contents of a plaint are only allegations, not evidence. According to **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where a defendant does not adduce evidence

the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

**“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”**

24. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

**“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 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.**

25. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that 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.

26. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.**

27. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.**

28. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

29. If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

30. Even if the defence of the Defendant was anything to go by, apart from the issue of whether or not interest was payable, the rest of the averments were simply bare denials.

31. In this case the plaintiff has given evidence on oath supported by documentary evidence which go to prove its case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that there was indeed an agreement between the plaintiff and the defendant for the supply by the Plaintiff to the Defendant of the said mechanical equipments at an agreed price.

32. It is clear from the evidence on record that the said equipments were supplied and that from the total of Kshs 260,601,000.00/= a sum of Kshs 29,772,704.10 still remains unpaid.

33. As regards the claim for commercial interest, it is clear that there was not contract with regard to the same. In Vimal Kumar Kochar T/A Vimal Exports vs. Marwell Limited Nairobi (Milimani) HCCC No. 489 of 2000, Ringera, J (as he then was) held that where the plaintiff has not made out any case for application of commercial rates or even proved what commercial rates are nor even shown what those commercial rates are and has further not shown that there was a contract between the parties that interest would be paid on the debt and if so from the date claimed in the plaint, the general principle of law that no interest is payable on a debt in the absence of a contract or trade usage in support of the claim must be applied and the interest awardable should be at court rates.

34. It follows that without any contractual justification for an award of interests at commercial rate, such interests are not awardable as it is not proved that the same was not in the contemplation of the parties when the contract was being entered into.

35. In the premises interests would only be payable at Court rates and not at commercial rate.

36. As regards general damages, in **Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 OF 2000 [2000] 2 EA 398**, it was held by the Court of Appeal that no general damages can lie for a breach of contract. The same Court in **Kenya Commercial Bank Limited vs. Charles Otiso Otundo Civil Appeal No. 198 of 2000** held while citing **Dharamshi vs. Karsan [1974] EA 41**, that there can be no general damages for breach of contract, in addition to, for example loss of profits.

37. Having considered the material presented before me I find that the Plaintiff has proved its case against the Defendant on a balance of probabilities. Accordingly I enter judgement for the Plaintiff against the Defendant Kshs 29,772,704.10 with interest at Court rates from 11<sup>th</sup> March 2016 when the demand was made till payment in full. The Plaintiff will also have the costs of this suit.

38. It is so ordered.

**Dated at Nairobi this 3<sup>rd</sup> day of July, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mr Musyoki for Mr Ogamba for the Plaintiff**

**Miss Mutuku fo Mr Muoki for the Defendant**

**CA Geoffrey**