



REPUBLIC OF KENYA



**Jamarat Apartments Limited v County Government of Vihiga (Civil Suit 4 of 2020) [2024] KEHC 5339 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL SUIT 4 OF 2020**

**JN KAMAU, J**

**APRIL 29, 2024**

**BETWEEN**

**JAMARAT APARTMENTS LIMITED ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF VIHIGA ..... DEFENDANT**

**JUDGMENT**

1. In its Complaint dated 23<sup>rd</sup> February 2017, the Plaintiff sought for Judgment against the Defendant for:-
  - a. The sum of twenty four million, one hundred and eighty three thousand, six hundred and thirty (Kshs 24,183,630/=) being sums owed to the Plaintiff for supply of two hundred and forty nine (249) tonnes of fertilizer.
  - b. The sums of Kenya shillings seven million, four hundred and ninety eight thousand, eight hundred (Kshs 7,498,800/=) being the sums owed for transportation of two hundred and forty nine (249) tonnes of fertilizer.
  - c. General damages
  - d. Costs of this suit
  - e. Interests in a) and b) above
  - f. Any other relief that the court may, in the interest of justice, see fit to grant.
2. On 13<sup>th</sup> June 2017, the Plaintiff filed a Request for Judgment on grounds that the Defendant had failed to file its Statement of Defence. The court proceeded to enter an interlocutory Judgment in favour of the Plaintiff and as against the Defendant.



3. However, on 6<sup>th</sup> April 2018, the Defendant filed a Notice of Motion Application dated 19<sup>th</sup> March 2018 seeking orders to set aside the aforesaid interlocutory Judgment and sought to be allowed to file its Statement of Defence among other prayers.
4. On 18<sup>th</sup> April 2018, the parties recorded a consent which effectively disposed of the aforesaid application. Consequently, the interlocutory Judgment was set aside. The Defendant was allowed to file its Statement of Defence whereafter the matter was set down to be determined on its merits.
5. As the terms of the said consent appeared not to have been clear to the parties, on 3<sup>rd</sup> December 2018, Musyoka J who was seized of the matter delivered a Ruling setting aside the judgment of 13<sup>th</sup> June 2017.
6. The Defendant filed its Statement of Defence dated 15<sup>th</sup> November 2021 on 16<sup>th</sup> November 2021.
7. Musyoka J took the evidence of Ali Haron Apei (hereinafter referred to as “PW 1”) on 22<sup>nd</sup> September 2022 when the Plaintiff closed its case. The Defendant asked for another date for the defence case.
8. Subsequently, on 22<sup>nd</sup> March 2021, Musyoka J transferred the matter which had initially been filed at Kakamega High Court to Vihiga High Court as the dispute fell within the jurisdiction of the latter High Court.
9. When the matter came up for the defence hearing on 28<sup>th</sup> September 2023 before this court, the Defendant’s counsel indicated that it would be closing its case without calling any witness. The court then directed parties to file their Written Submissions.
10. The Plaintiff’s Written Submissions were dated 17<sup>th</sup> October 2023 and filed on 31<sup>st</sup> January 2024 while those of the Defendant were dated 6<sup>th</sup> November 2023 and filed on 9<sup>th</sup> November 2023. This Judgment is based on evidence tendered by parties during trial and the aforesaid Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

11. Having looked at the Pleadings herein, the evidence tendered during trial and the respective parties’ Written Submissions, it appeared to this court that the only issue placed before it for determination was whether or not the Plaintiff proved its case to the required standard which in civil cases is on a balance of probabilities.
12. It was the Plaintiff’s submission that where a plaintiff adduced evidence in support of its case but the defendant failed to call any witness to support its allegations, the plaintiff’s evidence remained uncontroverted while the statement of defence remained mere allegations as was held in the case of *Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007* which cited the case of *Edward Muriga Through Stanley Muriga vs Nathaniel D. Schulter Civil Appeal No 23 of 1997*.
13. It pointed out that its claim against the Defendant was uncontroverted. It was emphatic that it had proved the existence of a contract and the fact that it carried out its obligations under the said contract. It pointed out that the Local Purchase Order (LPO) had not been disputed or impeached. It was its contention that the evidence it had adduced in court was logical and consistent. It asserted that it had proved its case on a balance of probabilities.
14. It also urged the court to award it interest of the suit. In this regard, it placed reliance on the case of *Tate & Lyle Food and Distribution Ltd v Greater London Council and Another* [1981]3 ALL ER 716 where it was held that an award of interest was not a punitive measure for having kept the Plaintiff out of his money but part of the attempt to achieve restitutio in integrum.



15. It pointed out that the sums claimed had been outstanding since 2015 when it delivered the fertiliser thus it was entitled to interest at court rates from February 2015 until payment in full.
16. On its part, the Defendant denied having issued an LPO to the Plaintiff on 18<sup>th</sup> December 2014 and denied the contents therein. It reiterated the contents of Paragraphs (3), (4) and (5) of its Defence and argued that under the County Government Procurement Laws, a party could not qualify to deliver services without pre-qualification and tendering process and that there was no evidence of any pre-qualification that it ever made as a result of which the Plaintiff's claim had to fail.
17. It was emphatic that it was not clear how the Plaintiff managed to procure services to it. It pointed out that *Public Procurement and Assets Disposal Act* No 33 of 2015 provided for procedures for tendering and prequalification to supply goods and services and that the Plaintiff had not shown that it complied with any such procedures.
18. It asserted that Article 227 of the *Constitution* of Kenya, 2010 requires that Public Procurement be carried out on a system that was fair, equitable, transparent, competitive and costs effective. It added that the *Public Procurement and Assets Disposal Act* gave effect to the said mandatory provisions of the *Constitution* of Kenya and that in the absence of the Plaintiff having demonstrated any of the procedures above, then its claim failed.
19. It contended that the Plaintiff did not produce any documents showing that it advertised the Tender to Supply the alleged fertiliser or that the Plaintiff applied and was prequalified to supply the same.
20. It pointed out that the invoices the Plaintiff produced were only copies and there was no evidence that the alleged goods were ever supplied as the Plaintiff never called a witness or any officer alleged to have received the said fertiliser on its behalf to explain how the delivery notes were processed. It asserted that the Plaintiff's documents were manufactured for the purpose of ascertaining its claims before the court herein (sic).
21. It termed the Plaintiff's claim as a non-starter and that it lacked any legal basis as regards procurement procedures and constitutional provisions thus should be dismissed with costs.
22. The applicable law regarding the burden of proof was Section 107 (1) of the *Evidence Act* Cap 80 (laws of Kenya) which states that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
23. Section 108 of the *Evidence Act* further provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
24. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. In this regard, the Court of Appeal rendered itself in the case of *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 as follows:-

“The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
25. This court considered the evidence of PW 1 against the backdrop of the aforesaid provisions of the law. He testified that the Plaintiff was his company and that it sold fertilisers and food. He stated that



he supplied fertiliser to the Defendant and was thus claiming for the costs and transport of the same. He produced in evidence a Delivery Note and Invoice dated 23<sup>rd</sup> April 2017 as evidence and said that he took a loan in order to supply the same.

26. On being cross-examined, he admitted that the Defendant did not give it a tender but that it went to his store, saw his items and gave him an LPO after agreeing on the price. He added that there was no written contract but that all the documents relating to the company had been filed and the bond resolution were signed by two (2) people, Halima and Fahiya, his wife and daughter, who were also directors of the company. He pointed out that the delivery notes had the Defendant's stamp as was evidenced on the receipt. He stated that he transferred the fertiliser and delivered to Vihiga.
27. This court noted, that though the Plaintiff relied on the precepts of contract and the breach of it thereof, in its submissions, it did not prove that the contract itself existed. The LPO did not amount to a written contract. In his cross-examination, he conceded that there was no written contract that was entered into.
28. Indeed, it was imprudent on the part of the Plaintiff to handle a transaction of such alleged colossal amount of money without a written contract more so when dealing with the government. The delivery notes and invoices he adduced in evidence could only be effective if there was a valid and binding contract between it and the Defendant herein.
29. Going further, it appeared to this court that the Plaintiff contravened the provisions of the *Public Procurement and Assets Disposal Act*. Indeed, Section 93, 94 and 95 of the said *Public Procurement and Assets Disposal* provides for prequalification, prequalification documents and approval of pre-qualified candidates.
30. Sections 93 of the *Public Procurement and Asset Disposal* Cap 412 C provides as follows:-
  1. Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.
  2. Pre-qualification shall be for complex and specialized goods, works and services.
  3. In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified.
  4. The invitation referred to in paragraph (2) shall include—
    - a. the name, address and contact details of the procuring entity;
    - b. outline of the procurement requirement, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
    - c. statement of the key requirements and criteria to pre-qualify;
    - d. instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and
    - e. instructions on the location and deadline for submission of applications to pre-qualify;
    - f. applicable preferences and reservations or any conditions arising from the related policy;



- g. declaration that it is open to bidders who meet the eligibility criteria; and
- h. requirement that only bidders with capacity to perform can apply.

31. Further, Section 94 of the [Public Procurement and Asset Disposal Act](#) states that:-

1. An accounting officer of a procuring entity shall promptly issue pre-qualification documents to all candidates who request them and shall maintain a record of all candidates to whom documents are issued.
2. The pre-qualification document shall contain all the information specified in section 93 and any other information necessary for the potential candidates to prepare and submit applications to be pre-qualified.

32. In addition, Section 95 of the [Public Procurement and Asset Disposal Act](#) stipulates that:-

1. The evaluation committee shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.
2. The record of results prepared under subsection (1) shall be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.
3. A procuring entity shall invite tenders from only the approved persons who have been pre-qualified.
4. A procuring entity shall notify every candidate who submitted an application for pre-qualification but did not qualify.

33. Going further, Section 96 of the [Public Procurement and Asset Disposal Act](#) states that:-

1. The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.
2. Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation or a notice in at least two free to air television stations and two radio stations of national reach.
3. In addition to subsection (2) a procuring entity shall:-
  - a. use Kenya's dedicated tenders portal or any other electronic advertisements as prescribed; and
  - b. post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.
  - c. In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide



circulation or a notice in at least two free to air television stations and two radio stations of national reach.

- d. Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national advertising, the procuring entity shall advertise using the options available in subsection (3)(a) and (b).

34. It was therefore evident from the aforesaid provisions of the law that the aforesaid processes of pre-qualification, evaluation, advertisement and issuance of tender were pre-requisites before the Plaintiff herein could supply the fertiliser to the Defendant. Notably, proof of compliance of all the aforesaid provisions of the *Public Procurement and Asset Disposal Act* was material in the case herein because the Defendant had disputed that it awarded it the tender for the supply of the aforesaid tonnes of fertiliser.

35. Going further, producing copies of receipts in a trial of the magnitude of this case was to treat its claim very causally. Primary evidence must be adduced in court at all given times as provided in Section 65 of the *Evidence Act*. However, secondary evidence can also be adduced. However, a party who wishes to rely on secondary evidence must comply with the provisions of Section 69 of *Evidence Act*.

36. Notably, Section 69(1) of the *Evidence Act* states that:

“Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- i. when the document to be proved is itself a notice;
- ii. when from the nature of the case, the adverse party must know that he will be required to produce it;
- iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- iv. when the adverse party or his agent has the original in court;
- v. when the adverse party or his agent has admitted the loss of the document;
- vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- vii. in any other case in which the court thinks fit to dispense with the requirement.

37. After considering the entire evidence that was adduced before the Trial Court, this court was convinced that the Plaintiff failed to prove his case on a balance of probabilities. The burden of proof lay with the Plaintiff to discharge before this court as per the provisions of Sections 107, 108 and 109 of the *Evidence Act* which it failed to do and thus weakened its case. The fact that the Defendant did not call any witness did not lessen the Plaintiff's burden to prove its case on a balance of probabilities.

38. The Defendant was also under no obligation to adduce any evidence to counter the Plaintiff's assertions or assist it to prove its case. Instead, the burden lay on the Plaintiff to prove that the Defendant owed it money. It never shifted to the Defendant at any given time.



39. It was unfortunate that the Plaintiff may have supplied the fertiliser worth millions of money to crooks. A tender worth Kshs 31,682,430/= was not one that could be dealt with casually. That was tax payers' money requiring the processes for which they were called upon to pay for services to have been open, transparent and strictly in compliance with the provisions of the law.
40. This court was called upon to protect tax payers' money and for that reason, it found and held that the Plaintiff had not proved its case against the Defendant on a balance of probabilities and the same had to fail.

### **Disposition**

41. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's case was not merited and the same be and is hereby dismissed.
42. As the Defendant was the Government and it would be punitive to award costs to a government against its citizen, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of this suit.
43. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF APRIL 2024**

**J. KAMAU**  
**JUDGE**

