



REPUBLIC OF KENYA



Board of Governors Friends School Kaimosi Boys v Shikoli t/a Mildred Stores (Civil Appeal 22 of 2022) [2024] KEHC 14926 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 22 OF 2022
JN KAMAU, J
NOVEMBER 28, 2024**

BETWEEN

BOARD OF GOVERNORS FRIENDS SCHOOL KAIMOSI BOYS ... APPELLANT

AND

MILDRED MACHIKA SHIKOLI T/A MILDRED STORES RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. Manyura (RM) delivered at Hamisi in the Senior Principal Magistrate's Court Civil Case No 61B of 2019 on 28th June 2022)

JUDGMENT

Introduction

1. In her decision of 28th June 2022, the Learned Trial Magistrate, Hon S. Manyura, Resident Magistrate, entered Judgment in favour of the Respondent as against the Appellant as follows:-
 - a. Plaintiff/Respondent to recover Kshs 731,000/= being the outstanding balance owing and due.
 - b. Interest on 1 above at court rates.
 - c. Costs of the suit.
 - d. The Defendant's Counterclaim is hereby dismissed
2. Being aggrieved by the said decision, on 29th July 2022, the Appellant herein filed a Memorandum of Appeal dated 27th July 2022. It relied on four (4) grounds of appeal.
3. Its Written Submissions were dated 5th March 2024 and filed on 7th March 2024 while those of the Respondent were dated and filed on 18th March 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that Grounds of Appeal Nos (1), (2), (3) and (4) were related as the issue that had been placed before it for determination was whether or not the Respondent proved her case to the required standard, which in civil cases is, on a balance of probabilities. The said grounds of appeal were therefore all dealt together.
7. The Appellant submitted that the Trial Court erred in having failed to consider the provisions of *the Constitution* of Kenya, 2010 and the *Public Procurement and Asset Disposal Act*, 2015. It pointed out that being a public school, the provisions of the said *Public Procurement and Asset Disposal Act* applied.
8. It invoked Article 227(1) of *the Constitution* of Kenya and contended that there was no competitive bidding, transparency and fairness in the alleged supply of goods by the Respondent in accordance with the aforesaid provision of *the Constitution*. It added that the Respondent did not participate in any tender and she did not prove that she had all the necessary documents required for the supply to public entities as provided under the law which included, invitation for tender, application for tender, award of tender, contract agreement and Local Purchase Order.
9. It submitted that the Respondent did not comply with the provisions of Section 93 of the *Public Procurement and Asset Disposal Act* as was mandated by Section 72 of the said *Public Procurement and Asset Disposal Act*. It relied on the case of *Royal Media Services vs Independent Electoral & Boundaries Commission & 3 Others* [2019] eKLR where the court stated that it was the duty of the contractor, as the procuring entity, to observe the provisions of Statute and the Regulations thereunder.
10. It asserted that the Trial Court failed to analyse the evidence of the parties and erred in holding that there was an offer that was given to the Respondent to supply sixty (65) bags of maize and sixty (60) bags of beans yet there was no evidence whatsoever of such offer being given to her either through Local Purchase Order(LPO) or even request for quotation.
11. It pointed out that she only relied on defective delivery notes which Bonny Luga (hereinafter referred to as "DW 2") disclaimed. It invited the court to look at the Witness Statement of Haron Kweyu (hereinafter referred to as "DW 1") which reinforced its argument that she did not supply it with any goods.
12. It faulted the Trial Court for having relied on the evidence of the former Principal Dr Tom Shavisa (hereinafter referred to as "PW 3") because his evidence was biased for the reason that the school always transacted through the Board of Management as was provided for under the *Basic Education Act* Cap 211 (Laws of Kenya).



13. It submitted that the method PW 3 alluded to request the Respondent for supply of goods and services was contrary to law, against public interest and was a private arrangement between them which could not have been enforced by the Trial Court. It argued that oral representations of a principal without the sanction of the Board of Management did not bind it and as such the same was clearly an illegality.
14. In this regard, it relied on the case of Pakar Investment Company Limited vs Municipal Council of Malindi [2016] eKLR where it was held that a supplier could not expect to receive a phone call from an assistant supply officer to supply goods and jump into the process of supplying unless he or she was pre-qualified.
15. It pointed out that the Trial Court failed to take into account the crucial evidence of DW 1 and DW 2. It maintained that the Respondent's alleged supply was suspicious, illegal and an attempt to embezzle funds through collusion with the former administration.
16. It cited the case of Kenya Airways Limited vs Satwant Singh Flora [2013] eKLR where the Court of Appeal while quoting the case of Mistry Amar Singh vs Shingh Sherano Wofunira Kuluby [1963] EA 408 held that no court should enforce an illegal contract.
17. It therefore asked this court not to be used to enforce an illegality since public interest superseded private interests. It submitted that the Respondent's case was tainted with fraud, collusion, conspiracy and illegality and thus urged the court to allow its Appeal as the same was merited.
18. On her part, the Respondent submitted that she produced Delivery Notes and Invoices dated 4th May 2017, 7th May 2017, 16th June 2017 and Bank Statement indicating Cheques No 002914 and No 003110 for Kshs 50,000/= each, which documents the Appellant never rebutted.
19. She asserted that upon the Appellant's request, she supplied and delivered sixty-five (65) bags of maize and sixty (60) bags of beans on diverse dates. She stated that she had not paid the total sum due standing of Kshs 731,000/=. She was emphatic that the aforesaid Delivery notes, invoices and the two (2) bank statements issued to her as part payment were sufficient proof of her case. In this regard, she invited the court to consider the provisions of Sections 107(i)(sic), 169 and 112 of the *Evidence Act*.
20. She submitted that she had proved her case to the required standard as it was not disputed that she supplied the Appellant with maize and beans and that it was only at the appellate stage when it sought to bring new evidence by denying the supply of the said cereals, which she stated was against the law.
21. To buttress her point, she relied on the case of Isaac Mugweru Kiraba t/a Isamu Refri Electrical vs Net Plan East Africa Limited [2018] eKLR where in a similar case, the court found that the plaintiff had proved his case and entered judgment in his favour.
22. She argued that Section 74 of the Public Procurement and Disposal Act permitted a public entity to use direct procurement in certain circumstances. She pointed out that the Appellant's school was facing food shortage due to boycott by former suppliers for none payment whereupon PW 3 asked her to supply food stuffs to school on credit to avert the pupils going on rampage and/or closure of the school.
23. It was her contention that the doctrine of necessity knew no law and permitted the use of certain provisions of the code or common law ostensibly in contradiction to other law in order to accomplish a vital objection, which in her case, was the supply of food stuffs in the Appellant's school. She therefore argued that she could not have been held liable for surpassing any law.
24. She further placed reliance on the case of Feba Radio (Kenya) Ltd t/a Feba Radio vs Ikiyu Enterprises Ltd [2017] eKLR where it was held that where a contractor or sub-contractor commenced work when



all terms have been negotiated and agreed upon but no formal acceptance had been recorded, that was sufficient evidence of acceptance of the contract terms. She reproduced the evidence of PW 3 and DW 1 and argued that there was no legal action that had been taken against her either by seeking refund of the partly paid sum of Kshs 100,000/= or alleging any forgery in respect of the rubberstamped delivery notes and invoices that were produced as evidence. She was emphatic that she had adduced sufficient evidence to prove the existence of a contract between parties herein and the same could not be denied on technicalities. She asserted that DW 2's evidence could not be taken as the truth.

25. 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 vs 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.”

26. The applicable law regarding the burden of proof was Section 107 (1) of the *Evidence Act* Cap 80 (laws of Kenya). The same states as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

27. 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.”

28. This court considered the Respondent's evidence and that of Leonard Agesa (hereinafter referred to as “PW 2”) and PW 3 against the backdrop of the aforesaid provisions of the law.

29. The Respondent testified that on diverse dates between 4th May 2017 and 16th June 2017, she supplied the Appellant's school with sixty-five (65) bags of maize and sixty (60) bags of beans all valued at Kshs 831,000/=. Her evidence was that the Appellant acknowledged receipt of the said cereals and promised to settle the money due to her on or before end of January 2018. She stated that she was paid in two (2) instalments of Kshs 50,000/= each on 24th May 2018 and 4th February 2019 totalling Kshs 100,000/= and leaving a balance of Kshs 731,000/=.

30. During her cross-examination, she stated that the school did not ask her for a tender document, LPO and Certificate of incorporation or business licence. She informed the court that she did not have a licence at the time and conceded that she did not enter into any contract with the school while supplying the said cereals. She stated that PW 3 had a way of confirming that she had supplied the school with the said cereals through invoices and delivery notes. She further said that it was DW 2 who signed the invoices and the delivery notes. She produced the aforesaid invoices and delivery notes as exhibits.

31. PW 2, a driver told the Trial Court that he transported the cereals to the Appellant's school on 16th June 2017. In his cross-examination, he stated that he had not furnished any document in court to show that he supplied the said cereals to the school.

32. PW 3 testified that during his administration, he requested the supply of the aforesaid cereals from the Respondent and that the same amounted to Kshs 831,000/=. He told the Trial Court that the first consignment was supplied on 4th May 2017 whereby he sent the school driver, the late Daudi to pick the



same using the School Bus Registration Number KBR 385 U. He added that the second consignment was on 5th May 2017 while the last one was on 16th June 2017.

33. It was his further evidence that he summoned the ad hoc tender committee to pay the Respondent. He pointed out that it was a time of crisis, there was shortage of food in the country as there was famine and that the regular suppliers were not able to supply. His evidence was that he obtained approval for the tender and that the Respondent was given the tender through the phone. He pointed out that he handed over the books of accounts, procurement and minutes together with a list of debtors to his successor, DW 1 herein.
34. When he was cross-examined, he explained that the procedure of servicing for suppliers was advertisement, bidder application, tender committee appropriation, request for goods and receipt in stock. He admitted that he did not advertise for supply of goods in this case. He pointed out that where suppliers failed to supply, he would revert to the ad hoc tender committee which would do a variation in the supplies. He confirmed that the said committee sat but did not issue any document showing that it had awarded the Respondent a tender. He did not produce any document. He said that he did not have access to the documents but the same could be provided by the Tender Committee.
35. DW 1 testified that when he took over the school, it had outstanding bills of Kshs 24,000,000/= and that creditors would flock his office. He said that he summoned the Board and a resolution was made to summon the creditors to supply documentation that would enable the school verify their credibility. The documentation required were KRA tax compliance, Certificate of Good Conduct, Identification Card/Certificate of Registration, Letter of Award for Tender, Contract between supplier and the school, LPO and Delivery Notes accompanied with invoices.
36. He was emphatic that the Respondent did not avail any of the aforesaid documents and that the Kshs 100,000/= was paid to each creditor to sustain them while awaiting the verification process. He stated that some of the creditors brought their documents and were paid meaningful amount. He averred that the school was willing to pay the Respondent and was only waiting for her to avail the aforesaid documents as proof of her credibility as a creditor but she failed to avail the same. He pointed out that there were stringent laws with regard to procurement and if he violated the same, serious action would be taken against him.
37. He further testified that he had been a Principal for fifteen (15) years and that the same procedure had been followed. He conceded that there were exceptions for change of supplier but that even then, there would be advertisement, calling in the board for that information, award of tender by the tender committee, issuing of the LPO, agreement with supplier and delivery. He asserted that even in emergency cases, the aforesaid compliance documents had to be given. He stated that the Respondent was only given the second payment as she had gone back to the school claiming that she had a sick child.
38. DW 2 denied ever having signed and/ or stamping the delivery notes and invoices produced that the Respondent relied upon.
39. This court noted, that although the Respondent relied on the precepts of contract and the breach of it thereof, in her submissions, she did not prove that the contract itself existed. When he was cross-examined, PW 3 he conceded that there was no written contract that was entered into.
40. It was imprudent on the part of the Respondent have had to handle a transaction of such alleged colossal amount of money without a written contract more so when dealing with the government as the school was a public entity. The delivery notes and invoices she adduced in evidence could only have been useful if there was a valid and binding contract between her and the school. The nature of that contract was dealt with later in this Judgment.



41. It appeared to this court that there was a contravention of the provisions of the Public Procurement and Assets Disposal Act in the supplies that the Respondent may have done. Sections 93, 94 and 95 of the said Public Procurement and Assets Disposal provided for prequalification, prequalification documents and approval of pre-qualified candidates.
42. Sections 93 of the Public Procurement and Asset Disposal stipulated 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 (emphasis court).
 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.”
43. 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.
44. 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 (emphasis court).
 4. A procuring entity shall notify every candidate who submitted an application for pre-qualification but did not qualify.”
45. 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).
46. PW 3 alluded to having procured the goods through direct procurement. This was provided under Section 92(1)(e) of the Public Procurement and Disposals Act which states that:-
- “Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following —
- e. direct procurement.”
47. Section 103(2)(b) of the Public Procurement and Public Disposal Act gave the parameters under which direct procurement could be used to procure goods and services. Amongst the grounds for direct procurement was if “there is an urgent need for the goods”.



48. Schedule 2 of the Public Procurement and Public Disposal Regulations, 2020 further provided that there was:-

“No minimum or maximum expenditure under this method provided the conditions under this section are met”

49. Be that as it may, the procedure for direct procurement had to be adhered to. Its procedure was provided in Section 104 of the Public Procurement and Disposal Assets Act. The same states as follows:-

“An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement:-

- a. issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.
- b. appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non- consultancy services being provided;
- c. ensure appropriate approvals under this Act have been granted;
- d. ensure the resulting contract is in writing and signed by both parties (emphasis court).

50. In addition, Regulation 90(1)(a) of the Public Procurement and Disposal Assets Regulations states that :-

1. In addition to direct procurement requirements set out under section 103 of the Act, the following shall apply—
 - a. ...a procuring entity shall conduct procurement using the direct procurement method subject to threshold matrix set out in the Second Schedule;
 - b. where an accounting officer uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 103 of the Act has been satisfied;
 - c. an accounting officer shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority in a format provided by the Authority;
2. Any direct procurement bid shall be evaluated in accordance with the provisions of the Act and these Regulations.
3. The negotiations shall be conducted by the ad hoc evaluation committee appointed in accordance with section 104 (b) of the Act.
4. The ad hoc evaluation committee responsible for negotiation under paragraph (3) may negotiate on terms that include—
 - a. price;
 - b. terms of contract;



- c. terms of delivery;
 - d. scope of work or service.
 5. On completion of negotiations, the committee under paragraph (3) shall prepare a report and submit it to the head of procurement function for professional opinion and for onward submission to the accounting officer for approval and award of the contract.
 6. Any direct procurement shall require the prior approval of the accounting officer in writing except under urgent need where approval shall be granted in line with section 69(3) of the Act.
 7. For greater certainty, the fourteen days window period between the notification of award and signing of the contract provided for under section 135(3) of the Act shall not apply for direct procurement method.
 8. The resulting contract shall be in writing and signed by both parties as provided for under section 104(d) of the Act (emphasis).
51. Section 104 of the Public Procurement and Disposal Assets Act stipulates that:-
- An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—
- a. issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.
 - b. appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non- consultancy services being provided;
 - c. ensure appropriate approvals under this Act have been granted;
 - d. ensure the resulting contract is in writing and signed by both parties.
52. The ad hoc committee referred to hereinabove was established under Section 46(1) of the Public Procurement and Disposal Assets Act. Section 46(4) of the Public Procurement and Public Assets Act states that:-
4. An evaluation committee established under subsection (1), shall:-
 - a. deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;
 - b. consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;
 - c. have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;
 - d. complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;



- e. adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.
5. For greater certainty a procuring entity shall where a member of the ad hoc evaluation committee contravenes any provisions of this Act, institute disciplinary measures in accordance with the procuring entity's disciplinary measures and the provisions of this Act.
53. The Appellant was required to process all procurements through a procurement committee as envisaged in Section 61 of the Basic Education Act that provided for the establishment of a finance, procurement and general purposes committee.
54. Section 61 (1) and 2(a) of the Basic School Act states as follows:-
 1. The board of management of an institution of basic education may establish such committees as the Board may consider appropriate to perform such functions and discharge such responsibilities as the Board may deem necessary.
 2. Without prejudice to the provisions of subsection (1), the board of management shall (emphasis court) establish the following committees:-
 - (a) finance, procurement and general purposes committee.
55. 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 school was a public entity that was bound by the said Public Procurement and Asset Disposal Act and Regulations. The Evaluation Committee had a critical role to look at the technical and financial aspects of a procurement, negotiation of the process, evaluation of bids, considering the proposals for prequalification and coming up with the registration lists.
56. The aforesaid processes of pre-qualification, evaluation, advertisement and issuance of tender were pre-requisites before the Respondent herein could supply the cereals to the Appellant.
57. Although PW 3 was emphatic that the tendering process was followed, the documents were, however, not produced in court. The court perused the lower court file and noted that the Respondent filed a Notice to Act in person dated and filed on 8th October 2021. If she had an advocate, she could have perhaps have been advised on the procedure of how documents that were with the Appellant could have been brought to the attention of the court.
58. Be that as it may, she ought to have had certain crucial documents such as a quotation, Local Purchase Order (LPO) or other relevant documents to show that the Board of Management approved the direct procurement of the maize and beans. PW 3 could only have acted through the resolutions of the Board of Management.
59. It was also not clear if there was any signature on the Delivery Notes that the Respondent adduced as evidence. What the court could see was just a stamp from Friends School, Kaimosi Boys. They bore no signature.
60. The most pertinent issue was that she did not also have a written contract duly signed by herself and the Appellant's school. Under the Public Procurement and Public Assets Act, a written contract was critical to bind the parties. Oral contracts were not recognised under the said Act. The Trial Court was correct in finding that the previous administration of the school through PW 3 intended that there be a binding contract for the supply of maize and beans to the school.



61. However, the relationship between the Appellant's school and the Respondent was not just a contractual process in the way the Trial Court put it. There was a process that preceded such binding contract by way of tendering of goods and services. A written contract would have bound other subsequent boards of the school. An oral contract depended on memory that could be erased once the person who entered it left the institution that had entered into a contract. If payment was to be done immediately, an oral contract could help a supplier. However, if payment was to be made at a later stage, that supplier had to ensure its interests were secured by binding institution as public officials are transferred and/or retire continuously leaving many pending bills.
62. The Appellant was under no obligation to adduce any evidence to counter the Respondent's assertions or assist her to prove her case. The burden of proof lay on her to discharge the same as per the provisions of Sections 107, 108 and 109 of the *Evidence Act*. As she did not comply with the provisions of the *Public Procurement and Asset Disposal Act* and Regulations, she did not prove her case on a balance of probabilities. The Trial Court therefore erred when it concluded that she had proved her case against the Appellant.
63. This court did not find any oral and documentary evidence that the Appellant had adduced to show that the Respondent had defrauded it of the sum of Kshs 100,000/=. Indeed, DW 1 told the Trial Court that a similar amount was given to all creditors to sustain them as they awaited the verification process.
64. In SYT vs TA [2019] eKLR the Court of Appeal stated that where a party failed to call evidence in support of his case, that party's pleadings remained mere unsubstantiated statements of fact. In the absence of proof, the Appellant's Counterclaim also failed.
65. It was unfortunate that the Respondent may have supplied the cereals worth of thousands of shillings. However, a tender worth Kshs 831,000/= was not one that could be taken lightly and dealt with casually. The processes for services to public institutions had to have been open, transparent and strictly in compliance with the provisions of the law because they were paid for by tax payers money. Payment of any monies to the Respondent, if at all she came to the rescue of the Appellant's school when it was in dire straits and supplied the foodstuffs was now left to the conscience of the board members.

Disposition

66. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 27th July 2022 that was lodged on 29th July 2022 was partly merited. The effect of this is that the Judgment of 28th June 2022 by Hon. S. Manyura be and is hereby set aside and substituted by an order that the Respondent's suit be and is hereby dismissed with no orders as to costs.
67. As the Appellant 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.
68. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

