



**Bora Global Limited v National Youth Service (Civil Case E235 of 2019)
[2022] KEHC 10268 (KLR) (Commercial and Tax) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E235 OF 2019**

EC MWITA, J

JULY 1, 2022

BETWEEN

BORA GLOBAL LIMITED PLAINTIFF

AND

NATIONAL YOUTH SERVICE DEFENDANT

JUDGMENT

1. The plaintiff, Bora Global Limited ('Bora Global'), a limited liability company, sued the defendant, National Youth Service, (NYS), also a body corporate established under section 5 of the [National Youth Service Act](#) 2018 for failure to pay a debt for goods supplied in 2014. Bora Global averred that in 2014, it was prequalified as a supplier under the Youth Access to Government Procurement Opportunities programme and in January 2015, Bora Global applied for and was awarded tender No. NYS/RT/27/2014-2015 for supply and delivery of various foodstuff(s) worth Kshs. 234,400,000.
2. Bora Global pleaded that according to the tender, it was to supply Maize Meal 2kg x 12 bales- 30,000 bales at Kshs. 1,900 per unit making a total cost of Kshs. 57,000,000; Powder Milk 25kg packets- 5,350 packets at Kshs. 21,000 at a total cost Kshs. 115,025,000 and green grams 90kg bags-2,500 bags at 24,950unit at a total cost of Kshs. 62,375,000.
3. Bora Global further pleaded that a contract was entered into on 2nd February 2015 when it was notified of the award of the tender. Bora Global asserted that on diverse dates between May and June 2015, it supplied foodstuffs to NYS thus discharging its obligations under the contract. The supplies were made base on Local Purchase Orders (LPOs). Bora Global further asserted that although NYS made a payment of Kshs. 46,781,250 for the supply of green grams, it did not settle the balance of Kshs. 25,093,750 in respect of supply of 5,000 bales of maize meal and 2,500 bags of green grams.



4. Bora Global stated that NYS published a notice in the Daily Nation newspaper of 18th September 2018, calling on suppliers to submit pending bills with supporting documents. Bora Global forwarded details of the outstanding amount in the letter dated 20th September 2018 but NYS did not pay. Bora Global instructed its advocates to issue a demand letter which did not elicit a response. Bora Global filed a plaint dated 30th July 2019 and sought judgment against NYS for KES. 25,093,750.00; Interest at court rates and Costs of the suit.
5. NYS filed a defence dated 15th September 2020, denying entering into any contract with Bora Global. NYS also denied paying Kshs. 46,781,250 or owing any money to Bora Global. NYS averred that if any contract was entered into or tender awarded to Bora Global, it was a subject of investigations or criminal prosecution before Court.

Evidence

6. During the hearing, Bora Global called Wilson Ngima, (PW1) as its director as a witness. Ngima adopted his witness statement dated 30th July 2019 filed together with the plaint as evidence in court, Ngima also produced a list and bundle of documents dated 30th July 2019 as exhibits A1-27.
7. In the witness statement, Ngima stated that Bora Global supplied the contracted items on diverse dates between May and June 2015 and the goods were received on behalf of NYS and each delivery note and invoice stamped. Ngima explained that maize meal was supplied under LPO No. 2455347, invoice No. 057, delivery notes Nos. 054, 056, 057 and 058. Green grams, were supplied under LPO No. 2455348, Invoice No. 060 and Delivery Note Nos. 065, 066 and 067; LPO No. 2455274, Invoice No. 059 Delivery Note Nos. 061, 062 and 063; LPO No. 2455349 Invoice No. 061 Delivery Note No. 068, and LPO No. 2455350, Invoice no. 058 and Delivery Note No. 060.
8. Ngima stated that NYS made part payment of Kshs, 46,781,250 leaving a balance of Kshs. 25,093,750. outstanding and despite Bora Global submitting details of the balance and supporting documents, NYS did not pay the debt.
9. In cross-examination, Ngima admitted that there was no evidence to show that he was a director of Bora Global or that there was authority from Bora Global to file the suit. Ngima stated that while the contract was executed in February 2015 and the last delivery done on 30th June 2015, the suit was filed in 2019. Ngima also conceded that the execution section of the contract was undated.
10. Ngima further admitted that Bora Global did not file bank statements to prove that NYS paid some money in 2016. When referred to delivery Note 058 in respect of a delivery made on 26th May 2015, Ngima intimated that the stamp which indicated that the goods were received on 26th April 2015 must have been an error.
11. On its part, NYS did not call any evidence.

Bora Global's submissions

12. Bora Global filed written submissions dated 16th February 2022 and urged the Court to allow the suit and enter judgment against NYS as prayed. Bora Global submitted that it had proved its claim for Kshs. 25,093,750 for the supply of goods to the NYS and relied on the tender document, LPOs, Delivery Notes and invoices.
13. Bora Global argued that NYS misinterpreted Section 3 of the *Public Authorities Limitation Act* to argue that the claim was time barred. Bora Global contended that NYS is a body corporate established under section 5(2) (a) of the *National Youth Service Act*, 2018 and that the cause of action accrued



on the date of breach of contract and not when the contract was entered into as NYS claimed. Bora Global pointed out that although the final delivery was in June 2015, there was evidence that NYS requested for pending bills to be submitted in 2018. Furthermore, Bora Global argued, NYS did not challenge the letter dated 20th September 2018 in response to the call for submission of pending bills with supporting documents.

14. According to Bora Global, its claim is for payment for supplies made under a subsisting contract since the contract had not been terminated pursuant to clause 16.

Submissions by NYS

15. NYS filed written submissions dated 17th March 2022. NYS asserted that as a public body it falls under the Government Proceedings Act as well as the *Public Authorities Limitation Act* and relied on *Board of Management, Moi Girls School Nairobi v Jael Mureithi & 3 others* [2021] eKLR to that effect. NYS further relied on section 3(2) of the *Public Authorities Limitation Act* to support the contention that the suit was filed after 3 years and ought to be dismissed. NYS also argued that the cause of action arose whenever the procuring entity did not pay promptly as required in Clause 12.2 of the contract.
16. According to NYS, Bora Global ought to have filed the suit by June 2018 based on the last delivery that was made in June 2015. NYS argued that Bora Global filed the suit out of time without seeking leave.
17. NYS contended that where a matter is statute barred, the Court has no jurisdiction to entertain it. For this proposition NYS cited the decisions in *Anaclet Kalia Musau v Attorney G & 2 others* (Civil Appeal No. 111 of 2017) [2020] eKLR and *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* (Supreme Court Petition No. 19 of 2018 (para. 40).
18. With regard to the alleged contract between, NYS contended that the contract lacks authenticity as it did not comply with section 87 of the Public Procurement & Asset Disposal Act, No. 33 of 2015. NYS pointed out that the alleged notification of award produced by Bora Global was undated and did not bear a stamp from NYS. NYS again argued that there was no proof of payment to support the argument that there was consideration.
19. NYS challenged the claim that Bora Global delivered the items and referred to delivery Note 058 which bore a stamp dated 26th April 2015 contrary to the allegation that the goods were supplied on 26th May 2015. NYS further referred to Delivery Note No. 063 which neither showed the date the goods were received nor NYS stamp.
20. NYS submitted that Bora Global failed discharge the burden of proof as required by section 107(1) of the *Evidence Act*. NYS relied on the Court of Appeal decision in *Karugi & another v Kabiya & 3 others* [1987] KLR 347. NYS urged the court to dismiss the suit with costs.

Determination

21. The claim against NYS is for Kshs. 25,093,750 being the balance for foodstuffs supplied during the year 2015. Bora Global's case is that whereas foodstuffs were, NYS only made part payment leaving the amount claimed unpaid. NYS denied entering into a contract for supply of what Bora Global alleged to have supplied. NYS took the position that if any contract was entered into, it was criminal and that investigations were being conducted or criminal prosecutions were pending. Whereas Bora Global called a witness, NYS did not.
22. I have considered this case and the evidence on record. Two issues arise for determination, namely; whether the suit is time barred and whether Bora Global has proved its case.



Limitation

23. NYS argued that as a public body it falls under the *Public Authorities Limitation Act* which requires that a suit be filed within three years. According to NYS, the suit was filed in 2019 outside the limitation period.
24. Section 2 of the *Public Authorities Limitation Act* defines proceedings against the Government to include proceedings against the Attorney-General or any Government department or any public officer. Section 4(2) provides that No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
25. The argument by NYS that the suit is time barred cannot stand. Section 5(1) of the NYS Act, 2018 establishes the NYS and under section 5(2), NYS is a body corporate with perpetual succession and common seal with power to sue and be sued. NYS as body corporate, is not a department of the Government. For that reason, section 4(2) of *Public Authorities Limitation Act* cannot apply to a corporate entity that is not a department of the Government that the Act applies to. The argument must fail and is rejected.

Whether the case was proved

26. Bora Global has relied on the contract the basis of which the goods were supplied. The witness for Bora Global testified regarding the foodstuffs that were supplied, that is bales of maize and Green grams; that Local Purchase Orders were issued and that the supply of the foodstuffs was supported by Delivery Notes and invoices.
27. I have considered the evidence on record and the documents relied on as exhibits. A plaintiff bears the burden of proving his case. That proof is on a balance of probabilities. Section 107 (1) of the *Evidence Act* provides 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.” Further section 108 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.” Section 109 is to the effect that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.
28. NYS did not call evidence thus the only evidence on record is that by Bora Global and the documents produced as exhibits. Even then, that did not mean Bora Global had its case proved or lessen the burden to prove the case. The burden of proof is not lessened even where the suit proceeds by way of formal proof. The standard of proof remains at all times. In this regard, the Court of Appeal stated in *Karugi another v Kabiya & 3 others* [1983] eKLR: [1987] KLR 347 that the burden of the plaintiff to prove his case remains the same and is not in any way lessened because the case is heard by way of formal proof, though where the matter is not defended, or is not validly defended that burden may become easier to discharge.
29. The case for Bora Global hinged on a contract said to have been entered into on 2nd February 2015 when Bora Global was notified that it had won the tender. I have perused the documents produced by Bora Global to support this position. One of the documents is a letter dated 2nd February 2015 from the Ministry of Devolution and Planning signed by Eng. Peter Manguti, the Principal Secretary, and witnessed by Dr. Nelson Githinji Director, NYS on behalf of the Ministry and Willison Ngima General Manager and witnessed by Marie Blessings Nganga, Director on behalf of Bora Global. The letter was headed “Notification of award of supply and delivery of food stuffs for National Youth Service.”



30. Attached to the notification letter is a contract form with the description of the goods that were to be supplied, the quantity, unit price and total cost. Although that contract was executed by the same parties, the document lacks vital information. For instance, the contract does not have the date on which it was executed. Second, the document does not have the validity period required at clause 5. The missing information was critical to show the date it was executed and the validity period. This information would determine when the contract was entered into, the period it was to remain valid and whether the goods were supplied within the period of the contract.
31. Bora Global asserted that the contract was entered into on 2nd February 2015. That cannot, however, be correct. This is so because, first; as the witness admitted during cross examination, there was no date on which the contract was executed and, second; the notification letter itself stated that a contract would be signed in 14 days given that there was no appeal. Bora Global did not demonstrate that the contract was executed within the time or that the alleged goods were supplied within the contract period.
32. That is not all. There are discrepancies in the documents Bora Global relied on. For instance, Delivery Note No. 058 shows that goods were received on 26th April 2015 yet it was dated 26th May /June 2015. Could goods be received before the date the document stated were supplied? Again, Delivery Note No. 063 for supply of 125 90Kgs bags of green grams was not stamped. This raises the question whether goods were indeed delivered. There is also this LPO 2455348 for supply of green grams worth Kshs. 15,593,350. The No. 2455348 on the LPO was cancelled by hand and indicated to be No. 1621, but the cancellation was not endorsed. The shortcomings highlighted above are critical in determining the validity of the contract given that NYS denied entering into such a contract.
33. Having given due consideration to the evidence and the material placed before this court, the conclusion I come to is that Bora Global did not prove the case to the required standard and this court cannot endorse such a transaction that has not been proved on a balance of probability.
34. For the above reasons, the suit is hereby dismissed. As it was not clear whether goods were supplied or not, each party will bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY 2022

E C MWITA

JUDGE

