



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 43 OF 2002

BIO-MEDICAL LABORATORIES LIMITED.....
PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....
DEFENDANT

J U D G E M E N T

1. The Plaintiff herein was filed on 17 January 2000, over 12 years ago. It is unfortunate that the court file has passed through the hands of several judges before finally landing on my desk. Indeed, the evidence of the Plaintiff's witness was taken by my learned brother Justice Apondi as long ago as October 2010. He completed the evidence of the Plaintiff's one witness Mr. Michael M. Muthee on 25 November 2010. In my turn, I recorded the evidence of the 4 witnesses for the Defence being Messrs. Ndegwa, Nyachio, Tangu, & Ndolo, which was concluded on 19 January 2012.
2. The Plaintiff detailed the particulars of the parties and more particularly that the Hon. Attorney General was sued as such representing the Permanent Secretary of the Ministry of the Environment and Natural Resources. It detailed that a contract dated 20th of March 2001 was entered into in response to the Defendant's Tender No. MENR/16/2000/2001 and the specification attached thereto, together with the Defendant's letter of offer and acceptance dated 16 March 2001, signed by the Plaintiff on 20th of March 2001, the Plaintiff's letter of acceptance dated 5 April 2001 and the Plaintiff's Performance Bond dated 28th of March 2001. The Plaintiff was committed to supply the Defendant Ministry with 530 metric tons of 35% Tropical Chloride of Lime ("TCL") chemicals and substances out of its warehouse in Nairobi by 30th of June 2001, at a monetary consideration of Shillings 24,910,000/- being Shs 47,000/- per ton. The Plaintiff continued to detail that during May 2001 the Plaintiff with the knowledge of the Defendant Ministry, imported into Kenya 200 metric tons of TCL but the Ministry collected, took delivery and paid only for some 20 metric tons of the same. Thereafter, the Ministry refused to accept delivery of the balance of the TCL amounting to some 510 metric tons.
3. In the course of the contract, the Plaintiff had ordered chemicals as were required to the extent of a further 330 metric tons which it said, were manufactured and stored in a warehouse in Mumbai, India. Such chemicals were ready for shipment and delivery in Nairobi. The Defendant became liable to collect and take delivery as well as a pay for the contracted chemical goods at a total cost of shillings 24,910,000/- plus consequential loss and damage. The Plaintiff maintained that by the Defendant's breach and repudiation of the contract, it had suffered loss and damage. Thereafter, the Plaintiff set out the particulars of loss and damage totalling Shs.27, 562,200/-.
4. The Defence herein was filed on 25 March 2002. At paragraph 3 thereof, the Defendant detailed that the contract awarded to the Plaintiff was on an "as and when required" basis for the contract period and

therefore, the quantity of any chemicals ordered was strictly at the discretion of the Defendant. The Defendant further averred that the chemicals ordered by the Plaintiff did not meet the required standard/specification especially on the most critical parameter for TCL. The Defendant had generally denied the contents of paragraphs 3 – 8 of the Plaintiff putting the Plaintiff to strict proof thereof.

5. Under cross examination, PW 1 detailed that under the contract with the Ministry for the chemicals to be supplied, the required percentage for TCL was 35%. The contract period was for 2000 to 2001 i.e. up to 30 June 2001. The Ministry for Water took 20 tons of the chemicals which they used without any dispute. A month later that Ministry recommended to the GSU that they should buy from the Plaintiff. The witness stated that chlorine is very volatile and the longer you keep it, the more it loses its potency. The Plaintiff had acquired a certificate from the Kenya Bureau of Standards which passed the quality of the chemicals. The Plaintiff had initially imported 200 metric tons. The total that was supposed to be imported was 530 metric tons. The manufacturer's representative from India came to Kenya and went to see the Permanent Secretary in the Ministry of Water. PW 1 detailed that the Plaintiff had written many letters to the Ministry in vain. Ultimately the Plaintiff decided to file this case. The chemical products were being manufactured in India. Usually the consignment would be delivered in 30 days. The certificate of analysis would normally be given before the goods were imported. The Plaintiff never agreed that it would import the chemicals from the United States. Eventually, the Department of the Environment at City Hall destroyed 160 metric tons of the rejected consignment. The Plaintiff documented everything and was issued with a Destruction certificate. PW 1 maintained that the Plaintiff had got a quantity contract and had committed itself to import the consignment. It did not agree that the consignment was rejected due to its quality.

6. On 22 July 2002, the Plaintiff filed a Notice of Motion herein, which sought the striking out of the Defence. That application was rejected by the court. However at paragraph 10 of the affidavit sworn by PW 1 dated 19th of July 2002, he listed the documents that he considered relevant to this matter. These were as follows: –

- (a) Newspaper advertisement in the Daily Nation dated 2 November 2000;
- (b) Contract agreement dated 5th of April 2001;
- (c) the Defendant's tender no. MENR/16/2000/2001 and the specification attached thereto;
- (d) the Defendant's letter of offer and acceptance dated 16th of March 2001;
- (e) Plaintiff's loan facility with its banker as per letter dated 27th of March 2001;
- (f) Plaintiff's performance bond dated 28th of March 2001;
- (g) local purchase order to part of the contract consignment dated 27th of April 2001;
- (h) Plaintiff's letter informing the Defendant of the importation and availability of the acquired and specified chemicals, dated 25th of May 2001;
- (i) Plaintiff's letter informing the Defendant of the costs and consequences of the then threatened breach of contract, dated 25th of July 2001;
- (j) Plaintiff's receipt for payment of import duty and VAT to the Kenya Revenue Authority concerning the importation and sale of the contract goods;
- (k) Plaintiff's banker's statements of the required money wire transfer to the overseas suppliers' bankers in New York dated 26th of March and 30th of March 2001 for US dollars 43,943 and 22,057 respectively;
- (l) Plaintiff's receipt for freight and clearing services dated sixth of May 2001 shillings

900,000/-;

- (m) the Kenya Bureau of Standard's Certificate of Analysis concerning the required laboratory test report dated 16th of November 2001 confirming that the Plaintiff's goods were of the required contract specification;
- (n) receipt of the January 2002 storage rental charges paid by the Plaintiff dated 4 January 2002;
- (o) Exporter's certificate of analysis dated 22nd of March 2001 showing batch numbers of the subject chemicals during the importation, which was a requirement of the Kenya Bureau of Standards to confirm that the quality at importation so as to prevent dumping.

7. As indicated, the Defendant called 4 witnesses which only one Mr. Evans Ntabo Nyachio (DW 2) submitted a witness statement to court. However, the defence opened by calling Mr. Kimani Ndegwa as its first witness. Mr. Ndegwa stated that he was a chemist with the Ministry of Water and Irrigation. He had joined the Ministry in April 1986. He was aware that the Plaintiff was a contractor to the Ministry for the supply of chlorine. The chlorine was used to treat water to kill the bacteria in the water, hence the need for chlorine supply. The contract for water treatment chemicals was awarded annually and at that time the Ministry had advertised for TCL which should contain 35% available chlorine. Mr. Ndegwa testified that what had brought the parties to the court was because the chemicals that the Plaintiff had supplied, did not have the required 35% available chlorine. He had visited the Plaintiff's go-down in the industrial area along Mombasa Road, Nairobi. They had drums of TCL which he sampled and took the samples for testing. The first testing laboratory was the Government Chemist, the second was the Kenya Bureau of Standards and the third was the Ministry of Roads and Public Works. The fourth was his parent Ministry, being the Ministry of Environment and Natural Resources. After testing, the chemicals were not achieving the 35% available chlorine. At the Kenya Bureau of Standards 31.2% available chlorine was reported. The Government Chemist reported 27.9%. The Ministry of Roads and Public Works reported 32.8%. His home Ministry that of Environment and Natural Resources, reported 31.2%. DW 1 stated that the testing was done by the four separate laboratories on the same sample taken from one drum. The average percentage from the four laboratories was 30.59% well below the requirement of 35%. DW 1 maintained that usually his Ministry allowed and accepted a test result of 34.5%. The chemicals as supplied by the Plaintiff were not suitable for the Ministry's requirement which is why the Ministry did not accept it. As far as DW 1 was concerned, there was no other issue to his knowledge as between the parties. However, he noted that the contract required that the products should be supplied by Orion of the USA. The products in the Defendant's go-down were from India. DW 1 knew that from the labels.

8. DW 1 believed that the chlorine content issue is what led the Ministry to cancel the contract. The Ministry sent the Plaintiff a letter informing it that the samples taken had failed to match the required specification and consequently cancelled the contract. He produced the test certificates as Defence Exhibit 1. Mr. Ndegwa detailed that as a result of failing the test, the Plaintiff was asked to supply the right quality chemicals by a letter sent by Mr. Nyachio dated 30 November 2011. The Plaintiff did not provide replacement chemicals, it just went to court. Thereafter, DW 1 read out to court clause 5 (ii) of the contract being Plaintiff's Exhibit 4. The Ministry was unable to collect substandard goods from the Plaintiff's go-down that is why the clause was there in the contract. It had to make good the chemicals. DW 1 was not aware of any destruction of the chemicals by the Nairobi City Council.

9. Under cross-examination, DW 1 detailed that he was not involved with contract preparation as his job was to do the chemical assessment. He was not aware of the process of importation of chemicals. He was aware that a shipment inspection is done at the port of export but not in relation to this particular shipment. The purpose of the inspection is to conform with what the customer wants in regard both to quantity and quality. DW 1 stated that he was unaware of which company was to carry out the inspection of the goods for this particular contract. He had not bothered to try to find out. He had heard of SGS but he did not know and was not aware that the chemicals had been inspected by SGS. He was also not aware that the chemicals had been inspected at the port of entry by the Kenya Bureau of Standards. However, he was aware that it was KBS that is responsible for inspection of goods at the port of entry but he was not aware whether it maintained a record.

10. On further examination by counsel for the Plaintiff, DW 1 stated that he knew that there was an Efficiency Monitoring Unit at the Office of the President but he was unaware that the said Unit was monitoring this particular contract. He was also not aware that this contract was a re-tender. DW 1 was aware that the contract was for supply for the year 2000 to 2001 but he was not aware of what was happening before the tender was granted. The Ministry had a supply of chemicals. He was not aware of any public outcry or aware of any emergency. All he did was to prepare the technical report that was used by the supplies officer to communicate to the supplier that the chemicals did not meet the requirements. He agreed that he had been involved in the technical aspects of the tender document. He noted that by the time he had done the testing, the tender period had expired. However, he was not aware as to whether the chemicals had been imported within the validity date of the tender. Upon being pressed, DW 1 admitted that some of the chemicals had been supplied and used. He then stated: *“I did not bother to know but I knew who had tested the chemicals supplied. I did not have the original tests results on the chemicals that had been supplied. I did not verify whether the chemicals that I had tested were from the same batch.”*

He continued by saying that on testing, he did not have the root of the product, only the supply and delivery details. On this particular occasion, he said, he was told to go to test at the Plaintiff's premises. Usually, he tested chemicals once the delivery had been made. He confirmed that delivery should only be made by the supplier on receipt of a L.P.O.

11. Mr. Ndegwa confirmed that TCL is a chemical which contains chlorine but also other elements like iron. Chlorine can be supplied as a gas but the Ministry's infrastructure does not allow for gas, so it needed the goods in the solid state. Chemical chlorine would go off after more than six months but it depended on how one packs it. If one had the chemical in storage, one would retest it maybe after six months. DW 1 confirmed that he had not looked at the tender documents in relation to the Plaintiff. He was not aware that it was the Indian supplier that was detailed thereon. He was only aware of the Plaintiff's letter of acceptance which detailed that the supplier was Orion of USA. He was not aware of any visitation from the Indian supplier. All that he did was to conduct the test samples and he took the four samples to the four laboratories. He was transported in the Plaintiff's vehicle. The Plaintiff's staff was very cooperative and that he was trying to help them. He confirmed that the test results were not the same from the four laboratories, each laboratory arrived at its own conclusion as they were independent of each other.

12. Mr. Ndegwa was referred to the report of Kenya Bureau of Standards as regards the two parameters tested. He stated that there was no conclusion made, merely the result being 30.4% available chlorine and 0.7% moisture. He noted that the report was dated 16 November 2011, the date of submission being eighth of November 2011. He remarked that usually contracts with his Ministry expired in June. He confirmed that this test was being carried out around three months from the end of the contract. He did not know the importation date as to when the chemicals arrived in Kenya. He only knew that there was a contract which is why he went to the Plaintiff's premises. The Director told him to take the samples at the Plaintiff's premises. He was unaware of any letter threatening legal action even before the Ministry tested the samples. He was not aware that the Attorney General had been in communication with the Ministry in that regard. The witness was then shown the letter dated 7 November 2011 from the Attorney General to the Permanent Secretary of his Ministry. He confirmed that the letter had been sent to the Permanent Secretary after the testing had been carried out. He had not seen the letter before he had come to court. He was testing the chemicals on 8 November and the contract had already expired. He was not aware of any recourse in damages or the position with regard to the Performance Bond. As to the actual inspection, the witness confirmed that he was in the Plaintiff's go-down and saw the drums there himself. They were full of holes. All the four experts reported that the chemicals were substandard, they all failed. He was comfortable with that. He confirmed that he did not find out about the test on the 20 tons of chemicals which had already been supplied and used. They had passed the test, which is why they used them. DW 1 confirmed that the batch numbers do not change. Even the ones that he tested at the Plaintiff's go-down had several batch numbers. He had tested more than eight batch numbers. He had not queried as to whether he was testing samples from the same batch numbers as the 20 tons of chemicals accepted and used. TCL is not very volatile. Chlorine is a solid. The margin of error in their testing is .05%. The chlorine supplied was in powder form. If one opens a TCL drum, you can smell the chlorine. After a drum has been opened the chlorine will take a long time to deteriorate, this is different from gas.

He would not have known as to whether the chlorine, when he inspected it, had deteriorated from the time that it had been imported. He had never seen the remarks from the Attorney General that the chemical was available for destruction. The Ministry was unaware of the date and time that the chemicals were being destroyed. He was not aware that after the delivery and payment of the first 20 tons, the Ministry had issued a further L.P.O. He was aware that the Plaintiff did not replace the consignment. If it had brought the replacement chemicals, DW 1 would have gone to test them. As he was not called upon to test, it means that they did not deliver. The area of L.P.Os is not in DW 1's domain. However, DW 1 was aware that other than the Plaintiff, there was no other contractor delivering such chemicals. If the Ministry runs out of chemicals, it can borrow from elsewhere even from the Nairobi City Council.

13. Upon re-examination, Mr. Ndegwa confirmed that the chemicals did not come from Orion in the USA, they were supplied from India. He confirmed that the consignment of chemicals had failed even at the Kenya Bureau of Standards' laboratory. He took the samples with the Plaintiff's representatives present. He did not test the samples himself, he took them to the four independent laboratories. What he was concerned with was that all the tests showed that they were below the Ministry's standard.

14. At the renewed hearing of the suit, DW 2 Mr. Evans Ntabo Nyachio was sworn in. He was a public servant and joined Government in 1982. He is currently the Head of Procurement in the Office of the Prime Minister. In the year 2000, he was stationed at the Ministry of Environment and Natural Resources. He produced his witness statement which he had signed on 14 December 2011. He testified that a tender for the supply of tropical chloride of lime was advertised by the Ministry in the print media. He detailed that among the bidders at the close of the tender was the Plaintiff, who later succeeded in having the contract awarded to it. Such was to supply 35% TCL in the amount of 530 metric tons at a unit cost of shillings 47,000 per ton (ex factory/warehouse, Nairobi). The total contract price was shillings 24,910,000/-. The contract was specified to be on an "as and when required" basis. Supply was to be effected against confirmed LPOs being issued up to the period ending 30 June 2001. The letter of acceptance reference number WD/SB/CTB volume 3 (99) was issued to the Plaintiff on 16 March 2001. The same was accepted/acknowledged on 20 March 2001. Subsequently, a formal contract agreement was entered into and signed by both parties. The Plaintiff accepted all the terms and conditions of the contract without any changes or reservations. This was evidenced by the letter of acceptance and being acknowledged on 20 March 2001, alongside the signed contract agreement. TCL was to be supplied with 35% of chlorine and was to be sourced from the Orion Corporation of the USA. DW 2 confirmed that part delivery of 20 metric tons worth Shs. 940,000/- was made by the Plaintiff and accepted/paid for as per the terms and conditions of the contract.

15. As regards the contract, clause 5 thereof required the supplier to deliver quality standard/specifications as provided for in the tender documentation. In this case DW 2 detailed that samples had been supplied for testing and rejected. DW 2 stated that the Government had a right to reject supplies in accordance with clause 5(iii) of the contract which read: "*any materials that did not meet the stipulated standards/specifications as was provided for in the tender documents.*" Thus, maintained DW 2, inspection and quality assurance was an integral part of the contract. All rejects were to be held by the supplier at its premises at its own costs and risks. This was provided for in clause 8 (1) of the contract. DW 2 further maintained that notification of the reject for the consignment that was to be supplied was made to the Plaintiff. However, the Plaintiff did not respond to such until this matter was brought before court. DW 2 maintained that the government had given due notification as required in the contract and at the expiry of 14 days, it was at liberty to return any inferior product or seek recovery from the contractor such as recovery under the Performance Bond which was worth 10% of the contract sum. DW 2 noted that the Performance Bond had been provided along with the Plaintiff's letter of acknowledgement. The Government did not take advantage of this condition in the contract.

16. Under cross-examination DW 2 admitted that he had not seen or have with him the original file from the Ministry when he prepared his witness statement. He did not have the correspondence file as he had left the Ministry in April, 9 years ago. He had requested a copy of the contract after the court had adjourned after the last hearing. He had been through the tender documents as submitted to court by the Plaintiff. However he had not looked at the tender documents after the matter had come to court as he did not know where they were. When he had arrived at the Ministry he had found this particular tender going

on. This was a chemical tender which was being used all the time. It had been necessary to re-advertise the tender and this was normal procedure. DW 2 stated that he could not recall that there had been an argument over the quality of the chemicals supplied. He did not know whether the Plaintiff had detailed in its tender document that it was to source the chemical from the United States supplier. In the letter of acceptance, it was the Ministry that stipulated which company should be the supplier. The letter of acceptance was after the contract had been signed. It was not correct that, when the Ministry instructed the Attorney General, his attention was drawn to the fact that it was a different supplier. DW 2 had been coming to court a number of times in the last four years. He noted that the Ministry had written a letter on the issue of the supplier stating that its product had not passed the test. He confirmed that he had not written a letter of default. The supplier was not the issue, it was the product. The Ministry had no complaint as regards the supply of the 20 metric tons. However there was a clear contract for the supply of 530 metric tons. He confirmed that for any procurement contract there must be a purchase consideration and that was the amount that the Ministry had budgeted.

17. DW 2 stated that the Ministry was not scared of this litigation coming. He could not remember the date of the testing but it was not after the contract had expired, as it had been extended. This had not been included in his witness statement. The contract was extended, it was running, it had not ceased. When the contract was nearly expiring the Ministry found that the product was still in stock. Before the contract expired, the Plaintiff had notified the Ministry of the expiry of the same. He went to the Tender Committee who extended the contract. The decision as to the extension of the contract had not been conveyed to the Plaintiff because it had already gone to court. DW 2 confirmed that he knew when Government contracts expire. This purchase was for several chemicals, the money was used for other chemicals. The contract was expiring as at the end of the financial year being 30 June. DW 2 stated that Government's money does not end with the financial year – there was no time that the Government didn't have money to purchase the chemicals. As far as DW 2 was concerned the contract was straightforward. The supplier would indicate to the Ministry when the chemical consignment arrived, then the Ministry tested. After the testing, the Ministry would order the product. He was aware that the Performance Bond had a time limit. Once the Ministry had obtained a formal extension of the contract from the Tender Committee, it would have to write to the supplier to extend the Performance Bond. DW 2 said that there had been no dispute with the supplier. As far as he was concerned, DW 2 maintained that the contract had not been terminated. He did not know when the samples were taken but the records are there. He confirmed that he was not a specialist and was not aware of the expiry date of the chemicals. The source of the chemicals was not an issue what the Ministry wanted was the right material. "As and when" meant that the Ministry could ask for a quantity of product at any time within the contract period.

18. Upon re-examination, DW 2 confirmed that he only became aware of the dispute after the contract had expired. He was unaware as to whether the Plaintiff was involved in the original tender for the contract before re-advertisement. He was not in the Ministry at the time. He maintained that the Ministry did reject what was being supplied by the Plaintiff. It rejected what was being supplied because of the sample not meeting the test requirement. The Ministry did inform the Plaintiff of the rejection, DW 2 wrote a formal letter and signed it, the same being addressed to the Plaintiff's sales and marketing manager. There was a condition for termination of the contract where the product was rejected. This was all clearly indicated in the contract. There was no single time when the Ministry terminated the contract. The Plaintiff never responded to the Ministry as to what happened to the test samples.

19. On 19 January 2012, the Defendant called Edward Kipkuru Tangu as its third witness. He testified that he was in charge of the central water testing laboratory for the Ministry of Water and Irrigation. He was the senior principal chemist in charge of the laboratory. He had been there since 2001, occupying the same position. He was aware of the Plaintiff company because of the conflict in relation to the analysis that had been carried out in his laboratory. It had not met the required standard. He was analysing for available chlorine which should not be less than 34%. He maintained that the testing was referred to him by the Procurement Department of the Ministry. They wanted him to test for available chlorine. A sample of TCL was submitted to his laboratory. The Department gave an indication of the requirement – not less than 34% available chlorine by weight. He stated that his laboratory did the analysis. It arrived at a result of 31.2% available chlorine by weight. The finding was documented. The original test result was sent to the Procurement Department. DW 3 was referred to defence Exhibit 4. He

confirmed that this was the report that he had submitted dated 14th of November 2001. He signed the report himself. He stated that he also tested moisture content which came out at 1.79%. The sample never met the minimum for available chlorine but for the moisture it was okay. It was incorrect that the action by the Ministry is wrong. There is a standard for TCL, set by the Ministry. DW 3 noted that if a container with chemicals in it is not properly sealed such container will lose chlorine. However, it usually takes two years before the quality will fall below 34%. He noted that the period between procurement and testing was not two years. DW 3 recalled making a statement dated 13th of January 2012 and signing the same. He was shown the statement and the same was entered into evidence as Defendant's Exhibit 6.

20. Under cross examination, DW 3 admitted that he did not know when the tender was done and he did not know when the contract was to expire. He confirmed that he looked at the results. He did not look at the Ministry's file. He did not know that the subject tender had expired by five months when the samples were brought to him the testing. He did not get the history of the product. He explained that TCL means tropical chloride of lime. It is lime, calcium oxide and calcium hyper chloride. He explained that all of the contents of the sample are like a white chalk. He would have been looking for chlorine, which is not a gas, it is a solid that smells. You cannot see chlorine when it composes, it just disappears. He did not know that the chemical that he was testing was imported. He did not know of the tender requirements that it be manufactured out of the country and then imported. He did not know the date of manufacture and did not know the date that the chemical arrived in Kenya. He did not know of any manufacturers of TCL in Kenya. He did ask as to the date of manufacture. It could be relevant if the date of manufacture was two years before the testing. The quality could have been reduced. His job was to check the sample not the KBS certificate. He was not aware that the sample had already been tested by other laboratories. He was not surprised that the results of the tests by KBS and his laboratory were not the same. The difference could be accounted for depending on the analysts and also the test sample. The same is not homogenous. The difference would be about 2%. He did not take into account the history of where it was contained or how the sample had been taken – all these matters could account for the difference. He assumed that the person who had taken the sample had taken all these matters into account. He had already explained that when you take a sample from the top of the container or a different container, the difference could be as high as 3%. He had not been aware that KBS had passed the product. He detailed that the 34% is a set standard of the Ministry. He never knew what the test was used for and did not know to whom the sample related.

21. The Defendant called a fourth witness, one John Muasya Ndolo (DW 4). He confirmed that he was working with the Ministry of Water and Irrigation but was currently working at Embu. In November 2001, he was at the central water testing laboratories in Nairobi where they normally tested water quality. He confirmed that one of the products that he had dealt with in 2001 was a sample from the Plaintiff Company. What was being tested was a water treatment chemical – TCL. He did not actually do the test. He was assigned to a technical evaluation committee to look at the various analyses from the various laboratories from which samples had been taken. The same sample had been taken for analysis to the Government Chemist, KBS, Ministry of Road and Public Works as well as the laboratory at his Ministry. The technical evaluation committee's task was to look at and compare the results of the various testing laboratories and come up with a recommendation. The parameters of the analysis were available chlorine by weight of 34%. The findings were that the moisture content was within the requirement but the available chlorine from all four laboratories did not meet the standard for available chlorine at 34%. The committee was using the schedules from the other laboratories. It submitted a report on 28 November 2001. This was a technical evaluation report and he produced the same as Defendant's Exhibit 2. His name appeared at page 2 of the report as a member of the committee. The average for all the four laboratories was 30.59%. The conclusion was that the testing did not meet the minimum requirement as per the Tender document. He made and signed a statement for the purpose of the hearing of this suit dated 13 January 2012 which he produced as Defence Exhibit 7.

22. Under cross-examination, DW 4 stated that he did not do the testing personally. He was commenting on the various reports done by other people. He didn't have the other test results, they were given to him at the Ministry's headquarters. The reports did not have details as to how the samples were taken, the date of manufacture and how the products were stored. DW 4 stated that he expected that the samples had all come from the same source. He did not know that the results of the tests were from the

same sample but that he expected that to be the case. It was possible that they could all have tested the same sample but the results were different because of possible experimental errors. One possibility was that they were not prepared to a technical degree. Such may depend on the position of the testing machine. He was shown Defence Exhibit 2 and noted that the difference between KBS and the Ministry's testing is 2.4%. It was possible that this could be from the same sample. The results of tests could vary depending from where the samples were taken. DW 4 was unaware whether the samples were taken before the tender was issued. He did not know when the chemicals were imported. He did not know that 20 metric tons of chemicals had already been sold to and used by the Ministry. He would have been surprised that the first lot met the required standards and that five months later, such did not meet the required standard. It is possible that the product had been wrongly stored. The conclusion that was reached was that the chemical was usable but that one would require slightly more for water treatment purposes. He didn't know that the Ministry had completely rejected the product. He did not conclude that the KBS report was invalid. He did not know that the contract had expired and that this matter had been taken to court. He did not know that the Attorney General had been served with notice of the suit. To his understanding, the TCL samples were all the same and that is what he would have expected.

23. In re-examination, DW 4 was referred to the KBS report. He confirmed that bleaching powder cannot be used for water treatment purposes. In large-scale treatment of water, one would require a lot more powder for water treatment. Chlorine powder is used for disinfectant purposes. The percentage found by the KBS report was 30.4%. It did not meet the requirement of 34%. The samples admitted to the four different laboratories were to eliminate bias. None of the laboratories found the required 34%. The terms of the committee's reference were to give a recommendation.

24. The Plaintiff filed its written submissions on 24 February 2012. The submission commenced by detailing how the contract agreement dated 20 March 2001, was entered into by the parties. The Plaintiff stated that in the course of May 2001 and in pursuance of the said contract, as well as with the knowledge of the Defendant Ministry, it committed its bankers as well as the manufacturers and overseas suppliers, and duly shipped and imported into Kenya 200 metric tons of the required chemical. It noted that the Ministry collected and took delivery and indeed paid for some 20 metric tons of the chemical but refused to accept delivery of the balance of the agreed contract tonnage of 530 metric tons. The Plaintiff noted that it had ordered and had required the overseas suppliers to manufacture and store 330 metric tons in a warehouse in Mumbai. The Plaintiff thereafter details its claim for loss and damage as follows: –

	KShs
1. Principal sum paid out initially to supplier	7,500,000/-
2. Interest on principal sum borrowed from a Local bank at the monthly interest rate of 28% as detailed in the Plaint up to Jan 2002	722,200/-
3. Go-down charges at the rate of Shs 50,000/- monthly for six months	300,000/-
4. Loss of anticipated profit and commission	1,900,000/-
5. Loss of revenue on the supply because of tied up capital and resources at 10%	2,580,000/-
6. Uncollected goods value class anticipated	
Profits	<u>15,500,000/-</u>

7. Less money paid for 20 metric tons collected	<u>940,000/-</u>
TOTAL plus interest thereon	<u>27,562,200/-</u>

Consequently, the Plaintiff claimed against the Defendant in the Plaintiff for judgement in the sum of Shillings 27,562,200/- plus interest thereon at the rate of 28% from first of January 2002 until payment in full. The Plaintiff also claimed the costs of the suit and interest thereon.

25. The Plaintiff continued with its submissions by setting out and detailing the salient features of the Defence and, thereafter, summing up the evidence of PW 1. The Plaintiff noted that PW 1 had said that even before the contract was signed, it had started preparing for the importation of the chemicals ordered. It had applied for and been given a loan from the Equity Building Society of Shs.7.5 million. On 30 March 2001, the Plaintiff had tendered the first payment to the supplier in the amount of US dollars 43,943. It also submitted that the supplier had started manufacturing the TCL for the Plaintiff on 22nd of March 2001. The Plaintiff had written to the Ministry advising as to the arrival of the first consignment on 25 May 2001. By then there was an LPO ready to supply 20 tons of the chemical to the Ministry. Those chemicals were supplied and the Plaintiff was paid promptly. The Ministry officials kept saying that they would pay the balance of the consideration for the supply of the chemicals but this never materialised. It was at that stage the Plaintiff submitted that a Mr. Bharath of the Indian manufacturing company came to Kenya and went to see the Permanent Secretary in the Ministry. The Permanent Secretary had promised to take action but nothing further transpired. According to the Plaintiff, TCL is very unstable, extremely volatile. As a result, the Plaintiff detailed that shelf life is limited, the manufacturers stating that the chemical had a shelf life of two years. The Plaintiff also noted that the Government body in charge of quality control is KBS. The chemicals had been inspected before shipment from India by SGS. It was again inspected at the point of entry at Mombasa by KBS who gave the chemical a clean bill of entry and use in Kenya. The Plaintiff maintained that at the time of importation, the chemical did have 35% available chlorine. It noted that KBS will give it any leeway of usage over 25%. Under 25%, the chemical will be too impotent and invalid.

26. The Plaintiff further submitted that when the Ministry failed to honour its promise to take up the chemicals on time, the Plaintiff realised that the chlorine could react with other chemicals sometimes ending up with fire breaking out. The Plaintiff noted that it had been issued a certificate by KBS dated 8 November 2001 which showed that the available chlorine had dropped from 35% to 30.4%. However the chemical was passed by KBS indicating that it was still useful for its intended purposes. However, after the chemical had been stored at beyond its expiry date, the Plaintiff decided to destroy the same rather than have it land into wrong hands. The Plaintiff invited the Nairobi City Council Environmental Department to destroy it. The Council issued the Plaintiff with a Destruction Certificate dated 26th of June 2003, the letter requesting destruction was dated 10th of June 2003. Once the 200 tons had come into Kenya, and once the Ministry had not taken delivery of the same, the Plaintiff was obliged to rent go-down space for storage. It submitted that it had paid Shs.50,000/- per month from May 2001 to the date of destruction. The Plaintiff had also produced a receipt for the fees of the clearing agent who delivered the goods from Mombasa to Nairobi. These fees amounted to Shs 600,000/- for 10 containers and the clearance fee was Shs 300,000/-. The Plaintiff also produced receipts for customs duty paid on the first consignment of chemicals in the amount of Shs.272,147/-together with VAT at Shs.1,028,716/-. The Plaintiff also noted that the Ministry had recommended to the GSU to take TCL. This recommendation had been made on 21 May 2002 and on 25 May 2002 and the GSU took 50 drums.

27. The Plaintiff's submissions continued by detailing that on 2 July 2001, the Ministry returned to the Plaintiff its Performance Bond. This indicated that the Ministry had no intention of taking product for which it had signed a contract four months earlier. The Plaintiff noted that its net profit for the supply of the chemicals in full was going to be shillings 7 million. The Plaintiff formally demanded for this and the other sums detailed in its statement of claim, by letter from its advocates dated 24 October 2011 addressed to the Attorney General. The Plaintiff maintained that the only point of defence raised by the Defendant was that the quality of the chemicals was not found to be okay. The Plaintiff did not dispute the results of the various laboratory tests but noted that according to KBS, the range of available chlorine of up to 25% is still acceptable. The Plaintiff submitted that the argument of quality is ill intended since

the Ministry recommended to the GSU to buy and use the product well after the time the Ministry had refused to accept the chemicals. The Plaintiff detailed that it entered into the contract in good faith with the intention of doing a good job. It seeks the costs of the suit. The interest rate charged on borrowed money at the time was 35%. The Plaintiff maintained that it was still lucky to be in business.

28. Thereafter the Plaintiff submitted in relation to the contract referring to the contract document itself which was dated 5 April 2001. It also referred to the tender document, the letter of acceptance and the letter of surety (Performance Bond). The terms of the contract that the Plaintiff considered worth highlighting were firstly that the goods were to be manufactured outside Kenya and the letter of offer had read that the manufacturer should be "Messrs Olin Corporation – USA". This error was later corrected and the Plaintiff submitted that the fact that the chemicals were manufactured in India was inconsequential. Secondly, the chemical goods were manufactured in India and then shipped to Mombasa, transported to Nairobi, so as to be supplied ex-warehouse, Nairobi. Thirdly, even after the Plaintiff had achieved the shipment and storage, it was to await LPOs from the Government to take delivery. Fourthly, all this was to be complete by the period ending 30th of June 2001. Fifthly, should there be any default by the Plaintiff, the Government had insured itself by obtaining a 10% Performance Bond from the Plaintiff's bank. The Plaintiff in the event of default on the part of the government had only one remedy and that was to sue for recovery for loss and damage.

29. The Plaintiff had filed a Statement of Issues on 31st of October 2005. It had detailed the issues as follows: –

1. Was there a contract entered into between the Plaintiff and the Government of Kenya through its agent, the Ministry of Environment and Natural Resources (and its successors thereof), for supply of some 530 metric tons (or thereabouts) of 35% Tropical Chloride of Lime chemicals and substances, as pleaded in the Plaint? The Plaintiff answered that question in the affirmative.
2. Did the Plaintiff perform its part of the contract by first supplying 200 metric tons of the aforesaid goods and chemical substances, while the subject Ministry took and paid for only some 20 metric tons and refused to take delivery of the other 510 metric tons of the contract chemical goods and substances? Again the Plaintiff answered in the affirmative.
3. Did the Plaintiff order/make available some 330 metric tons of the contract goods and chemical substances, and store them in among other places, in a Mumbai warehouse and in Nairobi? The Plaintiff answered that question "yes".
4. Did the Defendant Ministry failed to take delivery of the goods and/or evidenced an intention not to be bound by the terms of the contract or not to perform its part or to pay to the Plaintiff the value of the contract goods in the sum of shillings 24,910,000/-? The Plaintiff answered "yes".
5. If the answer to the above, the foregoing, is in the affirmative, then did the Plaintiff suffer the repudiation of its contract, loss and damage as more particularised in the Plaint? Or, was the quantity of any chemicals ordered to be strictly at the discretion of the Defendant? The Plaintiff answered the first part "yes" but "no" for the second part because the quantity and period was a fixed one. It submitted that there was a public outcry in Kenya at the time owing to a shortage of chemicals for water treatment purposes.
6. Did the Defendant refuse to take delivery of the Plaintiff's chemicals because they failed to meet the required standards/specifications or the most critical parameter thereof? The Plaintiff answered "no", because the tests were belatedly carried out and only then as an excuse for impending legal action.
7. Who is liable for the breach of the subject contract, the consequential loss and damage that was suffered by the Plaintiff hereof, or if any, is suffered by the non-defaulting party? The Plaintiff's answer: "the Defendant.
8. Who should be condemned to pay the costs of this case? Again the Plaintiff felt that it should be

awarded costs.

30. As regards the law, the Plaintiff referred this court to the Sale of Goods Act (Cap 31) Laws of Kenya. It noted that the principal obligations of the Seller under the Act are to transfer the property in the goods to the buyer and to deliver the goods. Those of the buyer are to accept the goods and to pay the price. According to sections 49/50 of the Act, the Seller herein the Plaintiff, has a right to sue the buyer for the sale price, where the property in the goods has passed to the buyer or where a date for payment has been agreed (irrespective of delivery) and the price is not paid on that date. The Plaintiff maintained that in the instant case, the Defendant had refused, ignored and/or rejected to take possession of the goods or issue the suitable LPOs for the delivery of the goods even when part thereof had been delivered to a warehouse in Nairobi, as contracted. The Plaintiff noted that as per requests, the balance of the goods was already manufactured and stored ready for shipment from India. The Plaintiff maintained that even when repeatedly notified of the availability of the chemicals, the Government's conduct evinced an intention of not being bound by the contract, of a recession of the contract and indeed an abandonment of the contract, unilaterally. It noted that the attempt by the Defendant to take for analysis the chemicals already going to waste in storage, and long after the expiry of the contract, and after receipt of the statutory notification of intention to sue, was belatedly done, not done in good faith and in the Plaintiff's submission failed to offer any sort of satisfactory defence to the Plaintiff's claim.

31. The Plaintiff submitted that it had sent the first payment to the suppliers in India of US dollars 23,057 on 30 March 2001. To the confusion of the court, the Plaintiff then submitted that it had transmitted US dollars 43,943 to the supplier on 27 March 2001. In order for it to be able to transfer these amounts, the Plaintiff took a trade loan of shillings 7.5 million from the Equity Building Society at an interest rate of 28% per annum. In the event of a default, the Plaintiff was required to pay a penalty to the bank at the rate of 3% per annum over and above the loan interest rate of 28% per annum. According to the Plaintiff, the Defendant knew all that at the time. As regards the Defendant's tests on the selected sample of the chemicals, the Plaintiff submitted that the Ministry after an inordinate delay "pretended" to do a chemical test on the samples. The percentage that the Ministry found of chlorine present in the lime was still fit for water treatment except, as stated by the Defendant's witnesses, it would have required utilising greater quantities of the chemicals. The Plaintiff maintained that under the provisions of the Sale of Goods Act (Cap 31), the low content of the available chlorine in the chemicals should be treated as a breach of warranty that can "*give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.*" The Plaintiff further submitted that by returning the bank's Performance Bond to the Plaintiff on 2 July 2001, five months before the testing was undertaken, such was evidence that the Defendant had flagrantly and unilaterally decided to rescind the contract. The court was further referred to sections 38, 49 and 50 of the Sale of Goods Act.

32. The Plaintiff relied upon a number of authorities. The first of which was **Sempra Metals v Inland Revenue Commissioners (2007) 4 All ER 657**. I didn't quite see the relevance of this case being a House of Lords' decision in relation to the jurisdiction of the Court of Justice of the European Communities and whether that court had the common-law jurisdiction to award compound and simple interest as damages claims for breach of contract to pay a debt. I presume that the authority was quoted to this court, being of persuasive value, to show that this court has the authority to award compound as well as simple interest in claims for breach of contract. The next authority quoted was **McGregor on Damages, 15th edition at page 393**. The learned author put forward the proposition that in the Commercial Court, it had always been recognised that in commercial transactions, the award of interest should reflect the commercial value of money. That proposition had been expounded in the case of **Re Roberts (1880) 14 CH. D. 49 at page 52 (Court of Appeal)**. Further quoting **McGregor**, the Plaintiff repeated the learned author's agreement with the approach of **Forbes J. in Tate & Lyle Food and Distribution vs Greater London Council (1882) 1 W. L. R. 149**. While also saying that the appropriate rate of interest was that at which plaintiffs in general could borrow, the learned Judge added that this did not mean:

"that you exclude entirely all attributes of the Plaintiff other than that he is the Plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1% over the minimum lending rate. I think it would always be right to look at the rate at

which plaintiffs with the general attributes of the actual plaintiff in that case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate".

All in all, the Plaintiff sought to impress upon this court that it had the power to award interest on damages for breach of contract at commercial rates taking into account all the circumstances and the borrowing of the Plaintiff.

33. The Plaintiff also cited the decision in **Pearl Mill Company Ltd vs Ivy Tannery Company Ltd. (1918) KB 78**. That case involved a sale of goods contract providing for the goods "to be delivered as required". It was held that an inordinate delay on the part of both sides having taken place, it was not necessary, in order to put an end to the contract, for the defendant to give notice to the plaintiff that if it did not request further deliveries, the defendant would cancel the contract. The court held that the county court judge was justified on the facts of that particular case, in the finding that the plaintiff was estopped from denying that the contract had come to an end. Although persuasive, I did not see the relevance of this case to the matter before me as the facts therein were entirely different. Finally, the Plaintiff put forward three other cases from English courts which were interesting but no more.

34. The Defendant's submissions were filed on 21 March 2012. They commenced by detailing the contract and confirmed that the principle Defendant being the Ministry of Environment and Natural Resources had entered into a contract for the supply of 530 tons of 35% Tropical Chloride of Lime at an agreed cost of Shs 24,910,000/-. The contract was dated 5 April 2001. The Defendant outlined the details of the tender, the letter of acceptance and the letter of surety (Performance Bond). The Defendant noted that the contract would be on "as and when required" basis and that supply must be made/effected upon receipt of confirmed LPOs. The Defendant went on to say that after the signing of the contract the Defendant issued a LPO dated 30 April 2001 for the Plaintiff to supply 20 tons of TCL valued at Shs.940,000/-. Such was supplied. Thereafter, the Defendant maintained that the contract terminated on 30 June 2001 by operation of time. However the Government renewed the contract on 1 November 2001. The renewal was subject to the conditions and requirements of the tender. The Defendant continued to detail the dispute between the parties by saying that the Government required additional supply of the chemical and accordingly requested to test the chemical before issuing a LPO. The sample was collected from the Plaintiff's warehouse and subjected to laboratory analysis in four independent laboratories. The Defendant maintained that the samples failed the test as they did not meet the requirements of the contract. The Plaintiff was informed of the results of this analysis on 30th of November 2001 and the rejection by the Government to procure the chemicals from it. The Defendant insisted that it is the failure of the chemicals to meet the requirements specified and the rejection of the chemicals by the Government that has precipitated the present suit. Thereafter, the Defendant submitted its analysis of the evidence before court. The first point that the Defendant noted was that the Plaintiff had purchased the TCL from an Indian manufacturer RAYASEEMA –DUCEA-KASSEBOUW LTD. which was in breach of the contract, which had stipulated that the chemical should be purchased from the Orion Corporation of the USA.

35. The second point that the Defendant raised was that PW1 had stated that Chloride was unstable although it had a manufacturer's shelf life of two years from the date of manufacture. That evidence, it maintained, was at variance with the Plaintiff's letter of 25th of July 2001 which the Defendant quoted in part:

"Please note that Tropical Chloride Of Lime 35% also known as stable bleaching powder is very stable. It has a shelf life of two years from the date of manufacture. The stocks we are holding were manufactured in April 2001. If stored in a cool place, it can keep longer than the stipulated two years".

The Defendant noted that the Plaintiff had exhibited a certificate from KBS dated 16th of November 2001 showing that the Chloride had dropped from 35% to 30.4% (Plaintiff's Exhibit number 15). The

Defendant noted that this was despite the Plaintiff receiving a Certificate from SGS detailing 35%, hardly six months from that date for a product that supposedly had a shelf life of 2 years. Thereafter, the Defendant summarised the Defence evidence through its 4 witnesses. The point to note as far as the Defendant's submissions were concerned, was that it maintained that the contract was extended by mutual consent of both parties in writing and/or conduct. This submission the Defendant states, emerges from the evidence of DW 2. Further, in relation to DW 1's evidence, the Defendant detailed that it would suffice to note that the chemical was the property of the Plaintiff within its control and custody at all times prior to delivery to the Defendant. The Defendant then detailed the evidence in relation to the testing of the chemical by the 4 laboratories. The Defendant pointed out to the Court the provisions of section 15 of the Sale of Goods Act 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".

The Defendant also pointed out that the provisions of clause 5(ii) of the contract provided in part:

"..... the government shall have the right to reject, or in its discretion to require the correction or replacement of the articles, materials, workmanship or services which are defective or do not conform to the specified requirements of this contract....."

36. The Defendant then identified what it termed issue number 1:

"whether the Tropical Chloride of Lime (TCL) delivered by the Plaintiff to the Defendant answered the 35% Tropical Chloride of Lime (TCL) required by the Defendant under the contract?"

The Defendant submitted that the Plaintiff was bound to supply TCL within the description given in the notification of tender, repeated in the notification of the award of tender and acceptance, and affirmed in the contract. It agreed that the Plaintiff delivered and the Defendant accepted 20 tons of the TCL which conformed to the description and sample. However, the Defendant maintained that the Plaintiff failed to deliver the remainder of the TCL according to description and sample. I was referred to the authority of **Christopher Hill Ltd v Ashington Piggeries Ltd (1972) AC 441** in which it was held:

"the description must be so important that it is integral to the performance of the contract. In deciding whether the goods complied with the description, it was held that this is a question of fact in each case. Wilberforce LJ. stated that the law is not concerned with the metaphysical but the broad common sense and men in the market in question. Thus if pure birdseed means a minimum of 98% pure in the trade, that is likely to be what is required."

37. The Defendant maintained that its evidence was to the effect that the TCL was required for national water purification on a large scale. The percentage requirement for available chlorine was dictated by the Government's national water quality specification. Therefore, the description formed an integral part of performance. The Defendant maintained that the testing of the product as per clause 5 (ii) was covered by **section 35 (1) of the Sale of Goods Act** which 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".

The Defendant submitted that the tests conceived of in **section 35 (1)** is that conducted at the instance of the buyer. It is immaterial that the seller may have tested the goods on its own at the point of manufacture or at any time thereafter. The Plaintiff had relied on the first supply of TCL, 20 tons which were accepted by the Defendant. To insist that the Defendant was under obligation to accept the remainder of the TCL was not correct. The Defendant admitted in its submissions that the TCL was shipped in different consignments and that the contract was on the "as and when required" basis. However, this did not diminish the requirement as to description. The Defendant referred me to the authority of **Arcos Ltd v E.**

A. Ronnasen & Sons (1933) AC 470 where the English Court of Appeal dealt with the question of 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."

The Defendant pointed out that the fact that the 20 tons of TCL had conformed to the description and sample, did not mean *ipso facto* that the other consignments similarly conformed. The Defendant maintained that by any stretch of the imagination, the ratio of 20 tons to the whole could not be deemed to be "the bulk of goods" where the contracted quantity was a total of 530 tons.

38. The Defendant then detailed its second issue which was whether it was entitled to reject the Tropical Chloride of Lime (TCL) delivered by the Plaintiff to the Defendant? It enunciated that the right of rejection was well set out in the **Arcos case** (supra) where the court had held that where goods did not correspond with their description, the buyer is entitled to reject them whether or not the conformity of the goods affects their sale ability. Further, in **Vigers Brothers v Sanderson Bros (1901) 1 QB, Bingham J** had considered the buyer's recourse to reject where there was a non-rejection clause and found that the buyers in that case, were justified in rejecting. The clause

"does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning".

According to the Defendant, that condition is strict even where the contract makes provision for a non-rejection clause. In the current suit, the contract did contain a clause for rejection.

39. The third issue addressed by the Defendant was whether, if it was in breach of contract, what should be the measure of damages? The Defendant maintained that the rule is that damages are intended to place the party in the position it would have been had the breached not have occurred. They are not for the purposes of enrichment. The Defendant reiterated that supplies of the chemical were to be on the basis of LPOs. The contention that the Plaintiff ordered the entire amount of 530 metric tons and was therefore entitled to incur a credit thereon, should not be visited upon the Defendant. It had been testified by PW1 that the Plaintiff had sold 2 lots of 50 drums of TCL to the GSU but the value of those 100 drums is not quantified. The Plaintiff cannot be compensated twice for the same product. The Defendant maintained that if at all, the Plaintiff should be compensated for the value of the 200 metric tons imported less the 20 tons paid for by the Ministry and less the 100 drums sold to the GSU. There was no proof that the balance of the 330 metric tons was ever procured and delivered to the Plaintiff. The Defendant detailed that in the circumstances of this case, the Plaintiff can only be compensated with interest at court rates. It did not make for business efficiency to procure the TCL before it had been issued with the LPOs. The Plaintiff had assumed a liability with a third party which the Defendant was not privy to, nor was it a requirement of the contract. Indeed, the contract did not contain a credit financing clause or a clause in relation to interest.

40. The Defendant then responded to specific issues raised in the Plaintiff's submissions. It noted that the testing carried out in November 2001 was conducted way below the two-year window which was the undisputed shelf life of TCL. The diminished content of TCL was significantly higher than would be expected had the TCL conformed to the contract description. On the question of the delivery "as and when required", the Defendant detailed that as a fact, the contract was to run within a specified period ending June of 2001. It maintained that it extended the contract period and that the Plaintiff obliged the Defendant by allowing the testing within the extended period of the contract. Finally, the Defendant referred to and relied upon the provisions of **section 18** of the **Sale of Goods Act** as follows:

"where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained".

Apart from the 20 metric tons, these were future goods within the meaning and definition thereof in **section 2** of the **Act**. The Defendant requested this court to dismiss the Plaintiff's suit with costs to the Defendant.

41. The contract agreement between the parties was dated in type 5th of April 2001. The contract embodied the tender, number MENR/16/2000/2001, as well as the letter of acceptance and the letter of surety (Performance Bond). As pointed out by the Plaintiff, the letter of acceptance dated 16 March 2004 had to be executed and returned to the Ministry prior to the contract date. In that letter being Plaintiff's Exhibit 2, it detailed that the manufacturer of the Tropical Chloride of Lime should be Messrs Olin Corporation – USA. It should have read "Orion". I have no doubt that this particular requirement was waived by the Defendant who accepted the manufacture of the chemical and supply thereof from India. The duration of the contract detailed in the letter of acceptance was "**period ending 30 June 2001**". The letter of acceptance also detailed that the contract would be on "As and When Required Basis". Secondly, it detailed that "**Supply must be made and delivered upon confirmed Local Purchase Orders**". I would interpret that to mean that the supply of the relevant chemical was anticipated to have been made and completed prior to 30 June 2001. Indeed, the Performance Bond provided by the Equity Building Society on 28 March 2001 (Plaintiff's Exhibit 3) in the amount of Shs.2,500,000/-covering the due performance of the Plaintiff remained in force for a period of 90 days i.e. through to 27 June 2001. It is to be noted that the Ministry released the Performance Bond back to the Plaintiff under cover of its letter of 2 July 2001. The last paragraph of that letter requested:

"Please arrange to cancel the same with your guarantors accordingly."

To my mind, this clearly indicates that the contract period was to come to an end as at 30 June 2001. This would make sense as that date is the end of the Government's financial year. The Defendant submitted that the contract had been extended. However, no evidence of such extension by letter or otherwise was produced before court. It seems to me that this is somewhat conjecture so long after the event, that the Government had every intention of utilising the chemical stocks by drawing the same down prior to the end of the financial year. Further, it is trite law that the Court is not here to re-write contracts as between parties but to interpret the same. There is no clause in the contract as between the parties and dated 5 April 2001 which provides for the extension of the contract period.

42. From Plaintiff's Exhibit 8 it does appear that the product "Stable Bleaching Powder Tropical Chloride of Lime" was tested for available chlorine prior to dispatch from India and of the drums sampled, all passed the percentage requirement under the contract of 35% of available chlorine. That Certificate of Analysis detailed that the date of expiry of the product was two years since date of manufacture. In terms of that date, I observe from the Defendant's Exhibit 5, that two chemists from the Ministry and another chemist from the Government Chemist visited the premises of the Plaintiff's warehouse along Mombasa Road to discover 180 metric tons of TCL stored in 3600 GI drums each of 50 kg. Their report detailed that the TCL was further packed in polythene paper inside each drum to protect the chemical from corrosion. However the officers also noted that some of the drums were already corroded and had holes in them. The TCL was manufactured, according to the report, over a period of two weeks from 28th of March 2001 to 12 of April 2001 in 16 batches of between 218 and 50 drums per batch. That report was dated 26th of November 2001. In the Plaintiff's favour, is the fact that, out of the total contract order of 530 tons of Tropical Chloride of Lime, it was only called upon to supply 20 tons to the Ministry during the contract period. The Defendant acknowledged, in evidence, that those 20 tons were accepted as being within the test parameters stipulated in the Tender. Indeed payment was made therefore on 29 June 2001 in the amount of Shs.940,000/-.

43. From the Plaintiff's evidence, there were two further letters produced before court which were of significance. The first was dated 25th of July 2001, the second paragraph of which was pertinent:

"according to our interpretation of the contract, the quantity was supposed to be supplied in a very short duration before the expiry of the financial year ending 30 June 2001 as and when required."

The letter detailed that the Plaintiff had committed the Indian manufacturers to manufacture the whole

quantity of 530 metric tons. It notified the Defendant Ministry that 330 metric tons were lying in a warehouse in Mumbai, India awaiting shipment to Mombasa. The Plaintiff detailed that it was holding 180 metric tons of the chemical at its warehouse. Apart from reminding the Defendant as to bank interest accumulating the Plaintiff detailed that it had received a letter from the Ministry advising it that the contract had expired and thus the Plaintiff should deem it cancelled. The Plaintiff requested the Permanent Secretary of the Ministry to intervene with regard to the matter. As regards this letter, from the exhibits put before court by the Plaintiff, I do not see any letter from the Ministry as to the expiry of the contract. All that has been put before court is the letter from the Ministry dated 2nd July 2001 returning the Performance Bond.

44. The second letter of significance put before court is that from the Plaintiff's advocates C. N. Kihara & Co. dated 24th of October 2001. That was the letter before action demanding the sum of Shs.28,370,000/-the breakdown of which was given in the letter but has been reduced to shillings 27,562,200/-as detailed in the Plaint. I have no doubt that as a result of the receipt of that letter before action which had been addressed to the Attorney General, the Defendant went about its fresh inspection of the 180 metric tons of the chemical stored at the Plaintiff's warehouse, the samples going to the four laboratories. Although I believe the results of the same to be genuine, the samples were basically taken, to my mind, to find some sort of the defence for the Defendant to the threatened action by the Plaintiff. I am of the belief that the entire evidence, given by all 4 Defence witnesses, was put together very late in the day so as to support the Defendant's contention that the TCL did not correspond to description or sample. Accordingly, I find that the Defendant was in breach of the contract which expired on 30 June 2001. I find no evidence to show that it was ever renewed or extended. In my opinion, the Defendant is liable to the Plaintiff in damages therefore. The question would now seem to be – what is the quantum of damage?

45. In its Plaint, the Plaintiff has detailed specific damages under 7 heads of claim and has detailed a credit of Shs.940,000/- for the 20 metric tons of TCL delivered to the Defendant and paid for. Under paragraph 7 a) of the Plaint the Plaintiff claims the amount of Shs.7,500,000/- paid by it to the supplier in India. The evidence shows that 2 payments were made to the supplier, one on the 26 March 2001 for US\$ 43,943.00 and the 2nd on the 29 March 2001 for US\$ 22,057.00 making a total of US\$ 66,000.00. Unfortunately for the Plaintiff, this sum bears no relation to the amount it has claimed as paid to the supplier being Shs.7.5 million. Even at today's exchange rate of Kenya Shs.82/= to the US\$, the amount paid would only come to Shs.5.4 million. To my mind, the easier way to calculate what the Plaintiff has lost and the consequent measure of damages, is to take into account the tonnage of TCL imported, which would seem to have been 200 metric tons, less what the Plaintiff sold and was paid for and then compensate it for the balance. As is well known, the rule is that damages to be awarded are intended to put the party wronged in the position that it would have been had the breach of contract not occurred. As per the Defendant's submissions herein, damages are compensatory not for the purposes of enrichment.

46. The value per ton of the TCL was Shs 47,000/-. Such included the Plaintiff's cost of purchase, V.A.T and Customs Duty, cost of transportation Mombasa to Nairobi and its profit. To my mind, 200 metric tons that arrived in the Plaintiff's warehouse in Nairobi was thus worth Shs.9,400,000/-. Against this total, the Plaintiff received Shs.940,000/- from the Ministry for 20 tons of TCL supplied and paid for, plus Shs.235,000/- for 100 drums of TCL supplied to and paid for by the G.S.U. in November 2002. This leaves a balance of Shs.8,225,000/-. I accept the evidence of the Plaintiff that the balance stock after the 20 tons and 100 drums of TCL had been sold off, had to be destroyed by the Nairobi City Council as the chemicals had expired as per Plaintiff's Exhibits 12a, 13 & 14. It is pertinent to note that in the Plaintiff's letter of 10 June 2003 addressed to the Council, it specifically refers to the importation of 200 metric tons and details that it had about 180 metric tons to dispose of. However, what the Plaintiff has failed to do is to specifically plead for damages for the disposal fee which presumably it paid to the Council being Shs.28,613/- as per the Council's letter of 13 June 2003 (Plaintiff's Exhibit 14).

47. Having found then that the Plaintiff is entitled to damages in the amount of Shs.8,225,000/-, is it entitled to anything else? In its Plaint at paragraph 7 c), it has claimed 6 months' rent at Shs.50,000/- per month go-down charges. The only document that it has put before Court in that regard is Plaintiff's Exhibit 17 which is a receipt issued by Pan Auto House for the rent of a temporary go-down for January 2002 in the amount of Shs.50,000/-. I am inclined to disallow this claim as there is no evidence put before

this Court that a go-down had to or needed to be rented by the Plaintiff for the storage of TCL. The contract came to an end on 30 June 2001 and consequently, the Plaintiff could have expected its go-down/warehouse to have been empty by then if the Ministry had completed the contract on its side. However, the balance stock of the TCL was not destroyed until June 2003, thus one would have expected a claim for go-down rent for a period of 2 years, not 6 months. In my view, the rest of the special damages pleaded have been taken care of in the damages figure as above, which obviously includes such items as anticipated profit, processing commission (whatever that may have been), loss of revenue on supply because of tied-up capital and resources, uncollected goods plus anticipated profits.

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 **Sempra 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 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). PW 1 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 1st January 2002 until payment in full. The Plaintiff will also have the costs of this suit, again as prayed.

DATED and DELIVERED at NAIROBI this 5th day of July, 2012.

**J. B. HAVELOCK
JUDGE**