

**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.5 OF 2017**

**LYAVO ENTERPRISES LIMITED.....**

**.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF TRANS-NZOIA.....**

**.....DEFENDANT**

**JUDGMENT**

1. The plaintiff (Lyavo Enterprises Limited) has brought this suit against the defendant (The County Government of Trans-Nzoia) for breach of contract. It alleges that the defendant pre-qualified it for construction and maintenance of roads within Trans-Nzoia and thereafter contracted it to undertake road works on various roads in **Machewa, Tuwan, Kwanza and Matisi Wards** but failed to issue completion certificates and pay for the work done.
2. The plaintiff has brought this suit seeking for the following reliefs namely;

**(a) Payment of Kshs.66,954,854/-**

- (b) An order compelling the defendant to issue Completion Certificates to the plaintiff for work done.**
- (c) General damages for breach of contract.**
- (d) Costs of this suit.**
- (e) Interests on (a) and (d) above.**
- (f) Any other relief the court may deem fit to grant.**

### **3. The plaintiff's case**

The plaintiff claims that during the financial year 2013/2014 it expressed interest to the defendant to undertake works and tendered to be pre-qualified for road maintenance and won tenders thereof to do road works in various Wards in the County in 2014. That the plaintiff was issued with Offer Letters and it accepted the Offers upon which it was issued with contract agreements which were duly signed and returned to the defendant.

- 4.** It further avers that the defendant thereafter prepared and issued 32 Local Service Orders between the months of April and June 2014. That the Local Service Orders awarded were for undertaking work at **Machewa, Tuwan, Kwanza and Matisi Wards.**
- 5.** The plaintiff through its director James Kinuthia Mbugua **(PW1)** testified and tendered the following documents to support its claim;

- (a) An advertisement for pre-qualification, Tender Notice 2013/2014- PExhibit 1.**
- (b) Auditor's General Report dated 26/6/2014 on work done - Pexhibit 3**
- (c) Public Accounts Investment Report on audit on general report on road works in Trans-Nzoia County dated 16/11/2014- PExhibit 4.**
- (d) Ad-hoc Report on petitions on road works - Pexhibit 5.**
- (e) A letter from C.E.C Finance dated 16/9/2013 - Pexhibit 6.**
- (f) Plaintiff's Company Resolution dated 28/3/2017- PExhibit 7.**
- (g) Report from Department of Transport and Infrastructure dated 27/4/2017 - Pexhibit 8.**
- (h) Plaintiff's Bank statements showing part payments from 1/12/2013 to 15/12/2014 - Pexhibit 9.**
- (i) Payment vouchers per payments made on 30/6/2016 - Pexhibit 10.**
- (j) IFMIS report of all payments of work done - Pexhibit 11.**
- (k) Demand Notice dated 15/3/2017- PExhibit 12.**
- (l) A bundle of Local Service Orders - (L.S.Os)- PExhibiti 13.**

**(m) A letter dated 16/9/2016 from County Assembly of Trans-Nzoia - Pexhibit 14.**

**(n) A letter dated 21/10/2016 from the defendant addressed to Clerk County Assembly - Pexhibit 15.**

6. It testified that it is claiming a total of **Kshs.66,954,854/-** which amount he averred has been due since **2013/2014** adding that he has suffered so much damage owing to the debt including being blacklisted in Credit Reference Bureau (CRB).
7. It stated that its claim is based on thirty two (32) contracts adding that there was a time in **2016** when the County Secretary told them to surrender original documents to facilitate payments and they surrendered all original contracts, Local Service Order(s) and letters awarding them contracts.
8. The plaintiff avers that the defendant issued it with 32 Local Service Orders between the months of April and June 2014 and that the officer from the Ministry of Works showed them the sites where they were required to undertake the road works. That they commenced work under the supervision of the Ministry of Public Works from the defendant.
9. It avers that to undertake the works, it sourced funds from banks, individuals and personal savings to enable it hire machines to wit two graders, two tippers and one excavator

apart from hiring workers and engineers who were being paid on a daily basis.

10. The plaintiff further avers that it commenced and completed 100% of the works within 90 days and invited the County Officers from Public Works to inspect the work and were satisfied that the work had been completed 100%.
11. It claims that despite completion of work, the defendant failed to issue it with Completion Certificates despite demand. That it handed over the sites to the defendant and issued them with invoices for all the work done but the invoices have not been honoured to date despite several reminders.
12. It avers that owing to frustrations he petitioned the County Assembly of Trans-Nzoia to intervene and that it did through the Public Accounts Committee and the Public Investment Committee. That the Committees visited the sites in all the Wards and were satisfied that the works were completed.
13. The plaintiff further asserts that it joined hands with other affected contractors and petitioned the Auditor General's office which sent its officers to the sites and wrote to the County Assembly recommending payments.
14. The plaintiff contends that as a result of failure by the defendant to pay, it has suffered great loss and damage making it unable to meet its financial obligations.

15. In its written submissions dated 19/1/2026, done through learned counsel M/s K.W. Nakitare & Co Advocates, the plaintiff submits that it has proved its case against the defendant to the required standard and on that score relies on the following;

**(a) Report from the Auditor General on the road works tendered as PExhibit 3 and also tendered by the defendant as Dexhibit 1.**

**(b) Findings of the Ad-hoc Committee on roads PExhibit 5 and also tendered by defendant as Dexhibit 2.**

16. The plaintiff submits that its claim is well supported by the evidence it tendered and faults the defendant's **DExhibit 3** as an afterthought since it was written when the matter was already in court.

17. It contends that it filed Notice to produce dated **3/6/2024** demanding from the defendant's production of original Local Service Order(s) which are in its custody but the defendant failed to respond to the same. The plaintiff submits that the defendant paid Local Service Order at **Page 44** of its bundle of documents despite discrepancies of having been signed by a junior officer and that the defendant cannot be heard to say that it cannot honour similar Local Service Order(s) on account of the same reason.

18. The plaintiff contends that the defendant was under obligation to ensure that all Local Service Order(s) were duly signed by designated officers.

19. It submits that it has discharged its burden of proof and relies on the case of **GAS Kenya Limited -vs- Amber Enterprises Ltd (2020)eKLR.**

**20. The defendant's case**

The defendant in its defence denied the plaintiff's claim in toto claiming that the plaintiff was not properly pre-qualified to render the contracted works and denied owing it Kshs.66,954,584/- for services rendered.

21. It avers that the plaintiff was not pre-qualified to tender with the defendant and that any tender issued to it was irregular, illegal, null and void in its view.

22. It pleads that any contract entered between the plaintiff and any of its staff was fraudulent and not ratified by them.

23. It denies floating the tenders that the plaintiff applied for and that there was no formal award or contract made or Local Service Orders issued by the defendant committing funds for the contract.

24. It further pleads that the plaintiff did not turn up to present its claim during the audit exercise. It further pleads that no inspection was carried out on the work done and no report of Completion Certificate or official handing over was done in accordance with laid down procedures.

25. The defendant through its witness Rogers Simiyu **(DW1)** testified by adopting the statement made by one Philip Wasike, who was a former Chief Officer in Department of Public Works, Transport and Energy of the defendant.
26. The defendant reiterated that in the financial year **2013/2014** the defendant floated tenders for the supply of consumable items only and did not tender for construction works. That it advertised for pre-qualification of supplies. That there is no signed/sealed contract between the plaintiff and the defendant and that if there were such contracts, the defendant would have officially handed the respective sites to the contractor/plaintiff through its procuring unit.
27. The defendant however alleges that if there were any contract(s) between the plaintiff and the defendant, the plaintiff was paid as per its records.
28. It avers that the plaintiff's documents were signed by County Secretary through one J.T Muhindi but according to the defendant an ideal Local Service Order(s) must pass through at least five (5) officers before it is issued. That the following officers ought to sign or execute the Local Service Order(s);
- (a) The Chief Officer of the consuming department.**
  - (b) Procurement officer from the procurement agency.**
  - (c) Internal auditor.**

**(d) Chief Accountant and**

**(e) The contractor.**

29. The defendant faults the plaintiff for using the back door or using improper and corrupt means to secure the tenders.

30. That in light of schemes by fraudulent companies to embezzle public funds, the defendant recommended for special audit from the County Assembly as well as the Auditor General.

31. It tendered the following documents through **DW1** as its evidence namely;

**(i) Audit Report by Public Investment Committee dated December 2015 - Dexhibit 1.**

**(ii) Findings on Audit Report by Ad hoc Committee - Dexhibit 2.**

**(iii) Internal letter to the County Secretary by Chief Officer Public Works and Transport dated 25/8/2021 - Dexhibit 3.**

**(iv) A letter from C.E.C County Government Trans-Nzoia to interim Chain Supply dated 18/2/2014 - Dexhibit 4.**

32. According to the defendant there were no documents to support the claim by the plaintiff.

33. When pressed in cross-examination, **DW1** conceded that the plaintiff's documents exhibited in evidence were

from their office and conceded that the pre-qualification document exhibited as **PExhibit 2** indicated that the plaintiff was pre-qualified to tender and the Auditor's Report which it had exhibited included the plaintiff's name as among the contractors that were recommended for payments.

34. He further conceded that as per its exhibit **DEXhibit 2** as well as **PExhibit 5**, the Ad hoc Committee found the plaintiff as one of the contractors engaged by the defendant and needed to be paid. He further stated the Auditor General recommended that payments be based on work done.

35. At the close of the defence case both parties in this suit through respective counsels filed their final written submissions which I will consider as I evaluate the evidence tendered with a view to determining the case.

36. This case has basically raised 3 issues for determination which in my view are;

***(i) Whether there was a contractual relationship between the plaintiff and the defendant.***

***(ii) Whether the plaintiff rendered the contracted services.***

***(iii) If the answer to the above is in the positive, whether the defendant was obligated to pay.***

**37. Whether the plaintiff and defendant entered into a contract.**

In its written submissions dated **19/1/2026** the plaintiff insists that it was pre-qualified to supply services to the defendant and tendered a notice from defendant dated **9/1/2015** indicating that it had been pre-qualified to participate in bidding to supply and deliver local materials (sand, murrum, ballast, quarry blocks etc). The letter from the defendant was tendered as **Pexhibit 2**. The letter is duly signed by one Benignas Luyera for County Secretary and was signed on **8/1/2015**.

38. A clear scrutiny of that letter however indicates that the plaintiff's company was pre-qualified to supply and deliver local materials to wit sand, murrum, ballast and quarry blocks etc. The main dispute here is the presence of a contract or contracts for construction and maintenance of certain roads within Trans-Nzoia County to wit roads in **Machewa, Tuwan, Kwanza and Matisi Wards**. Those are the roads that the plaintiff pleads he was offered to carry out the road works and maintenance,.

39. The defendant on the other hand denies the plaintiff's claim and states in its defence that there was no contract signed between them and the plaintiff's company.

40. In the face of the dispute with regard to whether or not there was existence of contract or contracts the legal position is that whoever alleges has the burden of proof as well stipulated under **Section 107 of the Evidence Act**. The plaintiff being the one alleging the existence of a

contract had the burden of proof and the question posed is whether it has discharged that burden on a balance of probabilities which is the required standard in civil law.

41. In this case the plaintiff has not tendered contracts demonstrating that it was contracted by the defendant to carry out road construction and maintenance of various roads in **Machewa, Tuwan, Kwanza and Matisi Wards** totaling a tune of **Kshs.66,954,854/-**.

42. This court has gone through the exhibits tendered by the plaintiff and contained in the bundle of plaintiff's documents dated **13/3/2019** and **19/3/2024**. The only piece of evidence indicative that a contract existed is found on **Page 45** and **46** of the bundle dated **13/3/2019** and **Page 47** of the bundle dated **19/3/2024**. The contracts in both bundles are incomplete as the 2<sup>nd</sup> pages which would have shown who signed is missing. The plaintiff did not tender this crucial documents in its evidence when its witness testified in court. The same witness (**PW1**) did not even allude or make any reference to the said documents. In my considered view, it is not enough for a plaintiff to simply file a list of documents without formally tendering them during trial and making reference to them particularly when the matter(s) at hand is/are contested.

43. The offer letter dated **8/4/2014** at **Page 46** on the list of documents dated **19/3/2024** from the defendant is not supported by the plaintiff's acceptance. This is because the

letter indicates that the plaintiff was required to acknowledge receipt of the letter **‘signifying acceptance’** and that contract was to be signed within 30 days with respect to road maintenance of **PENGI-AMUKA- ST THOMAS-SABWANI KWANZA WARD.**

44. The failure by the plaintiff to tender documents showing or indicating compliance with the offer letter dated **8/4/2014** from the defendant is fatal to his claim. There is no demonstration that there was a contract signed by the 2 parties herein binding them to the obligations arising therefrom.

45. This court notes that the plaintiff must have noticed the gap in its case because in its Notice to produce dated **3/6/2024** filed and served on the defendant, it requested the defendant to produce the original contracts but on its end, it did not even tender copies of the contracts if it faulted the defendant for keeping the original contracts. No evidence was led to the effect that upon signing of contracts, the defendant retained the original contracts. If that was the case, then the Notice to Produce the same would have given latitude to the plaintiff to rely on secondary evidence as stipulated under **Section 69 of the Evidence Act.**

46. In this matter however, the plaintiff failed to tender any evidence whether primary or secondary to prove the existence of the disputed contracts with the defendant. The Notice to Produce filed cannot aid a party in a suit to prove

his case unless basis is well established that the documents to be relied on are in the hands of the opposite side and two, he must at least prove through secondary evidence about the existence of a fact giving rise to the cause of action.

47. In this matter the plaintiff has put considerable weight on Local Service Orders (L.S.Os), **PExhibit 13**, reports by Auditor General **PExhibit 3**, Public Accounts Investment Committee Report from County Assembly of Trans-Nzoia **PExhibit 4** and Ad-hoc Report by County Assembly on petitions received **PExhibit 5**. The same does show that there was some work done by the plaintiff among other contractors but the absence of a binding contract or contracts is fatal to the plaintiff's case because the documents cited have no legs to stand on. While they are supportive of the plaintiff's claim, I find that on their own without any contract cannot be sustained. This finding is based on the fact that during trial the plaintiff did not give reasons to explain how he delivered services to the defendant without a binding contract.

48. The defendant has submitted in its written submission that the engagement of the plaintiff was flawed from the inception because of lack of proof that there was a competitive process where the plaintiff was picked, issued with Offer Letter and a Letter of Acceptance. That the documents relied on by the plaintiff were not executed or processed in accordance with the law. The findings by the

Auditor General and County Assembly are not well founded with respect to the plaintiff's claim.

49. The defendant has further alluded fraud on the part of the plaintiff but this court finds that though the defendant did not prove the same or demonstrated that it reported the plaintiff to investigative agencies, I find that the documents relied on by the plaintiff are irregular for the simple reason that there are no binding contracts indicating that the plaintiff was engaged to carry out road maintenance in the areas alluded to in his plaint.

In the end this court finds that in the absence of binding contracts, the plaintiff's suit against the defendant falls short for want of proof. For that reason the same is dismissed with costs.

**DELIVERED, DATED and SIGNED at KITALE this .....14<sup>th</sup> .... day of .....MAY....., 2026.**

**HON JUSTICE R.K. LIMO**  
**KITALE HIGH COURT**

***Judgment delivered in open court***

***In the presence of***

***Nakitare for the plaintiff***

***No appearance for Karani for the defendant***

***Duke/Chemosop - court assistants***