



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 1361 OF 2000**

**VULCAN CO. LIMITED.....PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

**(ON BEHALF OF THE MINISTRY OF HEALTH)**

**J U D G E M E N T**

**INTRODUCTION**

1. The suit herein was commenced by a Plaint filed in court on 31st July 2000. The Plaintiff is an incorporation registered in the Isle of Man, and describes itself as a major supplier for the Ministry of Health for various medical goods over the past seven years before the filing of this suit. The Plaintiff's case is based on alleged several breaches of contract by the Ministry of Health represented herein by the Attorney General, including non-payment of goods supplied wrongful termination of contracts and non-payment of interest accrued on late payment of goods supplied by the Plaintiff with respect to:-

- a. Sodium Hypochlorite Solution as per the Ministry of Health Order Reference Number MOH/HQR/T/POP/III/IV/93 -94/185 for the supply of 71540 Packs of 5 Litres Sodium Hypochlorite Solution (Containing-.3.5 % w/v available Chlorine).***
- b. Disposable Dental Needles as per the Ministry of Health Order Reference Number MOH/HQR/T/ POP III/IV 193-94 (126).***
- c. Hartmann's Solution as per the Ministry of Health Order Reference Number MSCU/INJ/13/14.***
- d. Blood Taking Sets as per the Ministry of Health Tender Reference Number MOH/3/99-2000 Award Item Number 042-004 (a) and Local Purchase Order C968138.***
- e. Cotton Stockinette as per Ministry of Health Tender Reference Number MOH/7 99/2000.***
- f. Trifluoperazine Hydrochloride Tablets 5 mg Ministry of Health Order Reference Number C514093.***

2. The Claim against the Defendant with respect to the said Sodium Hypochlorite Solution is based on an alleged order which the Defendant gave the Plaintiff herein for the supply of 71,540 packs of 5 Litres of Sodium Hypochlorite Solution. The Plaintiff allegedly delivered 16,196 packs of Sodium Hypochlorite Solution to the Defendant Ministry and before they could supply the balance of 55,344 packs the Permanent Secretary in the Defendant Ministry allegedly unilaterally, improperly and without any justification blatantly terminated the said order on **31<sup>st</sup> July, 1997**. The Plaintiff alleges that in addition to supplying 16,196 packs of **Sodium Hypochlorite Solution** the Plaintiff had already produced 4600 packs for the next supply lot and had committed resources for 10,000 packs for delivery within 30 days at the time of receipt of the said termination notice dated 31<sup>st</sup> July 1997. As a result and as per the provision stipulated in the tender documents especially Clause 25.2 the Plaintiff was bound to deliver a further 14,600 packs and in reciprocation the Defendant was bound to receive the said 14,600 packs. Consequently the total amount of Sodium Hypochlorite Solution delivered by the Plaintiff came to 30,796 packs, leaving a balance of 40,744 packs. The Plaintiff alleges that it was only paid for 13,800 Packs, but has not to date been paid for 16,996 packs as it is entitled to nor has the Defendant paid interest of 2% per month for late payment which came about as the terms of payment as per the Contract were Cash Against Documents and based on the Defendants terms of supply and payment as stipulated in the Invoices. In addition the Plaintiff alleges that it has incurred further losses as it had committed resources in anticipation of satisfying the said order.

3. As regards the **Disposable Dental Needles** and **Hartmann's Solution** the Plaintiff alleges that the Defendant Ministry did not pay the Plaintiff Cash as stipulated in the terms and conditions of the Contract and subsequently failed to settle the interest accrued on the late payments, against documents. In all cases the terms and conditions of supply was payment within 30 days from the date of the Invoice and interest became payable at the rate of 2% per month on any payment overdue after the expiry of the 30 day period. Further, the Defendant Ministry herein is alleged to have irregularly, improperly and in breach of contract cancelled the orders for the supply of 110,000 Blood Taking Sets, and 17,000 Packs of 1,000 Tablets of Trifluoperazine Hydrochloride. The Claim against the Defendant with respect to the supply of 20,000 rolls of Cotton Stockinette is based on a Letter of Acceptance dated 31<sup>st</sup> January, 2000 addressed to the Plaintiff for supply of 20,000 rolls of Cotton Stockinette at the price of sterling Pounds 5.25 per roll. The Defendant however failed to notify the Plaintiff within the validity of the bid. The Plaintiff subsequently was compelled to submit a revalidated bid at Sterling Pound 7.875. The Defendant Ministry allegedly in contravention of procurement procedures failed to reconsider the Plaintiff's Lower bid and awarded the tender to the higher bidder thus wrongfully depriving the Plaintiff of the said Order.

4. The Plaintiff's claim against the Defendant in respect of the above alleged breaches is for:-

- i. The sum of US\$ 230,270.98 with respect to the supply of Sodium Hypochlorite Solution and interest thereon at Court Rates.
- ii. The sum of US\$ 75,058.25 with respect to the supply of Disposable Dental Needles and Hartmann's Solution.
- ii. The sum of US\$ 474,114.00 with respect to the wrongful termination of contract and breach of contract with respect to Blood Taking Sets, Trifluoperazine Tablets and Sodium Hydrochlorite Solution.
- iv. The sum of Sterling Pounds 157,500.00 with respect to the breach of contract for the supply of Cotton Stockinette.
- v. General and special damages pertaining to the improper termination and breach of contracts with respect to Sodium Hypochlorite Solution, Blood Taking Sets, Cotton Stockinette and Trifluoperazine Hydrochlorite

Tablets.

vi. Damages for loss of profits.

vii. Aggravated damages for breach of contract as the honorable court shall determine.

viii. Interest at 2% per annum.

ix. Costs of this suit plus interest thereon on higher scale including costs for senior and junior counsel.

x. Such further relief as the honorable court may deem fit and just to grant.

5. The Defendant had controverted the Plaintiff's claim through a Statement of Defence dated and filed in court on 14th November 2000. In respect to paragraphs 4 (a), 5, 6, 7 and 8 of the Plaintiff, the Defendant stated that the Plaintiff delivered a consignment of 13,800 packs of 4 litres each of Sodium Hypochloride solution which consignment met the technical specifications of the Order as pertains the supply of Sodium Hypochloride solution. However, the Defendant contends that the Plaintiff was paid Kshs. 4,817,442 in full settlement of the above consignment by invoice Nos. 1101, 1102 and 1103. The Defendant further avers that the second consignment of 2396 packs of 5 litres each was delivered to the Ministry of Health but on verification the said consignment was found to be of poor quality as it did not meet the specifications set forth in the Letter of Offer. The Plaintiff was advised to collect the same and replace it with an acceptable quality, which the Plaintiff refused, failed and or neglected to do. Therefore the Plaintiff was unable to service the said order and the Defendant lawfully terminated the same. In reply to paragraph 4 (b), 9 and 13 of the Plaintiff the Defendant denied that it received the alleged disposable needles and in response to paragraphs 4 (c) and 13 of the Plaintiff the Defendant denied that any such contract was awarded to the Plaintiff in respect of Hartmann's solution as alleged or at all. In response to paragraph 4 (d) of the Plaintiff the Defendant contends that the Plaintiff changed manufacturer of the said Blood Taking Sets from Peninsula Plymers Ltd to Terumo Penpol Ltd in breach of existing government procurement regulation. In any event the Defendant stated that the new samples submitted for technical evaluation by the Plaintiff were of poor quality and did not meet the specification in the letter of offer. In reply to paragraphs 4 (e) (f) and 14 of the Plaintiff the Defendant denied that it entered into a contract with respect to Cotton Stockinette or Trifluoperazine Hydrochloride Tablets as alleged or at all and the Defendant put the Plaintiff to strict proof. The Defendant alleges that the claims by the Plaintiff are pure falsehood and should be dismissed with costs.

#### **COMPLIANCE WITH PRE-TRIAL DIRECTIONS**

6. There were various interlocutory applications during the life of the matter including an unsuccessful application by the Plaintiff to amend the Plaintiff, and an application for entry of judgment in default of defence which was granted but was later set aside, paving way for pre-trial direction, which was to take place on 15th October 2014. None of the parties was able to comply by that date. On the application by M/s Lukobe counsel for the Defendant the date for compliance was extended to 24th October 2014.

7. On 24th October 2014, Mr. Omuga counsel for the Plaintiff informed the court that the Plaintiff had complied with pre-trial directions and had filed two volumes of the Plaintiff's Bundle together with the Plaintiff's witness statement which was filed in court on 15th December 2014. However, M/s Lukobe asked for six (6) more weeks to enable her comply. Her request was granted and sixty (60) days given to her to comply with Order 11. The matter was then listed for hearing on 16th December 2014. However, on that date, M/s Lukobe for the Defendant did not appear in court, and this caused adjournment, with the court noting that the claim by the Plaintiff is huge, and the Defendant needed to be properly represented. The court therefore directed that the Defendant be served with a fresh hearing notice for 19th January 2015.

8. On 19th January 2015, a M/s Ndirangu appeared for the Defendant and applied for adjournment on the grounds that she was new in the matter and that she needed time to comply with pre-trial requirements. Counsel asked for 30 days. The court denied the application for the adjournment of the case, whose hearing commenced on that day. M/s Ndirangu was however given the leave to file the Defendant's Bundle of documents and witness statements before the date for further hearing which was scheduled for 24th February 2015. However, on 24th of February 2015 the hearing could not proceed as a M/s Prisca Wamboi held brief for M/s Ndirangu and successfully applied for adjournment on the grounds that M/s Ndirangu was unwell. Upto that time, however, the Defendant had not filed either its bundle of documents, or witness statements. A further hearing was scheduled for 18th March 2015. On that date, M/s Ndirangu counsel for Defendant informed the court that despite their best effort, they were unable to get either documents or witnesses from the Ministry of Health, as the same were not available. The counsel further submitted that their client had instructed them to proceed with the hearing with the documents on record being the Plaintiff's documents and their defence, and that the Defendant would not call any witnesses to controvert the Plaintiff's testimony. The case therefore proceeded with the sole evidence of the Plaintiff's witness who was cross-examined on his evidence and on the Plaintiff's documents. Further hearings took place on 18th March 2015 and 15th April 2015.

9. The court directed parties to file written submissions, which were highlighted on 21st April 2015 by Order of court. Parties filed supplementary submissions, with the Plaintiff doing that on 28th September 2014 while the Defendant did the same on 29th September 2015.

### **THE PLAINTIFF'S CASE AND SUBMISSIONS**

10. The Plaintiff's case was presented by Dr Shaileshkumar Patel pursuant to a power of Attorney given by the Plaintiff to Mr. Patel executed on 24th September 2014. The Plaintiff called one witness, P.W. 1, **Dr. Shaileshkumar Patel** who both in his written witness statement and testimony in Court gave detailed explanation why judgment should be entered in favour of the plaintiff against the defendant on behalf of the Ministry of Health. In his evidence P.W. 1 tackled each head of claim and made references to specific pages of the two volumes of documents which were filed in Court on 23<sup>rd</sup> October 2014.

The summary of his evidence is as follows;

### **PRODUCT 1 - SODIUM HYPOCHLORITE SOLUTION**

The tender document issued by the Ministry of Health is found at pages 69-101 of Volume 1 of the Plaintiff's Bundle. The Plaintiff's terms of engagement are contained in its letter dated 14<sup>th</sup> October 1994 found at page 102. The Plaintiff's payment terms are set out in paragraph 5 of the said letter in the following words;

***“Payment Terms: Letter of Credit (preferred) or Cash Against Documents. A grace period of 30 days will be allowed from the time of shipment/delivery. However, in case of any delayed payment beyond the 30 days grace period allowed, interest will be charged at the rate of 2% per month, compounded monthly on the overdue account until payment of all outstanding dues including any interest accrued are settled in full”.***

11. At pages 65-66, is the letter dated 7<sup>th</sup> June 1996 accepting the Plaintiff's tender followed by letter of order also dated 7<sup>th</sup> June 1996, found at pages 67-68, which spells out payment terms at clause C in the following manner;

### **“C TERMS OF PAYMENT**

***Payment shall be cash against Documents through the Central Bank of Kenya. The Exchange rate used for the purpose of processing this order is 1 USD= 58.1822 as at 7<sup>th</sup> June 1996”.***

The letter required acceptance by the Plaintiff which was duly done. The Plaintiff supplied goods as and when directed by the Ministry and the delivery notes/invoices are found at pages 48-63. At page 64 is the invoice for the amount due under this product as at the date of the suit. The updated interest calculation is found at pages 34-39. The Witness testified that the balance of quantity in respect of this contract for the supply of 40,744 packs was, however, reduced by way of oral application for amendment from US\$ 244,464.00 to US\$ 183,348.00, being an amount claimed in relation to loss of profits. PW 1 testified that the Plaintiff had already paid HACO INDUSTRIES LIMITED for supply of 4,600 packs and had further committed resources to supply an additional quantity of 10,000 packs meaning that the Plaintiff was ready, able and willing to deliver the full order. The Plaintiff therefore claims balance of the order for Sodium Hypochlorite Solution for loss of profit against the quantity of 40,744 packs at the rate of US\$ 4.50 per pack as hereunder;

Tender price	US\$ 244,464.00
Less procurement price	US\$ <u>61,116.00</u>
Net profit loss	US\$ <u>183,348.00</u>

#### **Partial payment made on account**

12. Payment was eventually made on account on 24<sup>th</sup> February 1998, in respect of invoices numbers **1101,1102 and 1103 (see page 34 of volume 1)**. P.W. 1 testified that the Plaintiff has treated those payments made at the beginning of the year 1998, (*outside the payment terms set out in the letter of order aforesaid*), as partial payments on account and proceeded to claim interest. PW 1 stated that the basis for claiming interest at 2% per month was that the same was contractual and agreed by the parties.

13. PW 1 also testified that the Defendant, in purporting to terminate the contract or tenders, failed to comply with the provisions for termination of the contract or tender. The provisions for termination of the tender/contract are found in the tender document which runs from pages 69-101 (*tender document issued by the Ministry of Health*). PW 1 referred the court to page 94 is at Clause 22, which deals with termination for default of supplier, while at page 95 is clause 25, which deals with termination for convenience of the Ministry. Clause 25 reads:-

#### **“25. Termination for Convenience**

***25.1. The Buyer, may by written notice sent to the Seller, terminate the contract, in whole or in part at any time for its convenience. The notice of termination shall specify that termination is for the Buyer’s convenience, the extend to which performance of work under the Contract is terminated, and the date upon which such termination becomes effective.***

***25.2 Goods that are complete and ready for shipment within 30 days after the Seller’s receipt of notice of termination shall be purchased by the Buyer at the Contract terms and prices. For the remaining Goods, the Buyer may elect;***

***a. to have any portion completed and delivered at the Contract terms and prices; and/or***

***b. to cancel the remainder and pay the Seller an agreed amount for partially completed Goods and for materials and parts previously procured by the Seller”.***

14. PW 1 testified that in this case the contract was terminated on the grounds that “no formal contract forms were signed (*see paragraph 2 of the letter at page 287*) and since this could not have been a default on the part of the plaintiff it can be treated as amounting to termination for convenience of the Ministry within the meaning of clause 25 of the tender document. PW 1 testified that the Ministry should have accepted all the goods which the plaintiff was ready to supply and paid for them. PW 1 testified that prayer for the amount of US\$ 230,270.98, in respect of this product as at the date of the suit and subsequent interest as per the interest calculation on pages 34 to 39 are, therefore well founded and should be allowed by this court.

### **PRODUCT 2 DISPOSABLE NEEDLES**

15. PW 1 testified that the letter of order for this product is found at page 326 (Volume 2) of the Plaintiff’s bundle. It is dated 1<sup>st</sup> December 1995 and the order was for US\$ 54,000.00. The payment terms are found at page 327 in the following words:-

***“C Terms of payment***

***Payment shall be cash against Documents through the Central Bank of Kenya.***

***The exchange rate used for the purpose of processing this order is 1 USD= Kshs. 55,6083, as at 29<sup>th</sup> November 1995.***

***The letter constituted a firm order, and the Plaintiff was required to confirm its acceptance by signing the duplicate comply and returning it by return mail. Please confirm your acceptance of this order by signing the duplicate copy and return it by return mail”.***

The sales invoice of the Plaintiff is dated 14<sup>th</sup> May 1996 (page 329) and at pages 330 to 334 are importation documents and inspection certificate by SGS dated 14<sup>th</sup> March 1996. PW 1 testified that in as much as the letter of order gave payment terms as cash against documents meaning that payment fell due on or about 17<sup>th</sup> March 1996, the Plaintiff gave the Ministry a grace period of 30 days and started calculating interest with effect from 17<sup>th</sup> June 1996. An amount of US\$ 54,000.00 was paid in December 1996, at which point in time the outstanding amount was US\$ 60,812.77. The net outstanding balance on the date of partial payment was US\$ 6,949.03, which continued to accrue interest at the interest rate of 2% per month and stood at US\$ 15,963.62 as at 31<sup>st</sup> July 2000 when the suit was filed in court (*see pages 318 and 319*). PW 1 testified that the basis of this claim is that at the initial stages, the Plaintiff had informed the Ministry that it would charge interest at the rate of 2% per month compounded monthly, the Defendant did not object to the Plaintiff’s terms of contract, as it went ahead and issued a letter of order for the Plaintiff’s goods and further committed itself to pay cash against documents. In the premises, the Defendant lacks legal or moral basis to challenge the Plaintiff’s claim for interest at the contract rates.

### **PRODUCT 3- HARTMANN’S SOLUTION**

16. The letter of order for this product is at pages 335-336 of Volume 2 of the Plaintiff’s documents. PW 1 testified that the order was for US\$ 25,025.00 and payment terms on page 336 are worded as follows;

**“C Terms of payment**

***Payment shall be effected after 30 days from the date of the Bill of Lading. The Ministry of Health has no facilities at the moment to operate a letter of credit”.***

17. PW 1 testified that this order was issued by a letter dated 27<sup>th</sup> October 1993 addressed to

CORE INTERNATIONAL LIMITED, who appointed the Plaintiff as their executing agents/confirming house since they could not operate without a letter of credit.

The letter of Core International Limited addressed to the Ministry is dated 7<sup>th</sup> December 1993 and is found at page 337. PW 1 testified that the goods were supplied by the Plaintiff who raised its invoice dated 29<sup>th</sup> November 1993. At page 339 is the Ministry's payment authority dated 18<sup>th</sup> December 1996 addressed to Central Bank of Kenya, payment was finally made on 10<sup>th</sup> February 1997 (see page 320) at which Point in time a sum of US\$ 52,069.14 was outstanding. The payment reduced the Ministry's indebtedness to US\$ 27,044.14, which as at 31<sup>st</sup> July 2000 when the suit was filed stood at US \$ 60,908.82 (see page 321). PW 1 testified that the two claims, in respect of Dental Needles and Hartmann's Solution are combined for purposes of interest calculations at pages 322 to 325 of Volume 2, as well as prayer number (ii) of the Plaintiff's prayers. PW 1 testified that as at end of March 2015 an amount of US\$ 2,548,173.83, was due under the claim for these two products. Again, the Defendant had no reason not to pay the Plaintiff within 30 days from the date of bill of lading/invoice.

#### **PRODUCT 4- BLOOD TAKING SETS**

18. The letter of acceptance dated 14<sup>th</sup> January 2000 is found at page 395 it specifies quantity of 110,000, unit price, US\$ 1.40, total price US\$ 154,000.00. At paragraph 4 it is stated that;

***“Payment will be made against certified Goods Delivery Note for goods supplied against confirmed Purchase Order(s)”.***

19. The Local Purchase order dated 26<sup>th</sup> January 2000 for the quantity of 110,000 sets at a price of US\$ 154,000.00 is found at page 397. According to PW1, when the Plaintiff tendered for supply of this product, it was supposed to procure the same from an Indian Company known as PENINSULA POLYMERS LIMITED. However, before the Plaintiff could purchase the goods it had tendered for, the manufacturer's majority shareholding (74%) was acquired by TERUMO CORPORATION of Japan (see the letter dated 14<sup>th</sup> April 2000 at page 471). At page 479, is what is called “Fresh Certificate of Incorporation issued on 1<sup>st</sup> October 1999, by the Registrar of Companies, Kerala State of India, confirming change of name by PENINSULA POLYMERS to TERUMO PENPOL, and at page 480 is a copy of certificate issued by the Drugs Control Administration, Kerala State which confirms that TERUMO PENPOL LIMITED, was formerly known as PENINSULA POLYMERS LIMITED. PW 1 referred the court to another certificate issued by the same drug agency at pages 484 to 492 of volume 2 of the bundle. At page 493 is the Ministry's letter dated 27<sup>th</sup> May 2000 addressed to TERUMO in response to samples it had submitted to the Ministry for technical evaluation. The letter by Dr. R. O Muga, states at paragraph 2 as follows;

***“These samples were analysed against the set parameters by our Technical Evaluation Team, but were found to be unacceptable as they did not meet all the parameters specified”.***

20. PW 1 testified that the letter does not specify any parameter the sample did not meet or satisfy and/or when such parameters were supplied to the plaintiff. Further PW 1 stated in his evidence that indeed the letter of acceptance and LPO at pages 395 to 397, do not specifically set any parameter the product had to satisfy. A number of correspondences were exchanged in an attempt to convince the Ministry not to cancel the tender/order to no avail. The manufacturer undertook technical evaluation of the product and submitted samples of the product to National Public Health Laboratory Service (a department of the Ministry of Health), who by its letter dated 5<sup>th</sup> May 2000 (see page 454) gave the product a clean bill of health in the following words;

**“Findings**

***They are satisfactory for blood collection.***

***This CPDA- 1 preserves blood for 35 days. Hence, a very good anticoagulant”.***

21. PW 1 referred the court to other sets of test results by SGS India Limited found at pages 497-498 and pages 501- 502, which also gave approvals for the manufacturer’s products. PW 1 testified that the Plaintiff suffered loss of profits due to cancellation of the tender/order. The evidence of PW1 is that the Plaintiff was going to procure the product for US\$ 97,130 and sell it to the Ministry for US\$ 154,000, giving it a net profit margin of US\$ 56,870.00 as hereunder:-

US\$	154,000.00
Less US\$	<u>97,130.00</u>
Net profit/loss US\$	<b><u>56,870.00</u></b>

The tabulation of the loss sustained by the Plaintiff and accrued interest at 2% per month is found at pages 391 to 394, giving a figure of US\$ 1,892,838.91 as at 30<sup>th</sup> April 2015. PW 1 testified that the Ministry having not called any evidence to prove the parameter the product is alleged to have failed to meet must compensate the Plaintiff for the loss of profit it suffered because of the cancellation of the order.

**PRODUCT 5-COTTON STOCKINETTE**

22. The tender for this product was quoted in Sterling pound, quantity given as 20,000, rolls at £5.25 per roll, giving a gross figure of £105,000.00. The tender acceptance letter dated 31<sup>st</sup> January 2000 is at page 508, and gives payment terms at clause 4 in the following words;

***“4 payment will be made against certified Goods Delivery Note for goods supplied against confirmed Local Purchasing Order (s). Your response regarding this letter is expected to reach this office within 7(seven) days after notification.”***

By a letter dated 16<sup>th</sup> February 2000, the Ministry invited the Plaintiff to accept the tender within 7 days extension period (***see page 547***). By a letter dated 17<sup>th</sup> February 2000, the plaintiff applied for validation of the tender (***see page 548***), due to price variation by the manufacturers. A sample of the Ministry’s tender validation form is found at page 550. PW 1 testified that by its letter to the Plaintiff dated 1<sup>st</sup> March 2000 (***see page 551***), the Ministry states at paragraph 4 as hereunder;

***“The board having scrutinized all the conditions/terms of the same tender, therefore considered the 2<sup>nd</sup> lowest evaluated bid for the award of the items covered in your application”.***

The letter proceeds to state at paragraph 5 thus:-

***“Your counter-offers were rejected by the Board and offers to you cancelled. Please return the LPO No. 968076 for cancellation”.***

23. PW 1 testified that in response to the letter of 1<sup>st</sup> March 2000, the Plaintiff wrote to the Ministry on 6<sup>th</sup> March 2000 (***see page 552***) a complaint letter in which it stated at paragraph 5 as follows:-

***“We are wondering why you have disregarded our letter of 31st January 2000, in***

**respect of item 12 wherein we have clarified that the price of stg. 5. 25 is per roll of 10cmx20m and price of stg. 7.875, is per roll of 15 cm x 20 m. (on prorata basis -  $5.25 \times 15.10 = 7.875$ )”.**

24. The Plaintiff's beef with the Ministry is pegged on a document issued by the office of the President (OP) dated 20<sup>th</sup> March 1981(see pages 554 to 556) headed **CENTRAL TENDER BOARD PRICE VALIDATION/PRICE INCREASE APPLICATIONS**. The document was signed by one E.G. Karanja for the Chief Secretary. The circular document provides at clauses 1 and 2 as follows;

***“The Central Tender Board has therefore decided that the following procedure will be followed when the need for price validation and/or consideration of a price increase application becomes necessary:-***

***1. Where a winning tenderer refuses to accept a tender offer or fails to respond; the Department will go to the second lowest priced tenderer if validity period is not yet expired. If the validity period is already expired (which may be the case most of the times), prices of all remaining tenderers should be validated. As soon as this is done, the necessary recommendations should be forwarded to the Central Tender Board for adjudication.***

***2. Where a winning tenderer accepts an offer but asks for price increase before signing a legal contract, the Department concerned will ask all original tenderers to validate their prices including the tenderer applying for price increase. It is however important to note that the applicant for price increase (the original tender winner) is asked to validate price only in order to protect him from unfair price undercutting by other competitors. Otherwise if the original tender winner is still the lowest after price validation, the Government should pay him the price he applied for in his price increase application. The Department will of course forward their recommendation to the Central Tender Board for adjudication.”***

25. PW 1 testified that in this particular case the Plaintiff's bid price was still the lowest and according to clause 2 of the said circular, it should have been allowed to supply the product at its validated price. However, the Ministry in clear breach of the terms of the circular, proceeded to award the tender to the 2<sup>nd</sup> lowest evaluated bidder whose price was way too high compared to the validated price of the Plaintiff by some 16 million more (**see newspaper clips on pages 568 and 569**). PW 1 testified that the act of illegality on the part of the Defendant caused the Plaintiff loss of profits. The Plaintiff was going to procure this product at £4.02 and sell it to the Ministry of Health at £7.875, a piece, meaning its profit margin would have been  $3.855 \times 20,000 = \text{£}77,100.00$ . The loss of profit and interest calculation thereon are at pages 503 to 506, giving an amount of £2,664,352.85 as at 30<sup>th</sup> April 2015. The Plaintiff's evidence in respect of this product is once again unchallenged by the defendant who did not call any evidence.

### **PRODUCT 6 - TRIFLUOPERAZINE HYDROCHLORITE TABLETS**

26. PW 1 testified that the Ministry issued to the Plaintiff LPO number 514093 dated 28<sup>th</sup> May 1997 (see page 574) for US\$ 75,650.00. This was hardly a month to the end of the Kenyan Financial year which falls on 30<sup>th</sup> June each year. By a letter dated 9<sup>th</sup> June 1997 (**see page 579**), the plaintiff informed the Ministry that delivery would be effected within 8-12 weeks and requested the Ministry to advise it on the mode of payment. By a letter dated 28<sup>th</sup> August 1997 (**see page 580**), the Ministry informed the Plaintiff for the first time that it should have serviced the order before the end of the previous financial year and further that the order stood cancelled and directed it to return the LPO for cancellation. The Plaintiff wrote numerous protest letters found at pages 581 to 584, which did not elicit any positive response from the Ministry, who by a further letter dated 8<sup>th</sup> December 1997 (see page 585) reiterated that the Plaintiff should return

the LPO for cancellation. At pages 570 to 578 the Plaintiff has provided a tabulation of the loss it suffered due to the Ministry's unreasonable conduct. It would have made a profit of US\$ 33,490.00 if the Ministry had not cancelled the order as hereunder;

Tender price US\$ 4.45 X17,000.00	US\$ 75,650.00
Procurement price US\$ 2.48 X17,000.00	US\$ <u>42,160.00</u>
Net profit/loss	<b>US\$ <u>33,490.00</u></b>

PW 1 testified that once again, there is no evidence tendered by the Defendant to justify, such unreasonable and high handed manner in which it acted in this matter by issuing LPO on 27<sup>th</sup> May 1997 for goods to be imported from a foreign Country and expecting the Plaintiff to supply the same before 30<sup>th</sup> June 1997.

27. The Plaintiff raised the following issues for determination

1. Did the Defendant breach any of the contracts between itself and the Plaintiff for the supply of any of the following items; sodium hypochlorite solution, disposable dental needles, hartmann's solution, blood taking sets, cotton stockinette and trifluoperazine hydrochloride tablets, as pleaded in paragraph 4 (a)-(f) of the plaint or is the Plaintiff's claim unfounded?.

2. Did the sum of Kshs. 4,817,442/-, paid by the Ministry of Health to the Plaintiff settle the full value of the consignment of 13,800 packs (**of 5 litters each of sodium hypochlorite solution**), supplied by the plaintiff or did it constitute part settlement of the Ministry's liability to the Plaintiff?.

3. Did the second consignment of 2396 packs of 5 litres each of sodium hypochlorite solution meet the specifications set out in the letter of offer and if not, was the Ministry entitled to reject it?.

4. Had the Plaintiff procured the balance of the consignment of sodium hypochlorite solution by 31<sup>st</sup> July 1997, when the Permanent Secretary, Ministry of Health issued a directive terminating the order and if so, was that decision well founded in facts and justifiable?.

5. Did the Ministry of Health award the Plaintiff tenders for supply of disposable dental needles and hartmann's solution and did the Plaintiff supply the same to the Ministry and if so, can the Plaintiff claim the full value of that consignment from the Ministry?

6. Was the Ministry of Health justified in cancelling the tender for supply of blood taking sets on the ground of change of name of the manufacturer from PENINSULA POLYMERS LIMITED to TERUMO PENPOL LIMITED (*in spite of explanations offered by the plaintiff*), even if there was no change in the quality of the goods it tendered for?

7. Did the Ministry of Health award the Plaintiff tender for supply of Blood Taking Sets, Cotton Stockinette and Trifluoperazine Tablets as alleged in paragraphs 4 (e) and (f), and 14 of the plaint and denied in paragraph 11 of the statement of defence?

8. Is the Plaintiff entitled to the reliefs or any of the reliefs set out in the plaint, that is to say;

i. US\$ 230,270.98, being the balance on account of sodium hypochlorite solution;

ii. US \$ 75,058.25, with regard to tender for supply of disposable dental needles and

Hartmann's Solution;

iii. US\$ 474,114.00, on account of wrongful termination/breach of contract for supply of blood taking sets, trifluoperazine tablets and sodium hypochlorite solutions;

iv. Sterling Pounds 157,500.00, on account of breach of contract for supply of cotton stockinette;

v. Damages for loss of profits;

vi. Interest at the rate of **2%** per month from due dates until payment in full;

vii. Any or such further reliefs as the Honourable Court may determine?

9. What order should be made with respect to costs of the suit?

### **DEFENDANT'S CASE AND SUBMISSIONS**

28. The Defendant did not call any witnesses, but relied on its defence and other documents on record; cross-examined the Plaintiff's witness and objected to the suit on questions of law. The above notwithstanding, M/s Ndirangu submitted on the other issues as follows:-

#### **Whether the Defendant was justified in terminating the Contract for the supply of Sodium Hypochlorite Solution.**

M/s Ndirangu submitted that the Plaintiff was awarded the tender for the supply of 71,540 packs of 5 Liters of Sodium Hypochlorite Solution vide letter of offer dated 7<sup>th</sup> June 1996. According to the Plaintiff, the Defendant agreed that the product be delivered in batches due to its heat sensitive nature and further agreed to an independent laboratory such as the Kenya Bureau of Standards carrying out the testing. Subsequently the Plaintiff made 3 deliveries of a total of 16,196 packs of the solution effected through three separate consignments of 4,600 packs each and invoiced Invoice no. 1101 and 1102 of 27<sup>th</sup> November 1996 and invoice number 1103 of 14<sup>th</sup> February 1997 each for a sum of US \$27,600.00. Payment against the said invoices was settled around 24<sup>th</sup> February 1998. That payment on invoice numbers 1101 and 1102 became due end of January 1997 and were made 12 months from the expiry of the 60 day grace period while payment against Invoice no. 1103 was made 9 months from the expiry of the 60 days grace period. The Plaintiff therefore claims that they are entitled to interest on the delayed payments as per the terms of supply to compound interest at rate of 2% per month for the delay as well as interest at the same compounded rate on the interest so calculated until payment is made in full. In addition the Plaintiff claims that they made three subsequent deliveries of invoice 1104-1106. Counsel submitted that the Defendant refused to pay for the batches because they were of unacceptable quality and advised the Plaintiff to collect the same and replace with items of the agreed quality. The Defendant cancelled the contract on 31<sup>st</sup> July 1997 when they also informed the Plaintiff that there had been no formal agreement forms signed by the Plaintiff and the Government as required by the regulations and as such procurement could not be sustained. In this regard, the Defendant advised the Plaintiff to treat the Letter of Acceptance dated 7<sup>th</sup> June 1996 and Letter of Order dated 7<sup>th</sup> June 1996 null and void. Indeed the Plaintiff confirms that the first three batches Invoice No. 1101-1103 were tested, accepted and paid for. The Defendant submitted that the cancellation of further deliveries was necessitated by the fact that the subsequent batches failed to meet the specifications set forth in the letter of offer and the Plaintiff failed to replace the consignment.

29. The **Sale of Goods Act Section 35 (1)** provides:

***“ 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 the goods for the purpose of ascertaining whether they are in conformity with the contract.”***

30. The right to rejection of goods that fail to fit the description was well set out in ***Arcos Ltd v E.A Ronnassen & Sons (1933) AC 470*** where the English court dealt with non-conformity and stated that:-

***“the description that means the words used to indicate or referred to the goods and covers any mention of quantity or quality and any special method of packing to be used. Even the slight diversion from the quantity or size or quality of the goods ordered, or the way in which they are to be packed or their thickness is prima facie a breach of this condition.”***

31. Counsel further submitted that the claim for loss of profit against quantity of 40,744 packs which were not supplied may only succeed upon the Plaintiff demonstrating that the Sodium Hypochlorite Solution was complete and ready for shipment/delivery within 30 days after the seller's receipt of the notice of termination thereby giving rise to the obligation to pay. Counsel submitted that PW 1's claim that the Sodium Hypochlorite Solution was ready for supply and that they had already incurred expenses by paying for them from the manufacturer, Haco Industries Kenya Ltd. by the time they received the termination notice from the Defendant is not convincing and is not proved, citing the **Evidence Act Section 107 (1)** which provides as follows:

***“ 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.”***

32. In view of the nature of claim herein and the position of law, M/s Ndirangu submitted that the Plaintiff had not proved this aspect of its case.

**Whether the Defendant was justified in cancelling the tenders for the supply of Blood Taking Sets, Trifluoperazine Hydrochloride Tablets and Cotton Stockinette.**

**a) Blood Taking Sets**

Regarding Blood Taking Sets, the Defendant's counsel submitted that the Plaintiff was awarded tender for 110,000 Blood Taking Sets against Tender No. MOH/3/99/2000 as per letter of acceptance dated 14<sup>th</sup> January 2000 having submitted a sample from the manufacturer Peninsular Polymers Ltd which was evaluated and accepted by the Tender Board. The Plaintiff was issued with a Local Purchase order C968138 dated 4<sup>th</sup> February 2000. However before delivery, the Plaintiff informed the Defendant of change of name of supplier from Peninsula Polymers Ltd to Terumo Penpol Ltd which was effected on 1<sup>st</sup> October 1999. The Defendant vide letter dated 16<sup>th</sup> March 2000 instructed the Plaintiff to supply the item against the approved sample within 7 days of receipt of the said letter as submitting another sample other than what had been approved by the tender board would be against tendering procedures. Nevertheless, the Defendant allowed the Plaintiff to submit new samples of the Blood Taking Sets by the Technical Evaluation Team for analysis against the set of parameters but the said samples failed to meet all the parameters that had been specified in the letter of offer. The Defendant cancelled the contract vide letter dated 25<sup>th</sup> May 2000 on the basis that the Plaintiff failed to supply the product that had been approved by the Tender Board.

Counsel cited the **Sale of Goods Act Section 15** which provides as follows:

***“ where goods are sold by description there is an implied condition that the goods***

***shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.***

Counsel submitted that a new sample provided by the Plaintiff under the “new manufacturer” failed to meet the parameters that had been specified for the product in the letter of offer and was rejected on those grounds. The right to rejection as set out in the **Arcos case (supra)** entitles the buyer to reject goods that do not fit the description of that which had been agreed on however slight.

***“ Even the slight diversion from the quantity or size or quality of the goods ordered, or the way in which they are to be packed or their thickness is prima facie a breach of this condition.”***

**33.** Counsel submitted that the Plaintiff failed to supply the Blood Taking Sets of the quality that had been approved by the tender board, and the Defendant was justified in cancelling the contract.

#### **b) Trifluoperazine Hydrochloride Tablets**

The Plaintiff was awarded tender No. MOH/ICB/8/9-97 for the supply of 17,000 packs of 1000 of Trifluoperazine Hydrochloride Tablets and issued with a Local Purchase Order No C 514093 dated 28<sup>th</sup> May 1997. By August of the same year the Plaintiff had not delivered the product. The Defendant cancelled the LPO vide a letter dated 28<sup>th</sup> August 1997 on the basis that no deliveries had been made against it and the same was reaffirmed in the letter dated 8<sup>th</sup> December 1997. The Defendant humbly submits that they were justified in cancelling the contract with the Plaintiff on the basis of non-performance.

#### **c) Cotton Stockinette**

**34.** The Plaintiff was awarded a contract for the supply of 20,000 rolls of Cotton Stockinette at a sum of Pounds Sterling 105,000.00 vide a letter of acceptance dated 31<sup>st</sup> January 2000. The Plaintiff claims that the said letter of acceptance was issued after the expiry of 120 days tender validity period and therefore they had to seek confirmation from the respective manufacturer whether their offers were still valid. The Plaintiff informed the Defendant that the validated unit price applicable for the product was Pounds Sterling 7.875 per roll. The Defendant offered the Plaintiff a chance to supply the product vide the letter dated 4<sup>th</sup> February 2000 as the letter of acceptance was within the tender validity period. The Defendant rejected the re-validation offer and cancellation of the award vide the letter dated 1<sup>st</sup> March 2000. The Plaintiff failed to deliver the products and it is for the said reason that the contract was terminated. However, this court observes that the Defendant’s submissions in respect to this claim is not correct according to the documents on record. From the record, it is clear that the tender was given to the higher bidder in contradiction to the Tender Board’s regulations and this amounted to a breach of contract.

#### **Burden of Proof**

**35.** M/s Ndirangu submitted that the burden of proof in civil cases is on a balance of probabilities. The burden of proving that the Defendant is in breach lies squarely on the Plaintiff. As stated in **Central Microfilm Operators Ltd V Teachers Service Commission [supra]**.

***“ This being a civil case, the standard of proof was on a balance of probabilities. What this means is that in ordinary civil case, the case may be determined in favor of a part who persuades the court that the allegations he has pleaded in his case are more likely than not what took place, in percentage terms, a party is able to***

***establish his case to a percentage of 51% as opposed to 49%, the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred. ”***

M/s Ndirangu submitted that the burden of proof does not shift hence it is not for the Defendant to prove they are not liable for the Plaintiff's claim but rather for the Plaintiff to prove entitlement to recover from the Defendant. The Defendant submitted that in view of the nature of claim herein and the position of law as established in authorities herein produced, the Plaintiff has not discharged the burden of proof as established.

### **Whether the Plaintiff is entitled to interest on delayed payments for the supply of Disposable Dental Needles and Hartmann's Solution**

**36.** The Plaintiff was awarded tender for the supply of Disposable Dental Needles vide Letter of Order for Tender No. HQ/POP/III/IV/94-9 dated 1<sup>st</sup> December 1995. The same was invoiced on 14<sup>th</sup> May 1996 Invoice No. 1090 for the amount of US \$ 51,900. As stated in the Plaintiff's submissions payment for the items fell due on 17<sup>th</sup> June 1996 and was paid on 19<sup>th</sup> December 1996 following a 6 month delay in the amount of US \$54,000 leaving an outstanding balance of US \$ 6,949.03 which continued to accrue interest of US \$ 15,963.62 as at 31<sup>st</sup> July 2000. The Plaintiff was awarded tender for the supply of Hartmann's Solution vide Letter of Order dated 27<sup>th</sup> October 1993 under Invoice ref. KEN/01/93 for the amount of US \$ 25,025.00. Payment was to be effected after 30 days from the date of Bill of lading. Payment was made on 10<sup>th</sup> February 1997 after a delay of 37 months. Interest accrued for late payment at 2% per month which by the time of filing this suit amounted to US \$ 60,908.82. The Plaintiff claims that they are entitled to interest for the delay of payments with respect to the Disposable Needles and Hartmann's Solution at the rate of 2% compounded monthly as well as interest on the same compounded rate on the interest so calculated until payment is made in full. The Defendant submitted that whereas it is trite law that interest is compensatory to the Plaintiff for the deprivation of money through the wrongful act of the Defendant, compounded interest as prayed for by the Plaintiff does no justice and would be unconscionable, unfair and unjust enrichment of the Plaintiff. Counsel cited Justice Havelock J. in the case of **Premier Bag & Cordage Ltd v National Irrigation Board (2014) eKLR** wherein he stated:

***“From the foregoing, once payment of interest is ordered on a decree such interest shall only accrue on the principal only and not otherwise. This is because, charging interest on interest otherwise known in the commercial world as compound interest is punitive and not compensatory. As already held, interest is a means to compensate a party for having been kept out of its/his funds or property for some time and not to enrich such party or punish the opposing party. In this regard, the moment any interest is levied on any accumulated interest and not principal sum, such interest stops being simple and becomes compounded, and therefore punitive.”***

**37.** The Defendant submitted that compound interest on interest as is calculated and prayed for by the Plaintiff is punitive and would only serve the purpose to unjustly enrich them.

### **Whether the Plaintiff is entitled to the Award of Damages for Loss of Profits**

**38.** The Plaintiff prays for an award of damages for loss of profits pertaining to the improper termination and breach of contracts for Blood Taking Sets, Cotton Stockinette, Trifluoperazine Hydrochlorite Tablets and for the balance of the order for the quantity of 40,744 packs of Sodium Hypochlorite Solution. M/s Ndirangu submitted that the Plaintiff is only entitled to an award for damages if the Defendant is found to have been in breach of the contracts. However, if the Plaintiff too was in breach then it should not be entitled to be granted the prayer for damages, as was held in **Nabro Properties Ltd. Vs Sky Structures Ltd. & 2 Others [2002] 2KLR:-**

***“It is a maxim of law, recognized, that no man shall take advantage of his own wrongs and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and indeed admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest..., we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law.***

***Clearly therefore unless the Plaintiff proves that it was not guilty of failure on its part of the bargain, there would be no legal basis to award the damages it seeks.”***

39. The Defendant humbly submits that unless the Plaintiff proves that it was not guilty of failure to fulfill its contractual obligations in the three contracts, there would be no legal basis to award the damages it seeks. However even if there is a legal basis to award damages for loss of profits, the Plaintiff should prove that they attempted to mitigate the loss. In the Plaintiff is described as a company that has been involved in various tenders with the Government of Kenya. In spite of the cancelled tenders, it is doubtful that the tendered goods were of a total loss to the Plaintiff, if anything they may have been disposed of in a lucrative manner. These were the sentiments of the court in the case of **Pius Nyambane vs. Kenya Posts and Savings Bank (supra)** where the Court expressed itself as hereunder:

***“I must start by stating that the plaintiff’s evaluation of the damages he suffered is based on a misconception that the goods he bought were a total loss to him. My view of the matter is that upon cancellation of the contract, the Plaintiff had in his possession all the goods which he claimed to have purchased. He claims to be in the business of general supplies with individual and corporate clients. Given that position he should have had no difficulties in disposing the items he claims he had purchased for the defendant. It is also true that no attempt was made to mitigate the damages...it would therefore appear to me that what the plaintiff says he did amounts to an act of utmost folly and I would not have awarded him a penny even if he had succeeded in proving breach of contract by the Defendant.”***

40. M/s Ndirangu submitted that it would be unreasonable, even if the Defendant would be found to be in breach for cancelled contracts, for the Defendant to pay damages to the Plaintiff while the Plaintiff had the opportunity to dispose of the goods in his possession. The Defendant submits that the Plaintiff should have employed means to mitigate its loss, if any, which was occasioned by the cancellation of the contracts as the goods were still in its possession and at its disposal. The Defendant submitted that it has proved that there was non-performance on the part of the Plaintiff for the supply of Sodium Hypochlorite Solution, Blood Taking Sets, Cotton Stockinette and Trifluoperazine Hydrochlorite Tablets. The Defendant was therefore justified in repudiating the contracts as they did. Counsel submitted that whereas it is trite law that interest is compensatory to the Plaintiff for the deprivation of money through the wrongful act of the Defendant, compounded interest as prayed for by the Plaintiff does no justice and would be unconscionable, unfair and unjust enrichment of the Plaintiff. Counsel submitted that the Plaintiff has not discharged the burden of proof as is required, and that the suit must fail for those reasons. The Defendant submitted that the following issues were relevant for the determination of this suit:-

**Whether the claims for interest on delayed payments for the supply of Hartmann’s Solution, Disposable Needles and Sodium Hypochlorite Solution are time barred.**

41. M/s Ndirangu, counsel for the Defendant submitted that the Public Authorities Limitation Act provides for a limitation as to the time by which a claim brought against the government based on contract can be brought. Section 3 (2) states as follows:-

***“5. (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which***

***the cause of action accrued”.***

42. Counsel submitted that this suit was filed on 31<sup>st</sup> July 2000 founded on contract where the Plaintiff claims several breaches of contract by the Defendant. The tender for the supply of Disposable Dental Needles was awarded to the Plaintiff vide Letter of Order for Tender No. HQ/POP/III/IV/94-9 dated 1<sup>st</sup> December 1995. The same was invoiced on 14<sup>th</sup> May 1995 vide Invoice No. 1090 for the amount of US \$ 51,900 and payment for the goods fell due on 17<sup>th</sup> June 1996. The cause of action therefore for this particular claim arose on 17<sup>th</sup> June 1996 while the suit as earlier indicated was filed 31<sup>st</sup> July 2000, 4 years from when the cause of action accrued. M/s Ndirangu submitted that the tender for the supply of Hartmann's Solution was awarded to the Plaintiff vide Letter of Order dated 27<sup>th</sup> October 1993 under Quotation No. MSCU/3/1993-1994. The Plaintiff delivered the product to the Respondent and invoiced the sum of US \$ 25,025.00 as per invoice dated 29<sup>th</sup> November 1993. As per the terms stipulated in the Letter of Order, the payment was to be effected after 30 days from the date of Bill of lading while interest was payable after the expiry of 30 days. The cause of action with respect to this product therefore arose on or about 29<sup>th</sup> January 1994 while the suit was filed on 31<sup>st</sup> July 2000. Counsel submitted that the tender for the supply of Sodium Hypochlorite Solution was awarded in 7<sup>th</sup> June 1996. It is the Plaintiff's admission that they made 3 deliveries of a total of 16,196 packs of the solution effected through three separate consignments of 4,600 packs each. Payment on Invoice No. 1101 and 1102 became due end of January 1997 while payment on Invoice no. 1103 dated 14<sup>th</sup> February 1997 became due in April 1997. Invoice No. 1104 dated 27<sup>th</sup> March 1997 and Invoice 1105 dated 15<sup>th</sup> April 1997 all fell due before July 1997. Counsel submitted that the Plaintiff's claim falls due when the Defendant fails to pay as per the terms agreed in the contract. Counsels cited the case of **Sigma Engineering Company Ltd vs the Attorney General [2011] eKLR**, where the court, relying on Section 3 (2) of the said act stated that the Plaintiff's claim became due when the client failed to settle the first certificate. Counsel submitted that this suit was filed on 31<sup>st</sup> July 2000 and therefore for any claims brought against the Defendant, the cause of action should have arisen 3 years before the said date as provided for in the Public Authorities Limitation Act. The Plaintiff did not seek leave to file the claims out of time as per the provisions of the law and therefore the claim for interest on late payments for the supply of dental needles and Hartmann's solution are statutorily time barred. Responding to this issue of time limitation, Mr. Omuga, counsel for the Plaintiff referred to Section 6 of the Same Public Authorities Limitation Act which makes provisions for application of the Limitation of Actions Act Cap 22 Laws of Kenya. It also refers to part 3 of the said Limitation of Actions Act. Part 3 deals with exceptions to Sections 3 (2) of the Public Authorities Act. Those exceptions included firstly, acknowledgement of debt and secondly, part payment. In regard to acknowledgement, counsel submitted that time runs from the date of the last payment or acknowledgment and not from the date of failure to pay a certificate. Counsel submitted that in the case of Sodium Hypochlorite Solution, payment was made in 1998. Time started running from the date of payment. The suit was filed on 31<sup>st</sup> July 2000. Counsel referred the court to pages 295 – 313 of volume 2 of the Plaintiff's bundles. At page 313, the Defendant acknowledged the debt, stated and agreed that there was indeed a delay in the payment of the Plaintiff and agreed to pay interest. This letter is dated 4<sup>th</sup> April 2007 well after the filing of this suit, which amounts to actual admission of debt. Mr. Omuga submitted that due to the said admission the issue of limitation does not arise, and that the claims were filed within the requisite time on the basis of acknowledgment, and payment.

Mr. Ndirangu for the Defendant upon perusing pages 295 - 315 of the Plaintiff's Bundle Volume 1 agreed and concurred with Mr. Omuga that indeed this was an admission of the claim, by the Ministry of Health. M/s Ndirangu then submitted that based on those documents she conceded that her preliminary objection on a point of law on the time bar is not applicable in this matter.

43. So that I may dispense with this issue, I have considered the said letter dated 4<sup>th</sup> April 2007 by the Ministry of Health. The letter is referenced: **Verification of Pending Bills**. It is

addressed to the Head of the Secretarial Pending Bills Closing Committee. The letter addresses pending claims due to 14 Claimants against the Ministry. The Plaintiff herein is number 12 in the list. This letter must have been confidential as it purports to candidly state the status of the claim and how genuine the same is. The Plaintiff's claims appears to receive positive commendation, with the comments that the claims are due but have not been paid. There is also admission that the interests due on the claim at 2% per month would be paid. The sanctity and the truthfulness of this letter cannot be doubted. Firstly, it is signed on behalf of the Permanent Secretary in the Ministry. But secondly, and this is what gives it significance to this case, the letter was admitted as evidence of pending Bills in the Ministry of Health in the Truth, Justice and Reconciliation Commission. It was received at the Truth Commission Legal Unit on 30th April 2012. If there was ever any doubt in the evidence tendered by PW1, this letter clearly erases the same and shows on a balance of probabilities that the Plaintiff's claim is genuine. The letter does not just deal with the principal claims. It also addresses the sticky issues of payment of interest on the outstanding sums at 2% per month, and promises to pay the same to the Plaintiff.

### **ANALYSIS AND DISPOSITION**

44. I have carefully considered the suit herein, the prayers and the defence to the suit. The suit is based on alleged contractual breaches. I agree that the issues for determination are those raised by both parties and I will adopt them. I will use the issues as framed by both the Plaintiff and the Defendant, in finding a solution to the claim. It must be noted from the outset that the Plaintiff's case has not been challenged nor controverted by the Defendant. The Plaintiff's sole witness, PW 1, Dr. Shaileshkumar Patel both in his testimony, and in his witness statement provided detailed testimony as to why judgment should be entered for the Plaintiff for each head of claim in the Pliant. The Defendant only challenged the Plaintiff's witness on cross-examination, but failed to produce witness evidence to contradict the Plaintiff's testimony. The Defendant also relied on written submissions to challenge the testimony of PW 1. That notwithstanding, it is trite law that he who alleges must prove, and it is still upon the Plaintiff to prove its case on a balance of probability. Initially, the Defendant had challenged the claim on a preliminary objection on a point of law that the claims were time barred. However, pursuant to the foregoing paragraphs of this judgement the Plaintiff's counsel successfully proved that the preliminary objection was not sustainable partly due to acknowledgment of debt and payment. On this the Defendant's counsel M/s Ndirangu agreed that the Ministry of Health had vide its letter dated 4th of April 2007 addressed to the Truth, Justice and Reconciliation Commission admitted the entire claim by the Plaintiff as due. This court then established that the Preliminary Objection on time bar was not sustainable paving way to the determination of other issues in the suit. The first issue to be determined then is the legality of the claim for Sodium Hypochlorite Solution.

### **PRODUCT – SODIUM HYPOCHLORITE SOLUTION**

45. The tender document issued by the Ministry of Health is found at pages 69 – 101 of Volume 1 of the Plaintiff's Bundle. The Plaintiff's terms of Engagement are contained in its letter dated 14th October 1994 found at page 102. The Plaintiff's payment terms are set out in paragraph 5 of the said letter in the following words;

***“Payment Terms: Letter of Credit (preferred) or Cash Against Documents. A grace period of 30 days will be allowed from the time of shipment/delivery. However, in case of any delayed payment beyond the 30 days grace period allowed, interest will be charged at the rate of 2% per month, compounded monthly on the overdue account until payment of all outstanding dues including any interest accrued are settled in full”.***

At pages 65-66, is the letter dated 7<sup>th</sup> June 1996 accepting the Plaintiff's tender followed by letter of order also dated 7<sup>th</sup> June 1996, found at pages 67-68, which spells out payment terms

at clause C in the following manner;

**“C TERMS OF PAYMENT**

***Payment shall be cash against Documents through the Central Bank of Kenya. The Exchange rate used for the purpose of processing this order is 1 USD= 58.1822 as at 7<sup>th</sup> June 1996”.***

46. The letter required acceptance by the Plaintiff which was duly done.

The Plaintiff supplied goods as and when directed by the Ministry and the delivery notes/invoices are found at pages 48-63. At page 64 is the invoice for the amount due under this product as at the date of the suit. The updated interest calculation is found at pages 34-39. The Witness testified that the balance of quantity in respect of this contract for supply of 40,744 packs was, however, reduced by way of oral application for amendment from US\$ 244,464.00 to US\$ 183,348.00, being an amount claimed in relation to loss of profits. PW 1 testified that the plaintiff had already paid HACO INDUSTRIES LIMITED for supply of 4,600 packs and had further committed resources to supply an additional quantity of 10,000 packs meaning that the Plaintiff was ready, able and willing to deliver the full order. The Plaintiff therefore claims balance of the order for Sodium Hypochlorite Solution for loss of profit against quantity of 40,744 packs at the rate US\$ 4.50 per pack as hereunder;

Tender price	US\$ 244,464.00
Less procurement price	US\$ <u>61,116.00</u>
Net profit loss	US\$ <b><u>183,348.00</u></b>

47. Partial payment was eventually made on account on 24<sup>th</sup> February 1998, in respect of invoices numbers 1101,1102 and 1103 (**see page 34 of volume 1**). The Plaintiff treated those payments made at the beginning of the year 1998, (*outside the payment terms set out in the letter of order aforesaid*), as partial payments on account and proceeded to claim interest.

48. Mr. Omuga, counsel for the Plaintiff submitted that the basis for claiming interest at the rate of 2% per month compounded monthly is found at paragraph X on page 618, Anson's Law of Contract provides as follows:-

**“X INTEREST**

***At common law a debtor who fails to pay any sum due and owing on the date fixed for payment, is under no contractual obligation to pay interest in the absence of an express stipulation in the contract to that effect or unless such a stipulation can be implied from a previous course of dealing between the parties, or from trade usage”.***

49. Counsel also cited Section 48 of The Public Procurement and Disposal Act, 2005 which provides as follows;

***“48. The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement-***

***a. Unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and***

***b. the interest to be paid under paragraph (a) shall be in accordance with prevailing***

**commercial bank rates”.**

50. Counsel also cited High Court Misc. Application No. 148 of 2012 **SIMPSON SENDA WA KWAYERA –VS- THE ATTORNEY GENERAL & ANOTHER** where J. M. Mutava J, held at paragraph 35 of the ruling as follows:-

**“35. I have taken the liberty to read the Central Bank of Kenya Monthly Economic Review for the month of March 2012 and the same states that the weighed average interbank rate was at 24% per annum in March 2012 (see [www.centralbank.go.ke](http://www.centralbank.go.ke)). I would therefore take the view that the rate applied by the Plaintiff’s accountant in computing interest rate for purposes of the Plaintiff’s claim carries objectivity in view of the average interbank rate aforesaid”.**

51. In my view, the contract between the Plaintiff and the Defendant is clear both on the tendered for products and on the terms of payment and interest. Mr. Omuga submitted that in this case, the Plaintiff’s letter at page 102 gave its terms of credit supply. The Ministry went on to accept those terms without any form of qualification by the letters at pages 65 to 68, which also introduced a new clause to the effect that *“payment shall be cash against Documents”*. This is clearly an instance where the agreement to pay interest is specifically provided for in the correspondences which formed the contract between the parties. The Defendant cannot challenge its obligation to pay this contractual interest following its default.

52. Further, this court has found that the Defendant, in purporting to terminate the contract or tenders, failed to comply with the provisions for termination of the contract or tender. The provisions for termination of the tender/contract are found in the tender document which runs from pages 69-101 (*tender document issued by the Ministry of Health*). PW 1 referred the court to page 94 at Clause 22, which deals with termination for default of supplier, while at page 95 is clause 25, which deals with termination for convenience of the Ministry. Clause 25 reads:-

**“25. Termination for Convenience**

**25.1. The Buyer, may by written notice sent to the Seller, terminate the contract, in whole or in part at any time for its convenience. The notice of termination shall specify that termination is for the Buyer’s convenience, the extend to which performance of work under the Contract is terminated, and the date upon which such termination becomes effective.**

**25.2 Goods that are complete and ready for shipment within 30 days after the Seller’s receipt of notice of termination shall be purchased by the Buyer at the Contract terms and prices. For the remaining Goods, the Buyer may elect;**

*c. to have any portion completed and delivered at the Contract terms and prices; and/or*

***d. to cancel the remainder and pay the Seller an agreed amount for partially completed Goods and for materials and parts previously procured by the Seller”.***

53. PW 1 testified that in this case the contract was terminated on the grounds that *“no formal contract forms were signed”* (see **paragraph 2 of the letter at page 287**) and since this could not have been a default on the part of the Plaintiff it can be treated as amounting to termination for convenience of the Ministry within the meaning of clause 25 of the tender document. In the premises this court finds that the Ministry should have accepted all the goods which the Plaintiff was ready to supply and paid for them. It is also this court’s finding that the prayer for the amount of US\$ 230,270.98, in respect of this product as at the date of the suit and subsequent interest as per the interest calculation on pages 34 to 39 are therefore well founded and are herewith allowed by this court.

54. With regard to issue number 4 on whether the Plaintiff had procured the balance of the consignment of sodium hypochlorite solution by 31<sup>st</sup> July 1997, when the order was terminated, the answer to this issue is also in the affirmative. In his evidence on record PW1 stated that this particular product was being procured by the Plaintiff from Haco Industries Kenya Limited, who by its letter dated 27<sup>th</sup> August 1997 at page 208 wrote to the plaintiff at paragraphs 3, 4, 5 and 6 as follows;

***“Unfortunately, MSCU could not confirm to us when to deliver 4600 packs X5 litres which complied with the 3.5% requirement and were ready for delivery since week one of July 1997. Please refer to our fax of 10<sup>th</sup> July 1997 in this connection explaining our predicament. Due to lack of storage facilities, we had to write-off this batch.***

***Furthermore, we are at a loss as to what to do about the pending delivery of the 10,000/-, packs X 5 litre for which we are currently holding raw material in form of cartons, labels, 5 litre jerricans, soda ash and calcium hypochlorite to manufacture the above.***

***I would also like to remind you that once we have bought the raw materials (against any confirmed order) we are not in a position to refund money to Vulcan Ltd against the advance payment received from yourselves.***

***We trust that you shall resolve this matter with the MOH and arrange for the delivery of the pending consignments”.***

55. When the manufacturer’s letter is considered alongside clause 25 at pages 95-96 for termination of tender for conveyance of the Ministry, there is no doubt, whatsoever, that the Ministry, and by extension the Defendant cannot escape full liability in respect of this particular product.

56. M/s Ndirangu’s allegations in her submissions that the contract was terminated because the goods failed to meet required specifications is not correct. The reasons for termination are given in the letter dated 28<sup>th</sup> July 1997 at page 287. The reason was for “no formal convenience of the Ministry within Clause 25. In any event, M/s Ndirangu’s submissions lacks factual basis as the Defendant did not challenge the Plaintiff’s evidence on this issue. Therefore, the sum of Kshs.4,817,442/- paid by the Ministry to the Plaintiff in February 1998 was not in full satisfaction of the claim as at that time the Ministry’s liability to the Plaintiff stood at USD 212468.43

## **PRODUCT 2 DISPOSABLE NEEDLES**

57. The letter of order for this product is found at page 326 (Volume 2) of the plaintiff’s bundle. It is dated 1<sup>st</sup> December 1995 and the order was for US\$ 54,000.00. The payment terms are found at page 327 in the following words:-

### **“C Terms of payment**

***Payment shall be cash against Documents through the Central Bank of Kenya.***

***The exchange rate used for the purpose of processing this order is 1 USD= Kshs. 55,6083, as at 29<sup>th</sup> November 1995.”***

58. The letter constituted a firm order, and the Plaintiff was required to confirm its acceptance by signing the duplicate copy and returning it by return mail. The sales invoice of the Plaintiff is dated 14<sup>th</sup> May 1996 (page 329) and at pages 330 to 334 are importation documents and inspection certificate by SGS dated 14<sup>th</sup> March 1996. PW 1 testified that in as much as the

letter of order gave payment terms as cash against documents meaning that payment fell due on or about 17<sup>th</sup> March 1996, the Plaintiff gave the Ministry a grace period of 30 days and started calculating interest with effect from 17<sup>th</sup> June 1996. An amount of US\$ 54,000.00 was paid in December 1996, at which point in time the outstanding amount was US\$ 60,812.77. The net outstanding balance on the date of partial payment was US\$ 6,949.03, which continued to accrue interest at the interest rate of 2% per month and stood at US\$ 15,963.62 as at 31<sup>st</sup> July 2000 when the suit was filed in court (**see pages 318 and 319**). PW 1 testified that the basis of this claim is that at the initial stages, the Plaintiff had informed the Ministry that it would charge interest at the rate of 2% per month compounded monthly, the Defendant did not object to the Plaintiff's terms of contract, and went ahead and issued a letter of order for the Plaintiff's goods and further committed itself to pay cash against documents. This court finds that the claim in this respect is contractual and straight forward. This court cannot rewrite contracts for parties, but is obligated to honour and enforce all contractual terms which parties willfully enter into. The Defendant has not challenged this claim except by saying without basis, that interest should not apply. In my judgment, this claim has been fully proved by the Plaintiff on a balance of probabilities and I allow it.

### **PRODUCT 3- HARTMANN'S SOLUTION**

59. The letter of order for this product is at **pages 335-336** of **Volume 2** of the Plaintiff's documents. PW 1 testified that the order was for **US\$ 25,025.00** and payment terms on **page 336** are worded as follows;

#### **“C Terms of payment**

***Payment shall be effected after 30 days from the date of the Bill of Lading. The Ministry of Health has no facilities at the moment to operate a letter of credit”.***

60. This order was issued by a letter dated 27<sup>th</sup> October 1993 addressed to CORE INTERNATIONAL LIMITED, who appointed the plaintiff as their executing agents/confirming house since they could not operate without a letter of credit. The letter of Core International Limited addressed to the Ministry is dated 7<sup>th</sup> December 1993 and is found at page 337. PW 1 testified that the goods were supplied by the Plaintiff who raised its invoice dated 29<sup>th</sup> November 1993. At page 339 is the Ministry's payment authority dated 18<sup>th</sup> December 1996 addressed to Central Bank of Kenya. Payment was finally made on 10<sup>th</sup> February 1997 (**see page 320**) at which point in time a sum of US\$ 52,069.14 was outstanding. The payment reduced the Ministry's indebtedness to US\$ 27,044.14, which as at 31<sup>st</sup> July 2000 when the suit was filed stood at US \$ 60,908.82 (**see page 321**). PW 1 testified that the two claims in respect of Dental Needles and Hartmann's Solution are combined for purposes of interest calculations at *pages 322 to 325 of Volume 2*, as well as prayer number (ii) of the Plaintiff's prayers. PW 1 testified that as at the end of March 2015 an amount of US\$ 2,548,173.83, was due under the claim for these two products. These claims are in respect of payments made on account outside stipulated payment period outlined in the letters of offer and the Plaintiff's terms of payment. The Defendant has not denied these claims or led evidence to disprove them. This court finds that these claims have been proved on a balance of probabilities.

### **PRODUCT 4- BLOOD TAKING SETS**

61. The letter of acceptance dated 14<sup>th</sup> January 2000 found at page 395 specifies quantity of 110,000, unit price, US\$ 1.40, total price US\$ 154,000.00. At paragraph 4 it is stated that;

***“Payment will be made against certified Goods Delivery Note for goods supplied against confirmed Purchase Order (s)”.***

The Local Purchase order dated 26<sup>th</sup> January 2000 for the quantity of 110,000, sets at a price of US\$ 154,000.00 is found at page 397. According to PW1, when the Plaintiff tendered for supply of this product, it was supposed to procure the same from an Indian Company known as PENINSULA POLYMERS LIMITED. However, before the Plaintiff could purchase the goods it had tendered for, the manufacturer's majority shareholding (74%) was acquired by TERUMO CORPORATION of Japan (**see the letter dated 14<sup>th</sup> April 2000 at page 471**). At page 479, is what is called "Fresh Certificate of Incorporation issued on 1<sup>st</sup> October 1999, by the Registrar of Companies, Kerala State of India, confirming change of name by PENINSULA POLYMERS to TERUMO PENPOL, and at page 480 is a copy of certificate issued by the Drugs Control Administration, Kerala State which confirms that TERUMO PENPOL LIMITED, was formerly known as PENINSULA POLYMERS LIMITED. Another certificate issued by the same drug agency is found at pages 484 to 492 of volume 2 of the bundle. At page 493 is the Ministry's letter dated 27<sup>th</sup> May 2000 addressed to TERUMO in response to samples it had submitted to the Ministry for technical evaluation. The letter by Dr. R. O Muga, states at paragraph 2 as follows:-

***"These samples were analysed against the set parameters by our Technical Evaluation Team, but were found to be unacceptable as they did not meet all the parameters specified".***

62. However, as testified by PW 1, the letter does not specify any parameter the sample did not meet or satisfy and/or when such parameters were supplied to the Plaintiff. Indeed, the letter of acceptance and LPO at pages 395 to 397, do not specifically set any parameter the product had to satisfy. A number of correspondences were exchanged in an attempt to convince the Ministry not to cancel the tender/order to no avail. The manufacturer undertook technical evaluation of the product and submitted samples of the product to National Public Health Laboratory Service (a department of the Ministry of Health), who by its letter dated 5<sup>th</sup> May 2000 (**see page 454**) gave the product a clean bill of health in the following words;

***"Findings***

***They are satisfactory for blood collection.***

***This CPDA- 1 preserves blood for 35 days. Hence, a very good anticoagulant".***

63. PW 1 referred the court to other sets of test results by SGS India Limited found at pages 497-498 and 501- 502, which also gave approvals for the manufacturer's products. PW 1 testified that the Plaintiff suffered loss of profits due to cancellation of the tender/order. The evidence of PW1 is that the Plaintiff was going to procure the product for US\$ 97,130 and sell it to the Ministry for US\$ 154,000, giving it a net profit margin of US\$ 56,870.00 as hereunder:-

US\$	154,000.00
Less US\$	<u>97,130.00</u>
Net profit/loss US\$	<b><u>56,870.00</u></b>

64. The tabulation of the loss sustained by the Plaintiff and accrued interest at 2% per month is found at pages 391 to 394, giving a figure of US\$ 1,892,838.91 as at 30<sup>th</sup> April 2015. PW 1 testified that the Ministry having not called any evidence to prove the parameter the product is alleged to have failed to meet must compensate the Plaintiff for the loss of profit it suffered because of the cancellation of the order. In response to this claim, the Defendant stated in its submissions that the contract for the supply of Blood Taking Sets was terminated because firstly, there was a change of supplier, and secondly, that the goods supplied did not correspond with sample and description. However, the Defendant's explanation is not convincing. This is

so because the letter of termination did not specify the parameter of the requirements. Both the letter of offer and the LPO at pages 395-397 do not specify any parameters. Two different sets of tests were carried out, one by National Public Health Laboratory Service, a department of the Ministry of Health, and another by SGS India Limited. Both tests found the produce to be of merchantable quality. (see pages 454, 497 – 498 and 501 -502). Clearly, there was no reason for terminating this tender. Termination was in breach of the tender contract. The Ministry of Health was not justified in cancelling the tender for supply of blood taking sets on the ground of change of name of the manufacturer from **PENINSULA POLYMERS LIMITED** to **TERUMO PENPOL LIMITED** (*in spite of explanations offered by the plaintiff*), even if there was no change in the quality of the goods it tendered for. The action of termination was in bad faith and in breach of contract.

#### **PRODUCT 5-COTTON STOCKINETTE**

65. The tender for this product was quoted in Sterling pound, quantity given as **20,000, rolls** at **£5.25** per roll, giving a gross figure of **£105,000.00**. The tender acceptance letter dated 31<sup>st</sup> January 2000 is at page 508, and gives payment terms at Clause 4 in the following words;

***“Payment will be made against certified Goods Delivery Note for goods supplied against confirmed Local Purchasing Order (s). Your response regarding this letter is expected to reach this office within 7(seven) days after notification.”***

66. By a letter dated 16<sup>th</sup> February 2000, the Ministry invited the Plaintiff to accept the tender within 7 days extension period (*see page 547*). By a letter dated 17<sup>th</sup> February 2000, the plaintiff applied for validation of the tender (*see page 548*), due to price variation by the manufacturers. A sample of the Ministry’s tender validation form is found at page 550. PW 1 testified that by its letter to the Plaintiff dated 1<sup>st</sup> March 2000 (*see page 551*), the Ministry states at paragraph 4 as hereunder;

***“The board having scrutinized all the conditions/terms of the same tender, therefore considered the 2<sup>nd</sup> lowest evaluated bid for the award of the items covered in your application”.***

The letter proceeds to state at paragraph 5 thus;

***“Your counter-offers were rejected by the Board and offers to you cancelled. Please return the LPO No. 968076 for cancellation”.***

67. PW 1 testified that in response to the letter of 1<sup>st</sup> March 2000, the plaintiff wrote to the Ministry on 6<sup>th</sup> March 2000 (*see page 552*) a complaint letter in which it stated at paragraph 5 as follows;

***“We are wondering why you have disregarded our letter of 31st January 2000, in respect of item 12 wherein we have clarified that the price of stg. 5. 25 is per roll of 10cmx20m and price of stg. 7.875, is per roll of 15 cm x 20 m. (on prorata basis - 5.25x15.10 = 7.875)”.***

68. The Plaintiff’s beef with the Ministry is pegged on a document issued by the office of the President (OP) dated 20<sup>th</sup> March 1981 (*see pages 554 to 556*) headed CENTRAL TENDER BOARD PRICE VALIDATION/PRICE INCREASE APPLICATIONS. The document was signed by one E.G. Karanja for the Chief Secretary. The circular document provides at clauses 1 and 2 as follows;

***“The Central Tender Board has therefore decided that the following procedure will be followed when the need for price validation and/or consideration of a price***

*increase application becomes necessary:-*

**3. Where a winning tenderer refuses to accept a tender offer or fails to respond; the Department will go to the second lowest priced tenderer if validity period is not yet expired. If the validity period is already expired (which may be the case most of the times), prices of all remaining tenderers should be validated. As soon as this is done, the necessary recommendations should be forwarded to the Central Tender Board for adjudication.**

**4. Where a winning tenderer accepts an offer but asks for price increase before signing a legal contract, the Department concerned will ask all original tenderers to validate their prices including the tenderer applying for price increase. It is however important to note that the applicant for price increase (the original tender winner) is asked to validate price only in order to protect him from unfair price undercutting by other competitors. Otherwise if the original tender winner is still the lowest after price validation, the Government should pay him the price he applied for in his price increase application. The Department will of course forward their recommendation to the Central Tender Board for adjudication.”**

69. PW 1 testified that in this particular case the Plaintiff's bid price was still the lowest and according to clause 2 of the said circular, it should have been allowed to supply the product at its validated price. However, the Ministry in clear breach of the terms of the circular, proceeded to award the tender to the 2<sup>nd</sup> lowest evaluated bidder whose price was way too high compared to the validated price of the Plaintiff by some 16 million more (**see newspaper clips on pages 568 and 569**). PW 1 testified that the act of illegality on the part of the Defendant caused the Plaintiff loss of profits. The Plaintiff was going to procure this product at £4.02 and sell it to the Ministry of Health for £7.875, a piece, meaning its profit margin would have been  $3.855 \times 20,000 = \text{£}77,100.00$ . The loss of profit and interest calculation thereon are at pages 503 to 506, giving an amount of £2,664,352.85 as at 30<sup>th</sup> April 2015. In my view, the response to this claim by the Defendant is simply wrong. The Defendant alleges that the contract was terminated because the Plaintiff failed to supply the product. This is not correct. The tender was given to a higher bidder in complete violation of the Ministry's own regulations cited above. It was easily an act of impunity. A Tender Board cannot be allowed to act in blatant violation of its own rules and regulations which are meant to guide the process. The Plaintiff was denied a tender it had won, and this was a breach of contract. Therefore the Plaintiff is entitled to be compensated. I find this claim proved and vindicated and I allow it.

#### **PRODUCT 6 - TRIFLUOPERAZINE HYDROCHLORITE TABLETS**

70. The Ministry issued to the Plaintiff LPO number 514093 dated 28<sup>th</sup> May 1997 (**see page 574**) for US\$ 75,650.00. This was hardly a month to the end of the Kenyan Financial year which falls on 30<sup>th</sup> June each year. By a letter dated 9<sup>th</sup> June 1997 (**see page 579**), the Plaintiff informed the Ministry that delivery would be effected within 8-12 weeks and requested the Ministry to advise it on the mode of payment. By a letter dated 28<sup>th</sup> August 1997 (**see page 580**), the Ministry informed the Plaintiff for the first time that it should have serviced the order before the end of the previous financial year and further that the order stood cancelled and directed it to return the LPO for cancellation. The Plaintiff wrote numerous protest letters found at **pages 581 to 584**, which did not elicit any positive response from the Ministry, who by a further letter dated 8<sup>th</sup> December 1997 (**see page 585**) reiterated that the Plaintiff should return the LPO for cancellation. At **pages 570 to 578** the Plaintiff has provided a tabulation of the loss it suffered due to the Ministry's unreasonable conduct. It would have made a profit of **US\$ 33,490.00** if the Ministry had not cancelled the order as hereunder;

Tender price US\$ 4.45 X17,000.00

US\$ 75,650.00

Procurement price US\$ 2.48 X17,000.00 US\$ 42,160.00

Net profit/loss **US\$ 33,490.00**

PW 1 testified that there is no evidence tendered by the Defendant to justify, such unreasonable and high handed manner in which it acted in this matter by issuing LPO on 27<sup>th</sup> May 1997 for goods to be imported from a foreign Country and expecting the Plaintiff to supply the same before 30<sup>th</sup> June 1997. Mr. Omuga, for the Plaintiff submitted, citing the case of **Equip Agencies Limited & Others -Vs- Attorney General HCCC No. 1672 of 2000** (Consolidated with HCCC Nos. 673 and 674 of 2000), that a similar argument about expiry of Financial year was raised and hereunder is what R. Kuloba J said:-

***“To say that tenders “were for specific Government Financial Years”, is to say that if for no fault of a supplier but of the Government, a particular financial year expires before payment for goods supplied, the supplier forfeits his payment in future. It is not for the supplier to ensure that he is paid by Government before a financial year ends. But to uphold such a position would be to uphold trickery and dishonest dealing. Contractual rights and obligations transcend Government financial years”.***

71. Applying the same scenario to the case at hand, we humbly submit that the Ministry could not use expiry of the financial year as a ground for cancellation of the tender it had awarded to the Plaintiff for no fault of the Plaintiff. The termination was not justified, was against the rules of contract and that of natural justice and was an act of impunity on the part of the Ministry of Health. This termination was a clear breach of the contract the sanctity of which this court must uphold.

72. The Plaintiff with the leave of the court abandoned claims in respect of prayers (v), (vi) and (vii) of the Plaint. These claims are in respect of:-

(v) General and special damages pertaining to the improper termination and breach of contracts with respect to Sodium Hypochlorite Solution, Gollot Taking Sets, Cotton Stockinette and Trifluoperazie Hydrochlorite Tablets.

(vi) Damages for loss of profits; and

(vii) aggravated damages for breaches of contract as the honourable court shall determine.

73. From the foregoing paragraphs of this judgment, it is clear that the Plaintiff's entire claim has been proved on a balance of probabilities. It is to be noted that the claim was not challenged by contrary evidence, and despite the Defendant being given ample opportunity to defend the clam there was no credible challenge to the claim. This court notes, however, that the Plaintiff was in the 1990's a prominent supplier of medical equipment to the Ministry of Health. The facts leading to the current suit ought not to have been allowed to reach that level. The Ministry Officials intentionally and with impunity breached the tenders it had given to the Plaintiff thereby exposing the Government to unnecessary costs in lost profits and interest. In almost all claims there was no need to breach the contracts. However, it appears as if the relevant Ministry Officials had personal issues with the Plaintiff. These issues blinded the Ministry Officials so much and to the extent, they neglected to see the legal consequences of their actions of illegally terminating the contracts. In addition, even after admitting that the contracts were payable, the Ministry of Health still did not see the need to pay the same causing the Government to be liable in high cost interests. The claim is largely on applicable interest. The parties agreed at interest of 2% per month from the date payment was due to the date the contract sums and interest is finally paid. Given that these transactions took place in the 1990's 2% per month interest is colossal by all standards. The court's hands are not tied, when it comes to determining applicable interest. However, where the applicable interest rate is purely

contractual, and is accepted by all the parties, interfering with the contractual rate of interest by the court would amount to the court re-writing the contract for the parties, an issue which is a no go zone for the courts. It is also to be noted for the record that seven years after this suit was filed, the Plaintiff's claim including interests at 2% per month, was acknowledged or admitted by the Ministry of Health in its letter dated 4th April 2007 to the Truth, Justice and Reconciliation Commission. That letter is part of the evidence in this suit and the Defendant's counsel has admitted its content as truth. This then leaves little room for this court regarding the issue of interest. However, the starting point is Section 26 (1) of the Civil Procedure Act, which enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems reasonable. Under Practice Note Number 1 of 1982 issued by Simpson Ag CJ on 16th March 1982, the rate of interest, in the absence of any valid reason, for ordering a higher or lower rate of interest, is now 12% per annum. However, there are persuasive authorities on this issue.

74. In H.C.C.C. No. 189 of 2001, **KIAMBU SERVICE STORE LIMITED -Versus- WILLIAM KIGALO AGINGA**, where Ringera held as follows;

***“As regards interest, I find that parties agreed on a rate of 36% per annum in that regard, the general principle of law is that no interest is payable on a debt unless there is a contract providing for the same or there is in existence a trade, custom or usage in support thereof. In this instant case I find that the defendant bound himself by the contract of guarantee to pay interest on the debt at 36% per annum”.***

75. In H.C.C.C. No. 714 OF 1999 **STEWAN HOLDINGS LIMITED & ANOTHER -Vs- DUNCAN KINGORI MUKIRA trading as DUNCAN ENTERPRISES**, it was held by Ringera J. at page 13 as follows:

***“Arising from those answers, I further find that the defendant was to pay commission at 20% per month until the advance was paid in full. The defendant's counsel's attempt to make waves on the distinction between interest and commission did not impress me for the parties themselves called the premium on the money advanced a commission and in any case, as Mr. Kembi submitted, whether I was called commission or interest mattered not for 20% per month was payable on the advance until payment in full. A claim on contractual debt arising from a written contract whose terms are clear and unambiguous, cannot in my view, be decided on the basis of semantics and counsel's understanding of the meaning of the English Word”.***

76. In H.C.C.C. No. 165 of 2007 **TIMSALES LIMITED -VS- THE DEVCON GROUP LIMITED**, the court stated thus:-

***“The terms of the contract were contained in various documents.***

***It is trite that a contract can be contained in more than one document. In the Purchase Order, the parties contracted that the Defendant would pay the value of the products supplied within 30 days from the date of supply. In the invoices and Delivery Notes, the parties bound themselves to the application of interest on overdue amounts at the rate of 3% per month. The Defendant's complaint that some invoices read 16% per annum is in fact not evidence of disparity, since both rates mean the same. The Defendants complaint that the interest charged super ceded the principal sum is also not an issue in my view. The parties contracted to have interest applied on all sums remaining due and unpaid at a specific rate. The court cannot alter what the parties agreed as that will amount to re-writing the Agreement between the parties which a court of justice and equity cannot do.”***

77. In H.C.C.C No. 43 of 2002, **BIO - MEDICAL LABORATORIES LIMITED-VS-THE ATTORNEY GENERAL [2012] eKLR**, while dealing with claim for commercial, Havelock J. stated as follows:

***“48. However, the Plaintiff is undoubtedly entitled to interest on the damages awarded. The Defendant has stated that such should be at Court rates while the Plaintiff has requested that commercial rates of interest be applied by this Court, citing the authorities of Semptra Metals and McGregor on Damages (both supra). In that regard, I have perused the letter of offer made to the Plaintiff by Equity Building Society dated 27<sup>th</sup> March 2001 being Plaintiff’s Exhibit 5. The facility detailed in that letter was to facilitate the importation of chemicals from India (business working capital). PW1 detailed in his evidence that the Plaintiff had borrowed money for the purpose of financing the importation of the TCL chemicals. Consequently, I am persuaded that in this instance, the Plaintiff is entitled to interest at the commercial rate prevailing and award the same as prayed for in the Plaint at 28% from 1<sup>st</sup> January 2002 until payment in full. The Plaintiff will also have the costs of this suit, again as prayed”.***

78. It is common ground that the plaintiff transacted with the defendant on payment terms of either “cash against documents or payment within 30 days from date of bills of landing” and further that interest was to be charged at the rate of 2% per month, compounded monthly on any overdue account until payment in full (see page 102 of Plaintiff’s exhibit number 1). This position is alluded to at paragraphs 47, 48 and 49 of the defendant’s submissions dated 20<sup>th</sup> April 2015. Pages 295 to 317 of the plaintiff’s exhibit number 1 contain a copy of what the Ministry of Health submitted to The Pending Bills Closing Committee (PBCM) and The Truth Justice and Reconciliation Commission (TJRC) on 4th April 2007 (during the pendency of this case) with respect to the pending bills. The Plaintiff’s claim is dealt with at pages 312, 313, 314 and 315. At page 314, the Ministry presented a spreadsheet setting out the Plaintiff’s claim in respect to 3 (three) products namely; **SODIUM HYPOCHLORITE SOLUTION, DISPOSABLE DENTAL NEEDLES and HARTMANN’S SOLUTION**. The interest rate applied by the Ministry is 2% compounded monthly and the amounts for each of the three products as at 31<sup>st</sup> May 2005 (according to the Ministry’s own tabulation), were as follows;

A. Sodium Hypochlorite Solution	-	US \$ 740,094.44
B. Disposable Dental Needles	-	US \$ 50, 343.26
C. Hartmann’s Solution	-	US \$ <u>195,925.26</u>
<b>Total</b>		<b>US\$ <u>986,362.96</u></b>

76. It is evident that the Ministry had accepted that the same contract interest rate of 2% per month compounded monthly continued to apply for as long as the debt remained unsettled. In **TIMOTHY U.K. M’MELLA -VS- SAVINGS & LOAN (K) LTD [2007] eKLR**, the Court of Appeal held that a court of law has no business interfering in those instances where parties themselves willingly and voluntarily contracted and bound themselves by what would appear to be unconscionable and oppressive rates of interest as doing so would amount to the court re-writing the contract for the parties. This is what the court said at page 12 of that decision:

***“However, much as we may indicate our displeasure with the system that allowed that unfair system to thrive, there is not much the courts can do about it, as to do anything to stop it would amount to writing a new contract for the parties. That would not be in law tenable. Parties are bound by their own lawful contracts, freely entered into as this one was such a contract”.***

The court went further to state in the second paragraph as follows;

***“Thus, in our view, both the interests charged before the registration of the charge and after the registration of the charge were within the contractual agreements in that the interests charged before registration were as spelt out in the letter of offer together with the terms of the memorandum as to advances, both of which were forwarded to the appellant. Further, the appellant’s attention was drawn to the contents of both. The appellant then signed the acceptable note indicating that he had read the Memorandum as to Advances and he accepted the letter of offer. After the charge was registered, the interest charged was governed by the contents of the Memorandum as to Advances plus the contents of the charge”.***

80. In this case, the Ministry entered into the contract knowing full well that it was bound to pay for the goods within 30 days of either invoice or bill of lading (*whichever was applicable*). The Ministry did not pay within the stipulated time and by the report it submitted to BPCM and TJRC more than 4 years after this case had been filed, it admitted its liability to pay contract interest at the rate of 2% compounded monthly and worked out what it owed the plaintiff at that time. That being the case, this court would have no reason whatsoever to vary the contract between the parties on the rate of interest applicable to the plaintiff’s claim.

81. The Defendant objected to an award of compound interest citing the case of **PREMIER BAG & CORDAGE LIMITED – VS – NATIONAL IRRIGATION BOARD [2014] eKLR** where Havelock J. stated as follows:-

***“From the foregoing, once payment of interest is ordered on a decree such interest shall only accrue on the principal only and not otherwise. This is because, charging interest on interest otherwise known in the commercial world as ‘compound interest’ is punitive and not compensatory. As already held, interest is meant to compensate a party for having been kept out of its/his funds or property for some time and not to enrich such party or punish the opposing party. In this regard, the moment any interest is levied on any accumulated interest and not principal sum, such interest stops being simple and becomes compounded, and therefore punitive.”***

82. I agree with the sentiments expressed by the court in the above case, that interest levied on any accumulated interest and not on principal sum is punitive. Indeed, a party, like in the present case, who delays payment of what it acknowledges to be due to the other party, should be severely punished for that conduct. Indeed, it is to be noted that the Plaintiff had specifically prayed for an order of aggravated and punitive damages at prayer number (vii), which was subsequently dropped by the Plaintiff. It is also to be noted that this court has castigated the officials of the Ministry of Health for their conduct in this matter which has caused the Plaintiff great financial suffering. It therefore cannot be said that compounded interest herein is punitive. Rather, it is giving delayed value to the Plaintiff’s claim. In that regard, it should be both punitive (to the Defendant) and at the same time redemptive (to the Plaintiff.)

### **CANCELLED CONTRACTS**

83. With respect to cancelled contracts, it is be noted that the Report to the Truth Justice and Reconciliation Commission stated that by the time of the report they were still awaiting supportive documents. That notwithstanding, this court has already found that the Plaintiff has proved its case in regard to the claim of lost profits at the time of filing this suit as follows:-

i. Sodium Hypochlorite Solution - US\$ 183,348.00

ii. Blood Taking Sets - US\$ 56,870.00

iii. Trifluoperazine Tablets - US\$ 33,490.00

iv. Cotton Stockinette - GBP 77,100.00

84. The Plaintiff has claimed interest at 24% based on Section 48 (a) of the Public Procurement Act, 2005 which provides as follows:-

***“48 The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement:-***

***a. Unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and***

***b. The interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.”***

85. I have considered the Plaintiff's submissions, which is the correct position. However, in light of the fact that this court has already allowed monthly-compounded interest on the first limb of the claim, I, in the exercise of my discretion, allow the claim for lost profits as stated above with interest thereon at court rates from the date of filing of this suit until payment in full.

#### **FINAL ORDERS**

86. In the upshot, I enter Judgment for both the pending and outstanding accounts, as well as for lost profits as follows:-

#### **PENDING ACCOUNTS:**

***a. Sodium Hypochlorite Solution - US\$ 740,094.44***

***b. Disposable Dental Needles - US\$ 50,343.26***

***c. Hartmann's Solution - US\$ 195,362.96***

***(a, b) and (c) above to attract interest at the rate of 2% per month compounded monthly from 31st May 2005 till payment in full.***

#### **CLAIM FOR LOST PROFITS**

***d. Sodium Hypochlorite Solution - US\$ 183,348.00***

***e. Blood Taking Sets - US\$ 56,870.00***

***f. Trifluoperazine Tablets - US\$ 33,490.00***

***g. Cotton Stockinette - GBP 77,100.00***

***(d, e) (f) and (g) above to attract interest at court rates from the date of filing of this suit.***

***h. The Plaintiffs shall have the costs of this suit.***

That is the judgment of the court.

**READ, DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Omuga for the Plaintiff

M/s Ndirangu for the Respondent

Teresia – Court Clerk