



**Ethics and Anti-Corruption Commission v Naen Rech Limited & another (Anti-Corruption and Economic Crimes Civil Suit 3 of 2019) [2023] KEHC 19712 (KLR)
(Anti-Corruption and Economic Crimes) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 3 OF 2019**

EN MAINA, J

JUNE 29, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NAEN RECH LIMITED 1ST DEFENDANT

MAINA CHEGE 2ND DEFENDANT

JUDGMENT

1. By the Plaint dated 9th August 2012 the Plaintiff seeks Judgment against the Defendants jointly and severally for:-
 - a. The sum of Kshs 9,450,000/-
 - b. Costs incidental to this suit
 - c. Interest on (a) and (b) above at court rates

2. The Plaintiff brings the claim on behalf of the City Council of Nairobi, whose successor is the Nairobi City County Government, for the reimbursement of funds lost through an alleged irregular procurement of land parcel LR No 14759/2 situated in Athi River, Machakos District, measuring 48.30 hectares, intended for use as a public cemetery. The procurement was through an open tender advertised sometime in the Daily Nation of 18th September 2008 and the Standard Newspaper of 22nd September 2008. The Tender No CCN/MOH/T/020/08/09 culminated in the Award of the tender to the 1st Defendant for a sum of Kshs 283,000,000.



3. The Plaintiff alleges that the award was fraudulent and that part of the funds paid by the City Council of Nairobi as consideration for the land were unlawfully and illegally distributed to some public officials, private companies and other individuals for their benefit, and that more particularly a sum of Kshs 9,450,000 was paid to the 1st Defendant through its director the 2nd Defendant. The Plaintiff seeks restitution to the City Council of Nairobi for that amount together with interest.
4. The Defendants opposed the claim through a statement of Defense dated 8th October 2012. Together with the Defence they also filed a witness statement made by the 2nd Defendant and a list and bundle of documents. Both the witness statement and bundle of documents are dated 19th September 2015.
5. It is instructive to note that the suit was initially filed in the Civil Division of the High court as HCCC No 403 of 2012 and that on 23rd February 2018 it was dismissed for want of prosecution but reinstated by a ruling delivered on 6th December 2018. Upon being reinstated it was transferred to this Division and allocated the present case number: HC ACEC Civil Suit No 3 of 2019.

The Plaintiff's case

6. The Plaintiff's case is that the entire sum of Kshs 283,000,000 paid by the City Council to the 1st Defendant for the land is proceeds of corruption; that the tender was fraudulently awarded to the 1st Defendant as he was not the owner of the land LR No 14759/2 Athi River; that the tender was awarded irregularly as the tender evaluation committee's report was to the effect that none of the bids was responsive as none had satisfied the criteria of a soil depth of 1.8 meters or 6 feet and hence was not suitable for use as a cemetery; that the City Council of Nairobi entered into an unlawful agreement for the purchase of land from a party who did not bid for the tender; that the consideration of Kshs 283,000,000 was grossly overpriced compared to a market value of between Kshs 24,000,000 to Kshs 30,000,000; that out of the purchase price of Kshs 283,000,000, only Kshs 110,000,000 was paid to the owner of the property one Mr. Henry Musyoki Kilonzi (deceased) and the balance was fraudulently distributed to the 1st Defendant and other individuals. It is contended that the conduct of the 1st and 2nd Defendants was fraudulent and that they are liable to reimburse the public for the lost public funds.
7. The Plaintiff filed a total of 13 witness statements but elected to call only 4 witnesses who testified as follows:- PW1 - David Mukuri Wanjohi adopted his witness statement dated 29th April 2009; he testified that he worked at the City Mortuary as a Senior Funeral Superintendent. That he participated in the tender process in that capacity and his responsibility was to establish the soil profile of the several parcels of land and to confirm the soil depth which was required to be 1.8 metres which is what is suitable for burial of dead bodies. The land was also required to have red soil.
8. He testified that they visited the land associated with the 1st Defendant on 16th November 2008; that when they tested the soil, they discovered the land had black cotton soil of about 2 ½ feet with the remaining feet being murrum. He explained that the land was not suitable for burial because the soil did not allow for decomposition of dead bodies; that he made a report that the land owned by the 1st Defendant had not met the mandatory criteria set by the Tender Committee, hence earning the 1st Defendant zero points. He also stated that in spite of that the Tender Evaluation Committee nonetheless recommended the Award of the tender to 1st Defendant, (Tenderer No.7) having attained the highest overall combined score. He testified that to date the land is not being used as a cemetery; In cross examination, PW1 confirmed that the 2nd Defendant was present during the site visit; that the soil profile was black cotton soil at the top and then murrum as opposed to red soil; that he was a member of the Evaluation Committee and that he had dug graves and also buried and exhumed bodies for 5 years.



9. PW2 Anthony Mateng'e Itui testified that in the year 2008, he worked in the Ministry of Lands Headquarters as Chief Government Valuer, in charge of the Valuation Department; that the Ministry of Lands received two letters from the Nairobi City Council requesting for valuation of the land. The letters were dated 7th August 2008 and dated 4th November 2008. The letters were produced as PEXH 1. PW2 stated that on 6th March 2009, he received a letter (EXB P4) from the Auditor General, requesting for authentication of another letter that was attached and which was signed by one A. Otieno purportedly for the Deputy Commissioner Lands Valuation. He stated that he looked at the letter and it was not genuine and that he responded by giving a summary of why the letter was not an official letter by the Ministry of Lands-Valuations through a letter ref. No VAL/1360/19 dated 10th March 2009 (PEXH 5). PW2 pointed out several discrepancies in the letter (EXB P4) to include inter alia, that the same was dated 10th November 2008 yet the letter requesting his department to value the land was dated 13th November 2008; that his department was yet to receive a response to his letter from the Director Legal of the Nairobi City Council so the issue of him acting on the request was still outstanding. It was also his evidence that the letter (EXB P.4) was not from the Ministry of Lands as the letterhead was not the one used by his department; that his department would have issued valuation report and not a letter bearing a figure and further that his department did not have a Deputy Commissioner Lands Valuation but a Deputy Commissioner of Lands (Valuation). He also stated that the Department did not have an officer by the name A. Otieno.
10. PW3 Pius Nyange Maithya testified that he is a Valuer, employed by the Plaintiff from the year 2006; that on 7th May 2009 upon instruction of the Plaintiff he visited the land together with a team tasked with the investigation of this matter; that he inspected the land and returned a value of Kshs 30 million; that he submitted a valuation report (PEXH 6) and that the value was to apply as at the time the transaction took place. He stated that there were no structural developments on the land when he inspected it, that the area was sparsely populated and there were no utilities in the surroundings. He also testified that he based his valuation on the market price of land in the area and on the consideration that had been paid for a parcel of land in the area within that period.
11. PW4 Tabu Lwanga, an Investigator with the Plaintiff testified that the Commission's investigations revealed that the Nairobi City Council purchased the land for Kshs 110,000,000 but paid Kshs 283,000,000 occasioning a loss of Kshs 173,000,000 public funds. He produced the advertisement for the tender and the bid documents submitted by the 1st Defendant as PEXH 7(a),(b) and PEXH 8. It was his evidence that the 1st Defendant did not meet the eligibility criteria; that the registered owner of the land was Henry Kilonzi (deceased) who recorded a statement to the effect that he had not instructed Alphonse Mutinda & Co. Advocates to prepare the aforesaid letter or any letter and that his purported signature on the sale agreement was a forgery. PW4 also produced minutes of the Evaluation Committee containing the requirements and scores of the bidders and testified that none of the bidders met the requirements.
12. PW4 stated that the 1st Defendant was bidder No 7 and that it scored 0 on the criteria for soil depth; 2½ for infrastructure accessibility; 1 on accessibility to utilities and a total score of 86½ but was recommended for the tender as having purportedly achieved the highest score.
13. He stated that after evaluation, the report of the Evaluation Committee was placed before the Tender Committee together with a Valuation Report which placed the value of the land at Kshs 325,150,000/= but that the said Valuation was fraudulent as it was disowned by Mr. Itui from Ministry of Lands. He testified that the 1st Defendant's bid document (Exb.P.8) was submitted by Maina Chege (2nd Defendant) and one Winnie, the Directors of the 1st Defendant. He stated that he recorded the



statement of Henry Kilonzi (deceased) who said that he had not sold his land to the City Council of Nairobi but to the 1st Defendant which had presented itself to him as an Israeli company.

14. PW 4 stated further that the Forensic Document Examiner's Report of Antipas Nyanjwa dated 22nd February 2019 found that the signature on the sale Agreement between Henry Kilonzi and the City Council of Nairobi was a forgery. (The report by Antipas Nyanjwa was by the consent of Counsel for the parties received in evidence without the necessity of calling maker). Further that Henry Kilonzi only received Kshs 110,000,000 for the land although a sum of Kshs 283,000,000 was paid by the City Council of Nairobi for the land. PW4 stated that the balance was paid through cheques to an escrow account in the names of Odera Osiero & Co Advocates and PC Onduso Advocates with Kshs 9,450,000/- being paid to the 1st Defendant's account at Gulf African Bank Limited. PW 4 produced evidence of that payment as PEXH 18. He also produced a copy of the cheques, the account opening documents and statements for that account. In cross examination PW4 confirmed that the account opening documents belong to for the directors of the 1st Defendant, and that Mr. Henry Kilonzi confirmed to the investigation team that he never sold his land to the City Council of Nairobi.

The Defendants' case

15. The Defendants placed reliance on the Defence dated 8th October 2012, the witness statement of the 2nd Defendant and bundle of documents dated 19th September 2015. The 2nd Defendant who was the sole witness for the Defendants testified as DW1.
16. The 2nd Defendant Maina Chege (DW1) testified that he was at the material time a Director of the 1st Defendant; that initially the Impugned tender was supposed to close on 6th November 2008 but the date was adjusted to 6th October 2008; that the 1st Defendant submitted its bid documents on 6th October 2008, the same day of the closing of the tender; that the tender did not have a condition that only owners of the land were to bid and that the 1st Defendant won the tender and was issued with the letter of Award. He stated that the 1st Defendant entered into an agreement for sale of the land with Henry Musyoki Kilonzi, which sale agreement allowed the transfer of the land to the nominee of the purchaser, the 1st Defendant herein; That the consideration for the land was Kshs 283,200,000 / - whereupon the nominee paid a stamp duty of Kshs 5,664,000/- to Kenya Revenue Authority. The 2nd Defendant asserted that presently the property is registered in the name of the City County of Nairobi, the successor of City Council of Nairobi and that there has been no attempt to reverse the transfer.
17. He further testified that the tender was awarded to the 1st Defendant and not the 2nd Defendant; that the 2nd Defendant was not in any manner involved in a fraudulent scheme; that the funds were paid to the 1st Defendant; that he did not receive any amount from those funds; that the payment was therefore legitimate and this court should dismiss the case against him as he was dragged into a matter he did not participate in. He contended that the 1st Defendant bid for the tender, won it and supplied the land and hence it was legitimately paid.
18. In cross examination, the 2nd Defendant confirmed that Kshs 283,200,000 was paid by the Ministry of Local Government on behalf of the City Council; that only Kshs 9,450,000 was paid to the 1st defendant; that he was not privy to the reasons why the 1st Defendant was paid only Kshs 9,450,000/- but not Kshs 283, 000,000 as per the Award; that he wrote letters and later filed a suit against PC Onduso Advocate who failed to pay Kshs 41,200,000 into the 1st Defendant's account but paid only Kshs 9,450,000; that Henry Kilonzi was the registered owner of the land and it had never at any point been registered in the name of Naen Rech; that he represented the 1st Defendant in the contract and in the supervision of digging holes on the land for inspection by the Evaluation Committee and that he personally signed the letters and submitted the bid document to the City Council of Nairobi. He



confirmed that Naen Rech Ltd entered into a sale agreement with Henry Kilonzi for 120 acres, which was but a portion of his entire land, for a consideration of Kshs 110,000,000. He stated that he paid the deposit of 10% through Wina Flowers a sister company of Naen Rech, but he did not have proof of the payment. He also stated that Henry Kilonzi signed blank land transfer forms; that the transfer was by Henry Kilonzi to the City Council of Nairobi as a nominee of the 1st Defendant and contended that he purchased the land from Henry Kilonzi and sold it to the City Council at a profit.

Submissions by the parties

19. Learned Counsel for the parties consented to filing written submissions. Learned Counsel for the Plaintiff framed the issues from determination as follows:- Whether the tender process was irregular, the transaction fraudulent, unlawful, illegal and the entire sum of Kshs 283,000,000 represents proceeds of corruption; whether the Defendants received and dealt with public property and have been unjustly enriched to the tune of Kshs 9,450,000 at the expense of Nairobi City Council; whether by reason of the Defendants involvement in a corrupt scheme to defraud the City Council, they occasioned it loss and damage through unlawful means and are liable jointly and severally to reconstitute the Council to the full extent of Kshs 9,450,000 with interest; and which party should bear the costs and interest of the suit?
20. Learned Counsel for the Plaintiff submitted that compliance with the tender process was mandatory; that PW4's evidence was that none of the 12 bidders met the requirements as none of the trial holes had a soil depth of 6 feet, the soil profile was not the type required and that none of the land was one kilometer from a classified road. Counsel cited the case of *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) ex parte Meru University of Science and Technology* [2019] eKLR to support her submissions on the tender being unresponsive.
21. Counsel submitted that the fraud in the tender process was committed firstly, through the presentation of the forged letter by Alphonse Mutinda Advocate, informing the City Council of Nairobi that Henry Kilonzi had appointed the 1st Defendant to participate in the tender on his behalf; secondly through forgery of the sale agreement that had purportedly been entered into between Henry Kilonzi and the City Council of Nairobi for the sale of the property at Kshs 283,200,000 when there in fact was another sale agreement on the same date for the same land between Henry Kilonzi and the 1st Defendant for Kshs 110,000,000; thirdly, through the forged valuation report by one A. Otieno which valued the land at Kshs 325,000,000 which valuation was disowned by the Ministry of Lands; that the value of the land was between Kshs 24,000,000 to Kshs 30,000,000 as testified by PW3 and PW4; that the Defendants through a corrupt scheme conspired with other persons to unlawfully defraud the City Council of Nairobi by inflating the purchase price; that what remained of the Kshs 283,000,000 was not paid to the owner of the land Henry Kilonzi but was distributed amongst other persons including the Defendants.
22. On the 2nd issue, Counsel submitted that the 1st Defendant defrauded the City Council of Nairobi of Kshs 9,450,000; that the 1st and 2nd Defendants received the monies through a cheque No 030348 corresponding with the bank statement of the 1st Defendant and that therefore the Defendants were unjustly enriched.
23. On the 3rd issue, Counsel stated that under Section 55 of the *Anti-Corruption and Economic Crimes Act* (ACECA) the Defendants are jointly and severally liable for the loss of Kshs 9,450,000 with interest; that the Defendants unlawfully acquired public property; that the transaction was fraudulent and illegal and for that reason that the entire sum of Kshs 283,000,000 paid out by the City Council is proceeds of corruption; that the 1st Defendant was not the owner of the parcel of land; the 2nd



Defendant was a principal party in the fraudulent scheme; the Defendants conspired with each other and with other persons known to them to defraud the City Council of the said public money and the Defendants received the funds with knowledge that they were not entitled to the same. That further the Defendants directed the manner of disposition of the funds paid out by the City Council to several other persons.

24. Lastly on costs, Counsel submitted that the Defendants had the opportunity to return the monies to the City Council prior to the filing of this suit but they failed to do so, that they further failed to honour demand notices sent by the Plaintiff and as such they should be condemned to pay the costs of the suit.

Submissions of the Defendants

25. The Defendants relied on their written submissions dated 31st March 2023. The Defendants contended that the 2nd Defendant was not involved in the transactions as an individual; that the 1st Defendant is a juristic person as held in the celebrated case of *Salomon v Salomon* (1987) AC 78 and that, as such, no evidence linked the 2nd Defendant to the transaction. Learned Counsel for the defendants stated that the bid document did not forbid bidding unless one had land which was registered in their names; that the 1st Defendant complied with all the requirements for the tender; that no evidence linked the 1st Defendant to the valuation report for Kshs 325,158,000 and that the alleged valuer A. Otieno was never sanctioned and no action was brought against him. On the value of the property, Counsel stated that the City Council of Nairobi has never filed a claim for recovery of the overpayment of Kshs 80,000,000 which is the alleged value over and above the market value of Kshs 30,000,000 and there is therefore no reason to pursue the Defendants for Kshs 9,450,000. Counsel contended that the property was purchased from Henry Kilonzi and sold for profit to the City Council of Nairobi; that Henry Kilonzi never disputed the agreement for sale, or having been paid Kshs 110,000,000 by the 1st Defendant for it.
26. Counsel further submitted that the City Council of Nairobi is currently registered as the owner of the suit property LR No 14759/2 Athi River and there has been no action to re-transfer the land back to the seller; that the tender process was lawful; that the City Council of Nairobi obtained the land it tendered for; that the particulars of fraud and conspiracy were not proved and that the law requires that fraud be pleaded and proved beyond reasonable doubt. To support this submission Counsel cited the cases of *Moses Parantai and Peris Wanjiku Mukuru v Stephen Njoroge Macharia* [2020] eKLR and *Vijay Morjaria v Nansingh M D and another* [2000] eKLR.
27. Counsel further asserted that the judgments in HC ACEC Civil Suit No 2 of 2016 and HC ACEC Cr. Appeal No 5 and 6 of 2018 cited by the Plaintiff to prove that the Defendants were involved in a corrupt scheme to defraud the Council are not relevant in the circumstances of this case; that it has not been demonstrated that the 1st Defendant breached any procurement laws; that PC Onduso Advocate did not have instructions to disburse the sales proceeds as he purported to do; that the 1st Defendant lodged a complaint with the Ethics and Anti-Corruption Commission against the said Advocate for paying the proceeds of the sale to other parties and that Henry Kilonzi supported the Defendants' case against PC Onduso Advocate in HC Civil Suit No 181 of 2009 (OS).
28. Counsel stated that Kenya is a free-market economy that operates on a willing buyer/ willing seller basis; that the 1st Defendant won the tender and delivered the land at the agreed price hence making a profit and this court cannot be used to bargain the price on behalf of the City Council of Nairobi; that the City Council of Nairobi can recover the price if it sold the grave sites at the current market value of Kshs 15,000 per grave and hence raise a sum of Kshs 1,800,000,000 for the entire parcel of land. Counsel further placed reliance on the case of ACEC Suit No 6 of 2018 *EACC v Catherine Nkirote & 2 others* [2020] eKLR and urged the court to dismiss this suit with costs.



Analysis and determination

29. There is no doubt that the Plaintiff is vested with the mandate to pursue recovery or compensation of lost public funds under Article 252 of the Constitution and Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act, which law provides that:

“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall:-

.....

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.....”

30. The commission is also enjoined to bring recovery proceedings on behalf of public bodies under Section 53(3) of the Anti-Corruption and Economic Crimes Act (ACECA).

31. The Proceedings herein concern public funds which were expended to purchase land for use as a public cemetery. It is alleged that the procurement process was flawed and that certain persons corruptly benefitted from the transaction. The Plaintiff is clearly therefore seized with jurisdiction to bring this claim and the only issues for determination are:

- a. Whether the Award of the tender by the City Council of Nairobi for the purchase of Cemetery land was fraudulently awarded to the 1st Defendant.
- b. Whether the 1st and 2nd Defendant were unjustly enriched in the sum of Kshs 9,450,000 public funds received from the Nairobi City Council and whether the 1st and 2nd Defendants are jointly and severally liable to reconstitute as prayed in the plaint.
- c. Who shall bear the costs of this suit?

Issue (a): Whether the Award of the tender by the City Council of Nairobi for the purchase of Cemetery land was fraudulently awarded to the 1st Defendant.

32. On whether the tender for the purchase of the cemetery land tender no CCN/MOH/T/020/08/09 which resulted in the purchase of LR No 14759/2 situated in Athi River, Machakos from the 1st Defendant was illegal and unlawful, the Plaintiff contends that the tender process was irregular, fraudulent and a corrupt scheme to defraud the City Council of Nairobi; that the Tender Committee awarded the tender to a bidder whose bid was not responsive within the meaning of Section 64(1) of the Public Procurement and Disposal Act 2005; that all the tenders ought to have been rejected under Section 49 of the Regulations; that similarly, as the procuring entity the City Council of Nairobi ought to have rejected the tenders which were not responsive under Section 48(1) of the Regulations. On their part the Defendants contended that the tender process was above board; that nothing stopped the 1st Defendant from bidding even though it was not the registered owner of the land; that Kenya is an economy of willing buyer/seller; that the Award of the tender to the 1st Defendant was lawful; that the 2nd Defendant ought not to be a party in this case as he did not take part in the tender and that the 1st Defendant should be allowed to enjoy the profit it made from the tender.



33. A tender is responsive if it conforms to all the mandatory requirements in the tender documents. This is as provided in Section 64(1) of the [Public Procurement and Disposal Act 2005](#)(repealed) which states:-

“ 64.

(1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.”

34. Regulation 48(1) of the [Public Procurement and Disposal Act Regulations 2006](#) (repealed) enjoin procuring entities to reject all tenders which are not responsive. The Regulation states:-

“ 48.

(1) A procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act.”

35. The evidence of PW1, who was a member of the tender evaluation committee, was that none of the bids submitted was responsive; that none of the lands they inspected satisfied the mandatory criteria for a soil depth of 1.8 meters or 6 feet and none were therefore suitable for use as a cemetery; that particularly for the 1st Defendant, the soil profile was not the type required in that the soil profile was black cotton soil at the top followed by murram as opposed to red soil and further that none of the parcels of land was a kilometer from the road as specified in the tender. It is my finding therefore that in the circumstances the bids all ought to have been rejected and the bidders informed accordingly as was provided in Section 65 of the Public Procurement and Disposal Act 2005. It is also worth noting that the mandatory criteria was ignored when evaluating the tender leading to the 1st Defendant being awarded even though its land was not fit for the purpose either in the soil depth or the type of soil. The award of the tender to 1st Defendant was therefore irregular.

36. Again, from the evidence, the 1st Defendant received the letter of Award on 13th November 2008 while the letter of Acceptance of the Award is dated 24th November 2008. Its tender document is dated 6th October 2008. The tenders were opened on 9th October 2008 between 12.45 pm and 1.55 pm and evaluated on 19th October 2008. I have gone to the trouble of setting out the above dates so as to demonstrate that as at the time of putting in its bid and as at the time of the Award the 1st Defendant did not have an interest in the land which it purported to sell to the City Council of Nairobi. This is given that its agreement with Henry Kilonzi, the owner of the land, is dated 19th December 2008. Land is not any other commodity and for one to pass title to a purchaser it is requisite that one must have an interest in the land. Perhaps it was because of realization of that principle of law, that the 1st Respondent purported to invoke an agreement for sale which had purportedly been executed by the registered owner of the land. That however did not help matters as the agreement was disowned by the said Henry Kilonzi (deceased) in a statement which he recorded with the Ethics and Anti-Corruption Commission and which was admitted as evidence by an order of this court (Onyiego J) dated 16th October 2018. It was based on that sale agreement which was confirmed to be a forgery by one Antipas Nyanjwa a Document Examiner, that the Nairobi City Council paid a sum of Kshs 283,000,000 for the land. So not only was the 1st Defendant’s tender unresponsive but the 1st Defendant also had no interest in the land that it purported to sell to the City Council of Nairobi.

37. Further there was evidence that the consideration for the land was anchored on a fraudulent evaluation report. Antony Mateng’è Itui (PW2) disowned the letter from A. Otieno which purported to value the property at Kshs 325,150,000. It is my finding that he gave cogent reasons for so doing. Firstly, there was no such officer as A. Otieno in the Valuation Department of the Ministry of Lands. Secondly the letter



by A. Otieno preceded the letter written to Mr. Itui (PW2) by the City Council asking for valuation of the land. Mr Itui (PW2) also explained that his department would have presented a valuation Report but not a letter as had been done by A. Otieno. Clearly therefore the value attributed to the land by A. Otieno was intended to deceive and the same was therefore fraudulent. So in addition to the tender not being unresponsive for reason that the land was not fit for the purpose and in addition to the 1st Defendant not having an interest in the land and the agreement for sale upon which it was subsequently paid being a forgery the purchase price was also based on a fraudulent valuation report.

38. It is also not disputed that out of the Kshs 283,000,000 paid by the City Council for the land only a sum of Kshs 110,000,000 was paid to Henry Kilonzi, the registered owner of the land. The balance of Kshs 173,000,000 was distributed to other persons who were not parties to the agreement, some of them being officers of the City Council. Indeed, two such officers were convicted for corruption offences in relation to this very tender in Nairobi CM ACC No 44 of 2010 *Republic v Boniface Okerosi Misera & another* (unreported) and their conviction upheld in HC ACEC CR Appeal No 5 and 6 of 2018. (consolidated) – *Boniface Okerosi Misera & another v Republic* [2018] eKLR the Judge finding as I have done that Naen Rech had no land to sell and so was not eligible to tender; that the tender process was flawed as no bidder qualified; that Naen Rech was irregularly awarded and that the valuation report which informed the price of the land did not originate from the valuation department of the Ministry of Lands.
39. A similar finding was made by Mumbi Ngugi J, (as she then was) in the Case of Ethics and Anti-Corruption Commission v Stephen Kamau Githinji HC ACEC Suit No 20 of 2016, when she stated that “there was a corrupt scheme to defraud the council of funds amounting to Kshs 283,000,000.”
40. Learned Counsel for the Defendants submitted that the above judgments are not relevant to this case. It is however, my finding that these judgments are admissible under Section 45 of the *Evidence Act* and as I agree with the findings thereat, they are relevant.
41. My finding on issue (a) above is therefore that the Award of tender to the 1st Defendant for the purchase of LR No 14759/2 for Kshs 283,000,000 was irregular and unlawful and hence fraudulent and that fraud has been proved to the required standard.

Issue (b): whether the 1st and 2nd Defendants were unjustly enriched in the sum of Kshs 9,450,000 received from the City Council of Nairobi and whether they are jointly and severally liable to reconstitute the Plaintiff as prayed in the plaint.

42. Having come to the conclusion that the tender process was flawed and the Award of that tender was fraudulent it follows that the payment of Kshs 9,450,000 to the 1st Defendant amounted to unjust enrichment. Whereas this court is alive to the principle that the 1st Defendant being a body corporate is separate from its directors it finds that given that all the fraudulent actions leading to the award to the 1st Defendant were carried out by the 2nd Defendant he is equally liable with the 1st Defendant. That therefore the 1st and 2nd Defendants are jointly and severally liable to the Plaintiff on behalf of the Nairobi City County Government, the successor of the City Council of Nairobi in the sum of Kshs 9,450,000.
43. The interest payable for claims such as this one is provided for in the *Anti-Corruption and Economic Crimes Regulations, 2003* which states: -

“

3. Interest on compensation etc.



- (1) The interest prescribed for the purposes of Section 53(1) of the Act is twelve percent per year.
- (2) For the purpose of subsection 53(1) of the Act, for each amount for which a person is liable under Section 51 or 52 of the Act in relation to the loss suffered or benefit received interest is payable from the date the loss was suffered or the date the benefit was received.”

44. The sections referred to are Sections 51, 52 and 53(1) of the *Anti-Corruption and Economic Crimes Act*. In this case the City Council of Nairobi made a loss while the Defendants obtained a benefit and interest shall therefore be calculated at 12% per year from the date the sum claimed was paid to the 1st Defendant.

Issue (c): Who should bear the costs of this suit.

45. Costs follow the event and the Defendants shall therefore bear the costs of the suit.
46. The upshot Final Disposition is that I find that the plaintiff has proved its case on a balance of probabilities and accordingly there shall be judgment in its favour against the 1st and 2nd Defendants jointly and severally for: -
 - a) The sum of Kshs 9,450,000.
 - b. Interest on the above amount at 12% per annum from the date the amount was paid to the 1st Defendants.
 - c. Costs of the suit.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JUNE, 2023.

E N MAINA

JUDGE

