



**Optic Technologies Kenya Limited v County Assembly of Vihiga;
Ethics and Anti-Corruption Commission (Interested Party) (Civil Case
1 of 2021) [2023] KEHC 22833 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL CASE 1 OF 2021
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

OPTIC TECHNOLOGIES KENYA LIMITED PLAINTIFF

AND

COUNTY ASSEMBLY OF VIHIGA DEFENDANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. The suit herein is by the plaintiff, against the defendant, for a sum of Kshs. 19,441,000.00, plus costs and interests. The plaintiff claims that it was awarded 2 contracts by the defendant, to supply and install conference systems at Kshs. 5,996,000.00, and for supply of an interior design and structured data network of the defendant's Chamber at Kshs. 13,445,000.00. The plaintiff alleges that it used its own resources to perform the contracts, and that it handed over the 2 systems to the defendant, but it has not been paid the contract sums to date. It asserts that there was breach of the terms of the contracts, that the payment was to follow immediately upon completion and handover of the works.
2. The defendant filed a defence, where it denied every allegation made in the plaint.
3. The interested party was joined to the proceedings, vide orders made in a ruling delivered on 31st January 2019, on its own application. It was given 30 days to file and serve pleadings.
4. Directions were given on 23rd September 2019.
5. The oral hearing commenced on 25th November 2019. The first witness was Mr. Desmond Juma Lusweti. He was the Chief Executive Officer and a director of the plaintiff. He testified that the plaintiff had gotten 3 contracts from the County Government of Vihiga. He executed all 3, was paid for 1, and



not the other 2, hence the suit. He stated that the plaintiff was shortlisted for the 2 contracts. The suit is about the 2 contracts that were not paid for. He said that it started off with a request for quotations, dated 12th May 2014, for the conference system and the interior design data and structure network for the Chamber. Upon receipt of both requests, the plaintiff made quotations on both. It quoted Kshs. 5,996,000.00 for the conference system, and Kshs. 13,445,000.00 for the interior design and soundproof system. The plaintiff was then issued with tender offers, vide 2 letters dated 30th September 2014. The plaintiff accepted the offers vide 2 separate letters, dated 7th October 2014 and 8th October 2014. The 2 contracts were thereafter signed on 9th October 2014, between himself as director of the plaintiff and the Clerk of the defendant. The plaintiff performed the 2 contracts within 2 months. The plaintiff was thereafter given certificates of completion, dated 10th October 2014 and 26th November 2014, respectively. The plaintiff issued delivery notes, and surrendered them to the defendant, but was never paid for the works done and the systems delivered.

6. During cross-examination, the witness asserted that the work was done for the defendant based on the contracts. He stated that the completion certificates indicated that the work was inspected by the Internet Communications Technology (ICT) and Hansard teams. He said that there was variation of the terms of the contracts. He said that the plaintiff was shortlisted for the tender award, and that there was a letter to that effect. He said that he entered into the contracts on 9th October 2014, and the contract was performed within 1 day, for supply of conference facilities. He stated that it was a wireless system, that could be supplied within hours. He stated that the plaintiff did training the same day the system was delivered. The delivery and training was at Vihiga High School. He indicated that the equipment had been imported earlier, and was in store at the time the contract was entered into.
7. The defence case opened on 27th February 2020. Ms. Juliet Asila Ambune testified for the defendant. She was a Senior Procurement Officer with the defendant. She had worked for the defendant since 1st April 2014. She testified that when she joined employment with the defendant, the process of pre-qualification was going on, and she was not privy to it. She stated that there was a list of pre-qualified suppliers, and the plaintiff was in the list, as supplier of computers and computer hardware and software, among others. She asserted that the nature of the contracts alleged by the plaintiff did not make them suitable for pre-qualification, and they ought to have been through open tender, with clear specifications and bills of quantities from a technical person. Suppliers and contractors ought to have been invited to quote openly and the process that applies in open tenders followed. She asserted that that was not done. She stated that the applicable law was the Public Procurement Act, 2005, which required that a tender opening committee, appointed by the accounting officer, would have opened the tender, and recorded its contents in the minutes of the committee. An evaluation and tender processing committees would have been appointed to process and evaluate the tender, and forward their reports to the tender committee. The tender committee would have then advised the accounting officer on who qualified to be awarded the contract. She asserted that there was no tender committee with regard to the matter, that no contract was awarded, and no contract existed. She stated that procurement contracts were kept at the procurement office, and she only learnt of the said contracts after the plaintiff sued. She referred to the letter of demand from the plaintiff, dated 22nd July 2016, saying that she was not privy to the bill of quantities referred to in that letter. She said that the letter was responded to, indicating that the defendant was not aware of the contracts, and asking to be furnished with details and proof, but no proof was forthcoming. She stated that the process was illegal for surpassing the tendering process. She said she was not aware of any assessment having been done with regard to the works the subject of the suit. She also stated that she was not aware of the systems being installed, and staff trained. She said that the certificates of completion were fraudulent documents. She urged the court to dismiss the claims, as the work was not done and the services were not provided, to warrant the payments sought.



8. During cross-examination, by Mr. Bii for the interested party, she stated that the works had not been budgeted for, and there were no funds for it. She further stated that there should have been a procurement plan, and bills of quantities done by a technical person from the defendant or the County Executive. She also stated that there should have been a requisition by the defendant. She asserted that there should have been ad hoc committees to open the tenders, and there should have been bonds, bid bonds and performance bonds. She said that there should have been tender evaluation committees and a tender committee, which should have evaluated the tenders, and kept minutes. She raised issue with the letters of 12th May 2014, being requests for quotations, which she said should have been in standard form, rather than taking the form of the letters. She stated that such requests for quotations ought to have emanated from the procurement office rather than from the Clerk of the defendant, and should not have been signed by the Clerk of the defendant. She said that the tender offer letters, dated 30th September 2014, and the tender acceptance letters, dated 7th October 2014 and 3rd October 2014, were not in the records of the procurement office, and have never been in their custody. She stated that she was summoned by the interested party, and was confronted with the documents, and was asked to clarify. She explained that before the procurement office could pay on any tender or contract, it ought to have had received a requisition from the user of the equipment or goods, tender opening minutes, tender procuring minutes, tender committee minutes, a letter communicating award of the contract or tender, inspection certificates and reports, and payment certificates signed by technical people approving the payments. She stated that the procurement office did not have any of those documents, and payments could not be processed in the circumstances. She stated that the interested party questioned 5 Service Board members of the defendant, members of the tender processing committee, members of the tender committee, and persons who had signed the completion certificates provided by the plaintiff. She confirmed that the works were not paid for, for they had not been done, the equipment meant to be supplied had not been supplied, and she recommended that the court visits the site.
9. At cross-examination by Mr. Makokha, for the plaintiff, she stated that the procurement office had been fully formed by the time she joined the defendant. She denied that it was the Transitional Authority dealing with procurement at the time. She said she had no documents to show who renovated the Chambers at the defendant, and could not tell whether data networking and sound proofing was a part of the renovation. She said that no Hansard system was installed at the new Chambers. She also stated that she was not privy to the renovation. She stated that she was the custodian of all procurement contracts. She stated that the Clerk of the defendant, as accounting officer, used to handle all communication between the defendant and outside entities. She conceded that the letters of 19th May 2014, were from the then accounting officer. She stated that she was not aware whether the then accounting officer handed over to his successor. She testified that there was a completion certificate signed by Mr. Michael Oloo, who she said was still working for the defendant, and Mr. Silas Obwatsa, as head of Hansard and Chair of inspection team and user department. She stated that Mr. Obwatsa had not been arrested and charged with signing a forged document. She also stated that she knew the late Agnes Alosa, who was an officer at the ICT office, and who would have been one of the end users of the equipment to be supplied. She confirmed that there was a Hansard system in place at the Chambers of the defendant. Regarding the delivery notes, she stated that they were received by the Clerk of the defendant, instead of being received by a stores clerk. She affirmed that the plaintiff was pre-qualified for supply of computers and related equipment and software. She identified the Hansard as specialized equipment, but stated that the law did not allow direct procurement of such equipment. She stated that the procurement office sometimes sent quotes to pre-qualified contractors, for the purpose of selecting the best among them to provide the services they wanted. An evaluation committee, to evaluate the quotes, would sit and come up with a report, and



forward recommendations to the tender committee, after which the accounting officer communicates to the winning tenderer. She said she had not evaluated the genuineness of the contracts, as she had not been aware of them. She said that the contracts were allegedly fraudulent, hence she did not bother to check on the equipment allegedly installed or supplied.

10. During re-examination, she stated that Mr. Obwatsa was not present at assessment, and that he only signed the certificates. She said that in her opinion, Mr. Obwatsa was not qualified to sign the completion certificates. She said that she was not a member of the ICT technical committee. She confirmed that the system was functioning, although it was not operating well. She stated that Mr. Musambayi, the then accounting officer, did not handover to her. She stated that the contracts did not qualify for requests for quotations for the amounts quoted, and the 2 ought to have gone through the open tender process.
11. The case for the interested party opened the same day. The interested party called 12 witnesses, all employees of the defendant. Mr. Onzere Benson Mudangale was the first on the stand. He was an external member of the Service Board for the defendant. He stated that part of the mandate of the Board was approval of budgets and procurement of services. He stated that he was shown documents by the interested party, which were said to be questionable. He was seeing them for the first time. He stated that previous to that the Board had disciplined the Clerk for the defendant, after which several people and entities, including the plaintiff, came forward to claim that they had supplied goods and offered services to the defendant, and had not been paid. The Board then invited them to confirm whether or not they had supplied what they alleged. The representative for the plaintiff, Mr. Lusweti, came forward, and was asked to avail documents to facilitate payment, as there were no documents, in the possession or custody of the defendant, evidencing that the plaintiff had supplied goods or offered services to the defendant. Mr. Lusweti stated, according to the witness, that he had no documents with him. He was asked for Local Purchase Orders (LPOs) and contracts documents, but he had no such documents, and he said that the order to supply was done verbally. The witness stated that without such documents, the Board could not authorize payment. He stated that action was taken on the Clerk, Mr. Musambayi, and he was replaced with Mr. Ambaka Kilingi, and that Ms. Linnet Mugalizi also acted for some time as Clerk. He explained that the Board reported the issues about Mr. Musambayi to the interested party. He stated that the interested party showed them documents, which the defendant did not have, and which he did not know where they came from.
12. During cross-examination, he stated that the Board discussed, and agreed that the items were not handed over to the defendant. He stated that he became a Board member in December 2013, and that prior to that the Transitional Authority carried out the duties that were later taken up by the Board, including procurement. He stated that the Board was established in 2014/2015. He said that the Chief Executive Officer of the defendant was the Clerk, and it was he who was supposed to communicate the decisions of the Board to the outside world. It was him who was supposed to communicate with the winning bidders. He stated that the Clerk, at the time the alleged contracts were signed, was Mr. Musambayi, and in that capacity he had authority to sign the contracts. He stated that there was renovation of the Chamber of the defendant, and the Board was informed by the Clerk that that was undertaken by the plaintiff. He stated that the Hansard was never procured. He stated that the system in use had been given to the defendant by the Transitional Authority. As for the soundproofing and networking, he stated that the Board did not authorize payment, as there were no documents supporting the contract and the payment. He stated that the Clerk had the documents, but he did not hand them over to anyone. The Board had waited for him to handover, after his suspension, but he never came back to the defendant. He said that some documents were at the stores, and elsewhere, and the records could be reconstructed. He added that the Board had no issues with the plaintiff, and that the only problem there was was with documentation. He said that he had no minutes of the Board



meeting, where the plaintiff failed to produce documents. He said communication of the decision of the Board ought to have been made to the plaintiff by the Chair of the Board, and that he had no record of the communication from the Board to the plaintiff. He said that Mr. Patrick Kamoyani was the head of the Hansard Department, while Mr. Obwatsa was a member of the department. He stated that if Mr. Obwatsa signed the contracts, then he did not sign for the defendant, as the contract ought to have been signed by the head of the unit. He said no action was taken against Mr. Obwatsa, and that Mr. Obwatsa was never invited to appear before the Board to explain himself. He further stated that no action was taken against anyone with relation to the matter. He said that as a Board, they had not paid the plaintiff, although he was aware that the plaintiff did some work in relation to renovation and interior design and data networking.

13. At re-examination, he said that Mr. Musambayi was suspended because he was making unilateral decisions, including those relating to the contracts the subject of this suit, without involving the Board. He asserted that Mr. Musambayi should have been obtaining Board approval first. He stated that he was aware that the plaintiff did some works, relating to interior design and renovation, adding that the problem was with lack of documentation. He stated that the plaintiff took the Board to the site. He said that the Board did not sit and approve the works, which was a mandatory requirement, and that the Board was just told that renovation and interior design had been done. He said no payment was done, because there were no supporting documents. He said that there was no malice against the plaintiff, and that the entity ought to provide documents.
14. Mr. David Ogova Mulayi followed. He was a Member of the County Assembly (MCA) and the Majority Leader in the defendant. He was also a member of the Board at the material time. He stated that the Board impeached Mr. Musambayi, and suspended him, for not following the law relating to procurement, including in the instant case. After Mr. Musambayi was removed, the Board invited the representative of the plaintiff, among others, but he was unable to produce documents to support the claim by the plaintiff. He told them that the order was made to him verbally. He said that the Board was also summoned by the interested party, but they were not shown any documents. He said the contracts had not been approved by the Board. He said that he was not aware whether the contracts were paid. He stated that the Hansard being used by the defendant had been purchased through the County Executive. He said the defendant used to sit at the old Chambers of the County Council, before it moved to Vihiga High School, to give room for refurbishment of the Chamber.
15. During cross-examination, he stated that he was not a member of the Board in 2014. He stated that in 2013/2014 the defendant sat at the old Chamber, before moving to Vihiga High School, to pave way for refurbishment. He said that the defendant moved to the venue at Vihiga High School with all the equipment formerly at the old Chamber. He further stated that in the new Chamber new equipment or system for voting and recording was installed. When the defendant moved back to the new Chamber, from Vihiga High School, it did so with its old equipment. He confirmed that the refurbishment was done, but he could not tell the company which did it. He said that Mr. Musambayi was the Clerk then, and was the one who did communication of the decisions of the Board with outsiders. When shown the letters of 12th May 2014, inviting quotations, he stated he believed that they were written by the Clerk. He stated that the records of the Board were kept by the Clerk. He said he did not have a copy of the letter that invited the plaintiff to the Board meeting, saying that it was the acting Clerk who had made the invitation. He said that minutes were also taken by the acting Clerk, although, he confirmed, the minutes had not been placed before the court.
16. At re-examination, he said that the Clerk was suspended because he had done procurement contrary to the law. He stated that the equipment in the new Chamber was what they were using at Vihiga High



- School, and he was unaware that a new system was bought. He said that Mr. Musambayi kept some records, and that there must be some minutes of all these matters, even after Ms. Mugalizi took over.
17. Mr. Patrick Bunyali Kamoyani followed. He was an employee of the defendant, as head of ICT. He stated that in that capacity he had to be involved, as the technical person, with respect to acquisition of any ICT equipment. He said that he was not involved in the procurement of the equipment and the systems in dispute, although he was on duty when the contracts were entered into. He said he was on duty on 10th October 2014, when Mr. Michael Oloo signed the contract as acting head of ICT. He said that ordinarily a person could not act for someone who was on duty. When cross-examined by Mr. Aringa for the defendant, he stated that the statement that had been filed in court was first placed before him for the first time when he appeared before the interested party at Kisumu. He asserted that he never signed any document relating to the matter. When cross-examined by Mr. Makokha, he said that although there were duty registers, he had not provided one to show that he was on duty at the material time. He said that Mr. Oloo was still in the employment of the defendant, but he could not tell whether he was required to record any statement. He said that he was not in charge of the Hansard, saying that there was a section head for the Hansard, and both he and the head of Hansard reported to the Clerk. He said that Mr. Obwatsa was in charge of the Hansard section. He said when someone signed a document, it meant that he had verified it, and that if Mr. Obwatsa signed any document, then that meant that he owned it. At re-examination, he stated that Mr. Michael Oloo was in charge of payroll at the defendant, at the time of the testimony, and prior to that he was a personal assistant to the former Clerk. He said that he was not working in the ICT department, and he could not have, therefore, acted for ICT.
18. Ms. Brenda Ajema Kalegera testified next. She was an employee of the defendant, on the audit section. She had been appointed to the tender committee. According to her, the plaintiff was never awarded the tenders in question. She stated that the contents of the contracts ought to have been signed and delivered, and that that was not the case with the contracts alleged by the plaintiff. She said that in the course of her duty she did not audit any contract involving the plaintiff, as there never was any such contract. During cross-examination by Mr. Aringa, she stated that the tender committee did not see how the plaintiff was identified in the first place, although its name had been put on the pre-qualification list. She said she did not know how the plaintiff was awarded the contracts, and that she did not see any of the works done by it. During cross-examination by Mr. Makokha, she conceded that an auditor ought not sit in the tender committee as he or she could eventually audit the material at a later stage. But she added that she sat at the tender committee, and she did not conduct any audit at the time. She said that she had no minutes of the meetings of the tender committee that she sat at. She conceded that the former Clerk had signed the tender and contract documents, and that he had authority to sign them.
19. Mr. Silas Obwatsa Omukaya testified next. He was the Hansard Editor for the defendant, and the head of the Hansard section. He was an employee of the defendant when the contracts were entered into. He said that he was not involved in the procurement of the Hansard equipment, adding that by the time he was employed there was a system in place, and no other system was brought in after he was employed. When shown the 2 contract documents that he had signed, he stated that he was invited to the office of the former Clerk, and was asked to confirm whether there was a functional Hansard system, there was an existing system, and all what was required of him was to confirm that it was working. He stated that he went to the former Clerk, and confirmed to him that the system was working, so that he could pay. He said that he did not take part in the procurement of the system. During cross-examination by Mr. Aringa, he confirmed that he signed the documents in question on 26th November 2014. He said that he signed after the former Clerk asked him to ascertain whether there was a working system, which he did. He said that he signed a document to facilitate payment for the system. When cross-



- examined by Mr. Makokha, he stated that he signed 2 completion documents, adding that before he signed he was asked by the Clerk to confirm that the system was functional, and that he signed after he had ascertained that it was working. He said he was told to sign so that the supplier could be paid. He said that if there was no system he would have not signed the documents, and that he signed after he had verified, and that the signing was for authenticating the documents.
20. Mr. Moses Abwenje Akhavere testified next. He worked in the transport section of the defendant. He was a member of the tender committee. He testified that the plaintiff was one of the pre-qualified suppliers during the transition period. He said that he approved the tender for the plaintiff although he could not verify what it was for. He said that as members of the tender committee, they did not procure the Hansard system. He stated that the former Clerk wrote to them, but the tender committee did not sit to approve the procurement of the Hansard. When cross-examined by Mr. Makokha, he stated that he sat in the tender committee only when there was an issue relating to transport, and he would not be invited to sit at the tender committee to discuss ICT or Hansard equipment.
21. Ms. Judith Kadesa Osire testified next. She was in the tender processing committee in 2013/2014. She stated that the plaintiff was one of the entities that had applied to be pre-qualified for various tenders. The process had been advertised through newspapers. During the tender processing, the plaintiff was pre-qualified for supply of computers, printers and computer systems. When cross-examined by Mr. Aringa, she stated that she did not know whether the contract was awarded to the plaintiff, for her role ended at the pre-qualification stage. When cross-examined by Mr. Makokha, she stated that the plaintiff was a pre-qualified supplier. She did not have the minutes to support that, saying that she was not aware that the minutes were required. When she was shown her statement, she said that she did not know what servers were, and what they were used for. She said that she did not know what a Hansard was, and could not tell whether it was a computer software. She said the plaintiff was a pre-qualified supplier for computer and computer software. She said she was not in the tender award committee, but in the tender processing committee. She confirmed that it was the Clerk who was supposed to communicate with external persons and entities. When shown the letters and documents dated 12th May 2014 and 30th September 2014, she confirmed that they had been signed by the Clerk, the person who was authorized to sign them. However, on whether the tenders were awarded, she stated that she was not privy to that process. At re-examination, she raised issue with the letterheads and the date stamps used, saying that they were different from what was in use then.
22. Mr. Daniel Chitwa Chengenye followed. He was the Speaker of the defendant at the material time. He stated that when he took office, the new County government structure was being rolled out, and acquisition of a Hansard was one of the things they had to do. It was acquired with funds availed by the Transitional Authority. The infrastructure inherited from the defunct local authorities was also dilapidated and inadequate, and there was need to renovate it to accommodate the new structures of governance. The plaintiff supplied the initial Hansard machine, at the request of the Transitional Authority, and was paid by the County Government treasury. He stated that when he ceased to be Speaker in 2018, the Hansard system bought by the Transitional Authority was still the one in use. When the defendant moved to Vihiga High School, the system was still functional, and there was no need for a new one, hence the same was moved to Vihiga High School. The only request made was for the entity that had supplied the same be used to maintain it and related machines. The plaintiff was requested to move the Hansard system to Vihiga High School, and to install the same. The same system was transferred back to the renovated Chamber, after the renovation exercise was completed. The plaintiff, after the move back to the refurbished Chamber, was requested to install the digital microphones that had been supplied earlier, when the Hansard machine was first acquired. On procurement, he stated that the Board needed to be informed of what the departments required, and the Board would consider whether the request complied with the authority of the defendant. In



his view, the request, in the letter dated 12th February 2014, signed by the former Clerk, was by the Transitional Authority, and it was up to the Transitional Authority to liaise with the former Clerk. He explained that it was for the user department to make the request for the items required. He stated that in 2014 the defendant had no departments, and procurement was done by the central procurement unit of the defendant, in consultation with the Transitional Authority. In his view, the procurement should have been done by liaising with the central procurement unit. He stated that the procurement was not done properly, for the tender documents placed on record were not copied to him as Speaker, who would have forwarded them to the Board, for deliberation. He then said that there was indication that they were copied to him as Speaker, but there was no evidence that they were received by his office, which meant that they were not generated. He said the Board did not deliberate on the said letters, as the same were never received at his office. He said that he got to know of the letters, when the Auditor-General required the defendant to audit the major suppliers, and contracts that had been offered, and classified as pending. They invited all those who were alleging that they were owed by the defendant, and they also involved the Directorate of Criminal Investigations. He stated that Mr. Lusweti was invited on behalf of the plaintiff, and he attended a meeting before the Board, and said he requested to be assisted as he had only been given a letter of offer by the former Clerk, to enable him secure a loan facility, without tendering. He said that the former Clerk, who was behind those anomalies, was later dismissed, but it was established that he still had seals and stamps of the defendant, and he could still generate documents. He stated that up to 2015/2016, the defendant did not have its own procurement unit, and one was set up in 2016, after procurement officers were employed. Prior to 2016, procurement was done through the County Executive procurement unit, housed within the treasury of the County Executive.

23. During cross-examination by Mr. Aringa, he stated that he knew that the plaintiff supplied the Hansard through the Transitional Authority. He stated that as the defendant had no expertise to move the system to Vihiga High School, they turned to the plaintiff to help them relocate the system. He said that the system was by then newly supplied, and it only required maintenance. He stated that it was the plaintiff who supplied the Hansard system, and installed it. When cross-examined by Mr. Makokha, he stated that the interior design was done by George Miyiera, an engineer, and so was the Speaker's unit. He said that the Clerk had custody of the documents. He said he was the user of the Speaker's unit, and he knew who supplied it. He said that the Hansard and the interior design were paid for by the Transitional Authority, and were paid through the County Government treasury, although he had no documents to support that. He explained that the defendant had no procurement unit, and that the same was then centralized, at the County Executive. He stated that the Clerk was the accounting officer, but the Transitional Authority ought to have been involved. He said that the Clerk was entitled to make the requisitions, and he was authorized to requisition for the Hansard, the interior designs and the sound proofing. He also had authority to sign the letters that the plaintiff was relying on. He stated that they were copied to his office, and he conceded that he had not brought with him, to court, the correspondence file for the Speaker, for the relevant period. He said that the said letters were not received at his office, nor were they placed before the Board. He insisted that the letters should have been copied to the Transitional Authority, but he conceded that he had no document to show that the Transitional Authority should have been made a party. He said that he knew Mr. Obwatsa, as the Hansard editor, who was brought in by Mr. Musambayi. He said that Mr. Michael Oloo was a former employee of the defunct County Council, but he and Mr. Obwatsa had not yet been employed by the defendant. He conceded that they were still working for the defendant as at the date of his testimony. He said that Mr. Oloo used to work for Mr. Musambayi. He could not confirm whether Mr. Oloo was at the ICT department in 2014, although he said that Mr. Obwatsa was not head of Hansard, and that some Luo man was the head. He said that he disputed the designations indicated in the said letters, and he disputed the letterheads too. He also disputed the rubberstamps embossed on the documents.



He said that he only became aware of the documents, presented in court by the plaintiff, after he and other staff of the defendant were summoned to respond to audit queries.

24. Mr. Nelson Asena Amudala was next. He was a senior procurement officer, and a member of the tender processing committee and the tender committee. He asserted that there was no procurement of the items set out in the 2 alleged contracts. He said the contract documents were not in the custody of the procurement office. During cross-examination, by Mr. Aringa, he stated that he was a procurement officer at the material time of the alleged contracts. He said that the documents presented by the plaintiff point to certain procurements, and, for that reason, they should have been in the custody of the procurement department of the defendant after completion of the process. He said that he was in both the tender committee and the tender processing committee, and stated that they did the prequalification and the tender processing, and it was for the entity to raise provision for supply. He stated that the plaintiff did not supply the contract documents. He said he never saw the documents, until he was required to record a statement about them. At cross-examination, by Mr. Makokha, he stated that Mr. Musambayi was the Clerk then, and had appointed him to the 2 committees, and had the authority to sign documents for the defendant. He said that the completion documents were signed by Mr. Oloo and Mr. Obwatsa, who were in ICT and the Hansard units, respectively. He asserted that he knew them well, and they definitely signed the documents. He said that they were the user committee for ICT and the Hansard. He said that he was not sure whether any of the 2 was charged for signing the documents. He said that he could not sign what he had not seen, and added that he did not know whether the 2 had seen the items before they signed.
25. Ms. Christine Kageha was also a procurement officer. She said that her duty was to receive goods and to attend procurement meetings. She said that once goods were brought in, there would be an inspection and acceptance committee, appointed by the accounting officer, which would inspect the goods, and verify whether they met the standards. She said that that was not done at the time. She said that she was shown some documents at the premises of the interested party, which she had not seen before. She said that she ought to have seen them, if they existed, in her capacity as the issuing and receiving officer. She said that they used to take details of everything at the receiving of the items. She stated that they usually looked at documents from the defendant before they received the items. She said that the procurement unit did not receive any equipment as there was no supply. She said that she did not participate in any committee meeting for supply of the items. She said that the plaintiff had been given a pre-qualification that was limited to Hansard equipment. During cross-examination by Mr. Aringa, she stated that she joined the defendant in 2013, and sat at the tender processing and tender committees. She said that the tender pre-qualification could not involve contracts that exceeded Kshs. 500,000.00, and the contracts in question exceeded Kshs. 500,000.00. She said that she did not participate in the prequalification, and added that the documents ought to have been kept for 6 years, if they had reached the procurement department. During cross-examination, by Mr. Makokha, she stated that the tender processing committee did not authorize her to handle tenders exceeding Kshs. 500,000.00, adding that such contracts would be done at the County Executive level. She said that the Clerk was the accounting officer, and the person authorized to communicate about the tender committee. She said that accounting officer was expected to know when the process were going wrong. She added that there was no general announcement to the public on the correct procedures. In re-examination by Mr. Bii, she stated that there were procedures to be followed before the documents were signed. She also said that tenders would arise from the user departments, and they ought to be budgeted for, and the head of department would be the one to sign. After that the documents would go to the Clerk, who would instruct the procurement office to administer the tenders. She stated that the bidders would apply, and the tenders would be opened by the committee, and evaluated, after which the tender committee would recommend the award of the tender to the Clerk.



26. Mr. Alex Savai was the next witness. He was a Hansard/audio-visual officer with the defendant. He stated that the conference system was supplied in September 2013, comprising of computers, microphones, speakers and software. He stated that it was the officers at the department who would make a request for such equipment or materials, and in that case their request was justified by the Clerk. During cross-examination, he stated that procurement for the new Hansard equipment was done in 2017, and the defendant had been using the 2013 equipment all the while. He stated that he was taken through the use of the equipment on the day it was installed in September 2013. During cross-examination, by Mr. Makokha, he stated that he joined the defendant in June 2012. He identified Mr. Oloo, who was the acting Hansard editor, as his boss. He stated that he believed that it was the plaintiff who supplied the equipment. He also stated that the supplier was not paid. He stated that he could confirm that the plaintiff supplied the equipment. At cross-examination, by Mr. Didi, he stated that the events were happening during the transitional period.
27. Mr. George Kibisu Odemo testified next. he was the Sergeant-at-Arms with the defendant. He said he remembered that there was supply of conference facilities, being 10 microphones and 2 laptops. He also stated that inside the Chamber some internal design was made, at the Speaker's box. Soundproofing and some other works were also done inside, according to him. He stated that that happened in September 2013. He said that that happened during the tenure of Mr. Musambayi, who was not a full Clerk, and who was under the Transitional Authority. When cross-examined by Mr. Aringa, he stated that he was appointed Sergeant-at-Arms in April 2013. He said that his duty was to keep security, but conceded that his role was largely ceremonial. He was a member of the tender committee. He said that he participated in the award of the tender for supply of the Hansard system, and that the plaintiff had supplied its documents. When cross-examined by Mr. Didi, he stated that the equipment that was being used at Vihiga High School was moved to the new Chamber. He said that his role, with respect to it, was to ensure that the equipment was safe. He said that there was no proper management of the handover of the equipment. At cross-examination by Mr. Makokha, he stated that Mr. Musambayi did things by force, and there were systems that were not properly in place. He said that the equipment was supplied, but not all the items were supplied. He added that the ICT team was best placed to speak on what was supplied. He said that the soundproofing was also done by the plaintiff. He said he was not aware whether the plaintiff was ever paid. When shown the contract documents, dated 30th September 2014, he identified the signature on the document as that of Mr. Musambayi, saying that he signed on behalf of the defendant. When Mr. Bii re-examined him, he stated that not everything was supplied, as only a few items were supplied, being 10 microphones and 2 laptops for the Speaker's box, and soundproofing was done for the whole assembly.
28. At the close of the oral hearings, the parties filed written submissions.
29. In its written submissions, the plaintiff identifies only 1 issue, whether there was a contract between the plaintiff and the defendant. The plaintiff begins by submitting that it had discharged the burden of proof cast on it by section 107 of the *Evidence Act*, Cap 80, Laws of Kenya. It is submitted that the plaintiff produced documents to prove that contracts were entered into with the defendant, the contracts were performed, completion certificates were signed by authorized officers of the defendant, and invoices were raised, which were not settled. It is further submitted that Mr. Musambayi was the accounting officer for the defendant at the material time when he executed the contracts. Sections 7, 27, 31, 39, 63 and 69(3)(4) of the Public Procurement and Disposal Act, No. 3 of 2005, and *Dormakaba Limited vs. Architectural Supplies Kenya Limited* [2021] KEHC 210 (KLR)(Mativo, J) are cited in support of these submissions. It is further submitted that the interested party got into the proceedings to mislead the court, and that it had misapprehended the proceedings, and should be condemned to pay costs.



30. On its part, the defendant identified 2 issues; whether the purported contracts were tainted with illegality and irregularities in breach of the law, and whether the plaintiff is entitled to the reliefs sought. On the first issue, it is submitted that the alleged contracts contravened Article 227(1) of *the Constitution* and section 183 of the Public Procurement and Assets Disposal Act of 2015, and sections 27(4), 29, 74 of the Public Procurement and Assets Disposal Act of 2005, *Royal Media Services vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR (F. Tuiyott, J) and *Pakatewa Investment Company Limited vs. Municipal Council of Malindi* [2016] eKLR (Chitembwe, J) are cited. On whether the plaintiff is entitled to the reliefs sought, it is submitted that the contracts were illegal, and unenforceable, and, therefore, the reliefs sought are not available. *Heptulla vs. Noormohamed* [1984] eKLR (Simpson CJ, Kneller JA & Nyarangi Ag JA) and *Kenya Airways Limited vs. Satwant Singh Flora* [2013] eKLR (Maraga, M’Inoti & J. Mohammed, JJA) are cited to support these contentions.
31. On its part, the interested party identified 2 issues for determination: whether there were contracts for supply of goods and services between the plaintiff and the defendant, and whether the purported contracts were tainted by illegalities and irregularities for being in breach of the Procurement and Asset Disposal Act 2005 and the Procurement and Disposal (Amended) Regulations, 2013. On the first issue, it is submitted that the defendant had established that no contracts existed, as it could not trace any documentation relating to the said contracts. On the second issue, it is submitted that the purported contracts were tainted by illegalities and irregularities for non-compliance with the relevant legislation. *Grana Limited vs. National Social Security Fund* [2022] KEHC 61 (KLR)(Majanja, J) is cited to support the contention. *Noa Investment Limited vs. County Government of Nyamira* [2021] eKLR (Maina, J) is not cited in the written submissions, but it was filed simultaneously with the written submissions, and I believe it is also intended to support that contention.
32. The issues arising are whether there were contracts at all between the plaintiff and the defendant, and, if such contracts existed, whether they were performed, to warrant the payments sought by the plaintiff.
33. Before I delve into the issues, I should, perhaps, mention that the interested party sought joinder into the matter as such, in an application dated 28th September 2017. I granted that application vide a ruling that I delivered on 31st January 2019, where I directed the interested party to file pleadings within 30 days. That direction was not complied with at any time. The only documents that the interested party filed, after the directions, were a notice of change of Advocates, the interested party’s list of witnesses, and a bundle of witness statements recorded in 2017. As no pleadings were filed, I do not find the basis upon which the interested party called witnesses. What were the witnesses to prove by their evidence, in the absence of pleadings? The only filing that states the position of the interested party is that in the affidavit of Charles Kiptanui, sworn on 29th September 2017. The affidavit supported the application for joinder, and it was not the pleading contemplated in the directions in the ruling of 31st January 2019, and I did not make an order that the contents of that affidavit were to be taken as the pleadings by the interested party. Be that as it may.
34. Were there contracts between the plaintiff and the defendant? The plaintiff asserts that there were 2 contracts, one to supply and install a Hansard system, and the other for interior design and soundproofing. The defendant avers that no such contracts existed, as it had no records of the same. The interested party took the position that it went with the argument by the defendant that no such contracts existed, as the defendant had no documents, relating to those contracts, in its custody. In the affidavit, sworn by Charles Kiptanui, from the interested party, on 29th September 2017, it is averred that there were no such contracts, as the plaintiff had already supplied a Hansard system in April 2013, and had been paid for it.



35. The plaintiff placed on record documents to support its claim that there were 2 contracts between it and the defendant. There are 2 requests for quotations for the 2 contracts, both dated 12th May 2014; there are 2 tender offer letters, in respect of both contracts, both dated 30th September 2014; there are 2 tender acceptance letters, dated 3rd October 2014 and 7th October 2014, in respect of the 2 contracts; 2 contract agreements, in respect of the 2 contracts, both dated 9th October 2014; 2 completion certificates, in respect of both contracts, one dated 10th October 2014 and the other 26th November 2014; and copies of delivery notes, dated 10th October 2014 and 20th October 2014. Based on the above, there is prima facie proof by the plaintiff that it entered into 2 contracts with the defendant.
36. Did the defendant establish that there were no contracts? The position by the defendant was that it had no documents relating to those contracts in its custody, and, therefore, those contracts could not have existed. The defence statement, dated 4th May 2017, comprises largely of mere denials. It is pleaded that no contracts existed, and the plaintiff is put to strict proof. The witness called by the defendant, in her witness statement, dated 26th February 2020, stated that it wrote to the plaintiff to be supplied with documents to support the contracts, but none were supplied. It is also alleged that a meeting of the County Assembly Board was called, where the plaintiff was called upon to prove that such a contract existed, no proof was provided, instead the plaintiff is alleged to have stated that there was no written contract between it and the defendant, and that what there was was a verbal contract between the defendant and the then Clerk, Mr. Musambayi. Two things emerge from this. One, the statement of evidence to be placed on record ought to be in line with the pleadings. The contents of the written witness statement and the oral statement of the witness called by the defendant introduce matters that were not pleaded in the defence statement. The statement of defence comprises largely of denials. There is no specific averment about documents being called for, and the plaintiff failing to provide them to support the contracts, and there is also no specific averment that the alleged meeting of the Board, where the plaintiff stated that there was no written contract, and that what there was was a verbal contract. A party is bound by its pleadings, and should not vary its pleadings by introducing material by way of evidence. The evidence should not go beyond what is averred in the pleadings. The witness statement is not a pleading, and it should not introduce material that is not pleaded in the pleadings.
37. Even then, he who alleges must prove. It is another way of saying that the party who makes an assertion of fact must lead evidence to establish it. It was asserted, in both the written witness statement and the oral testimony, that the Board met, at which meeting the plaintiff allegedly conceded that there were no written contracts, and that what existed was a verbal contract between it and the Clerk to the defendant. These were serious allegations to make, to controvert pleadings in the plaint about a written contract. The defendant was bound to lead evidence that such a Board meeting was held in the first place. Secondly, concrete evidence should have been adduced to support the allegation that the plaintiff made a statement to effect that no written contract existed, and that what there was was a verbal contract. When Boards meet, a record, by way of minutes, is kept or maintained of the proceedings. No minutes of that meeting were tabled before the court. So, no evidence was presented or adduced to prove that such a meeting was held, and that the plaintiff, at that meeting, had conceded that there was no written agreement but a verbal one. The defendant, therefore, did not prove that no written contracts were entered into between the plaintiff and the defendant.
38. What about the interested party, did it provide proof that no contracts existed? As indicated above, the interested party did not file pleadings, despite the directions in the ruling of 31st January 2019. What can be taken to represent its pleadings are the contents in the affidavit of Charles Kiptanui, of 29th September 2017. The same does not allege that the contracts were non-existent, it acknowledges them, then alleges that they were not compliant with public procurement legislation. The position taken



in the Charles Kiptanui affidavit is at variance with the case presented at the oral hearings, that there were no contracts, and no performance of the alleged contracts, to warrant the plaintiff being paid the monies it was claiming. The witnesses presented by the interested party did not lead evidence to support the assertion in the affidavit of Charles Kiptanui, that the contracts existed, but largely testified that no such contracts existed, as set out in the statements that the interested party had recorded with various employees of the defendant in August 2017.

39. More fundamentally, the oral statements of the 12 witnesses presented by the interested party stated a position which can only be described as a mixed grill. Some asserted that no such contracts existed, and no services were rendered, nor equipment supplied, nor works done under them; while others stated that such contracts were executed, and under them services were rendered, equipment supplied, and works done. These 12 witnesses were employees of the defendant. Some could be expected to have knowledge of what happened, while others could not.
40. 3 of them testified as members of the defendant's Service Board. These were Mr. Onzere Benson Mudangale, Mr. Daniel Ogova Mulayi and Mr. Daniel Chitwa Chengenye. Mr. Mudangale testified that the Board was not in place until 2014/2015, and that before the Board was established, its duties were carried out by the Transitional Authority. He stated that Board approval should have been sought. Mr. Mulayi was a member of the Board in 2015/2016, but not in 2014. Mr. Chengenye did not state when the Board became operational, although he testified that the contract documents were not forwarded to him, as Chair of the Board, so that he could place them before the Board for approval. The disputed contracts were allegedly entered into, executed and performed within 2014, before the Board was established, and so the issue of approval by the Board being sought did not arise, as the Board did not exist then. The relevance of the testimonies by Mr. Mudangale, Mr. Mulayi and Mr. Chengenye can only be relevant with respect to the Board authorizing the settling of the claims by the plaintiff. The 3 witnesses talked of Mr. Lusweti telling the Board that the plaintiff was awarded the contracts verbally. As indicated above, the said remarks were allegedly made to the Board at a meeting convened specifically to deal with claims that were suspect. Such a meeting must have been of key importance, for the funds of the defendant were at stake. Secondly, the defendant and the Board was under a duty to account and to act transparently. Consequently, accounting documents were needed, as a record of what transpired at the meeting. The remarks by Mr. Lusweti should have been documented, by way of minutes. Mr. Mudangale, Mr. Mulayi and Mr. Chengenye did not refer to any minutes, where the said remarks were documented. No such minutes were filed in court, nor produced as exhibits at the oral hearings. Significantly, the 3 had different versions of the substance of the remarks by Mr. Lusweti. Mr. Mudangale and Mr. Mulayi said that Mr. Lusweti talked of a verbal order to supply, while Mr. Chengenye did not talk of the contracts being awarded verbally, but that Mr. Lusweti told the Board that he was merely given a letter of offer, to help the plaintiff secure a loan, and that there was no tendering. It cannot be that 3 Board members heard different things from Mr. Lusweti. I do not think much reliance should be given to these remarks, allegedly made by Mr. Lusweti, to the Board, given that no minutes of the proceedings, where they were allegedly made, were availed.
41. The other lot of witnesses, presented by the interested party, were from the procurement unit of the defendant. These were Mr. Nelson Asena Amandala and Ms. Christine Kageha. Their evidence was that the goods and services, the subject of the contracts, were not procured. According to Mr. Amandala, there was no procurement, because the documents, relating to the contracts, were not at the procurement unit; while Ms. Kageha said that she did not receive any of the goods or equipment allegedly supplied by the plaintiff. The disputed contracts were allegedly entered into and performed in 2014. According to Mr. Chengenye, who was the first Speaker of the defendant, and the Chair of the defendant's Service Board, and the titular head of the defendant, the defendant had no procurement unit until 2016, when procurement officers were employed. It cannot, therefore, be that Mr. Amandala



and Ms. Kageha could have firsthand knowledge of what transpired in 2014, when the procurement unit was not in place, and when they were yet to be employed. Ms. Kageha could not have received the goods or equipment supplied by the plaintiff in 2014, at the procurement unit, when there was no such unit, and when she and other procurement officers were yet to be employed. It is significant, that no documents were presented, relating to when the procurement unit was established, and on when Mr. Amandala and Ms. Kageha were appointed procurement officers in that unit.

42. The above discussion should be relevant to the evidence adduced regarding the tendering process. 6 members of the tender and tender processing committees were presented and testified. These were Ms. Brenda Ajema Kalegera, Mr. Moses Abwenje Akhavere, Ms. Judith Kadesa Osire, Mr. Nelson Asena Amandala, Ms. Christine Kageha and Mr. George Kibisu Odemo. The tendering and tender processing committees are organs within the procurement process, under the relevant public procurement law. The narrative by Mr. Chengenye, the titular head of the defendant, at the time, was that the defendant did not have a procurement unit in place, until 2016, when procurement officers were recruited. Procurement of goods and services, for the purpose of the defendant, he stated, was done through the County Executive. He stated that the defendant only got a full-fledged tender committee in 2016, which aligned with his earlier statement that 2016 was the year the procurement unit was established, after procurement officers were appointed or employed. That testimony was on all fours with that by Mr. Mudangale, who said that procurement was done by the Transitional Authority until the Board was established in 2014/2015. The disputed contracts were allegedly executed and performed in 2014. Without a procurement unit and tender committee in place, until 2016, it would follow that the testimonies of Ms. Brenda Ajema Kalegera, Mr. Moses Abwenje Akhavere, Ms. Judith Kadesa Osire, Mr. Nelson Asena Amandala, Ms. Christine Kageha and Mr. George Kibisu Odemo would be of little relevance, as the disputed contracts pre-dated the committees where the witnesses allegedly sat. They could not, logically, have handled the disputed contracts, since their committees did not exist when the contracts were allegedly entered into and performed. Moreover, none of the 6 witnesses made reference to any documents, which bespoke their appointments or their handling business during the period in question. No minutes of the proceedings of the alleged tender committees were produced by the interested party. Some of the testimonies of these witnesses were of little value. Ms. Kalegera, an auditor with the defendant, conceded that it would not have been proper for her to sit in a tender committee, as she could be called upon later to audit accounts relating to transactions handled by her tender committee. Mr. Akhavere was from the transport section, and testified that he only sat on the tender committee when issues of transport arose, and would not be invited to a tender meeting to deal with ICT and the Hansard. Ms. Kageha said she was not authorized to sit in tender committees or tender processing committees to handle contracts beyond Kshs. 500,000.00, and added that such were done at the County Executive level. The impugned contracts were well over Kshs. 500,000.00 in value.
43. The testimony by Mr. Mudangale, a Board member, acknowledged one of the contracts, that relating to renovation of the Chamber. He stated that the Board was informed that the plaintiff had done the soundproofing and networking. He conceded that some work was done, and the Board was even taken to the site. He stated that the works relating to renovation and networking were not paid, not because there was no contract, but rather because there was no documentation, from either the plaintiff or the defendant, to facilitate payment. He stated that it was an issue of documentation, and if the plaintiff was able to supply the documents, it would be paid. He further stated that the lack of documents had something to do with the failure by the former Clerk, Mr. Musambayi, to handover. He said that there were documents at the stores of the defendant, and elsewhere, and records, relating to that contract, could be reconstructed, adding that the Board had no issues with the plaintiff, with respect to that contract, except for lack of relevant documentation. Mr. Mulayi, on his part, took the view that the



former Clerk did procure, but did not follow the law. He stated that the refurbishment of the Chamber was done, but he could not tell by who, and he could not tell whether payments were made under the contracts. Mr. Odemo also stated that soundproofing and the Speaker's box were done by the plaintiff, and that some equipment was supplied. Mr. Chengenye, however, stated that the interior design and the Speaker's unit were done by a Mr. Miyiera.

44. The position regarding the Hansard is a little more contentious. Mr. Mudangale testified that there was no contract. The procurement for the Hansard was not done, and the defendant was using an old system, bought by the Transitional Authority. No documents were presented to support that contention. Mr. Mulayi gave similar testimony. Mr. Silas Obwatsa Omukaya was head of Hansard. He testified that no new Hansard system was bought, but he also confirmed that he signed the completion certificate on 26th November 2014. He gave the incredible explanation that he signed to confirm that there was a functional system in place, adding that he could not have signed if there was no system. Mr. Savai Alex stated that a Hansard equipment was supplied in 2013, and another in 2017. He said that he believed that it was the plaintiff who supplied the equipment. Mr. Odemo testified that some conference facilities were supplied, being microphones and laptops. He said he participated in the award of the tender for supply of the Hansard system, and that the plaintiff presented its papers. He said the equipment was supplied, but not everything was supplied, even though he went on to say that only the ICT department could give details of what was supplied, and what was left outstanding.
45. Related to that was the issue of the documentation. Mr. Mudangale had testified that the Board did not authorize payment on one of the contracts because of lack of documentation. He explained that the relevant documentation should have been with Mr. Musambayi, who had failed to handover. He was certain that documents to support that contract existed, and the challenge lay with the previous Clerk not having handed over. He went on to state that the documents were somewhere within the premises of the defendant, and all what was required was for someone to sort out the documents, and trace the relevant contract papers. The witnesses, such as Mr. Chengenye and Mr. Muyali, were clear that the Clerk was the custodian of the records of the defendant, and that it was only that office that could clear the air. The defendant had custody of the relevant records, as a majority of them were generated within its structures. It was the duty of the defendant to go out of its way to trace the relevant documents.
46. One issue that came out was that those transactions were carried out during the transition period, that is during the changeover, under the new Constitution, from the defunct local authorities to the new County administration. Mr. Chengenye addressed that. He stated that the transition was managed by the Transition Authority. He explained that the facilities and infrastructure, inherited from the defunct local authorities, were dilapidated and inadequate to accommodate membership of the County Assembly, and there was, therefore, need to renovate and refurbish them, to make them fit for purpose. That was the background to the acquisition of a new Hansard system, the renovation of the Chamber and related works. During that transition period, many structures were not in place, including lack of a Board and a procurement unit, among others. That explained, in part, why the procurement unit lacked documentation relating to transactions conducted prior to 2016, when it became operational. The transition period, and its attendant challenges of inadequate facilities, would also explain the need to procure directly, due to pressure of time. The witnesses mentioned that at one time the defendant had to operate from a room or hall at Vihiga High School, as the Chamber was being renovated and refurbished. There was, no doubt, urgency, to have the facilities, infrastructure and equipment in place as soon as possible.
47. On the legality of the disputed tenders or contracts, all the witnesses, for the defendant and the interested party, stated that the former Clerk to the defendant, Mr. Musambayi, who was the key figure in the contracts, was the accounting officer at the material time, that he was the one authorized to



deal with the outside world, in terms of communication on the affairs and decisions of the defendant and its organs and units, that he was the one to sign on contracts on behalf of the defendant, and that the signatures on the documents relied on by the plaintiff were all by him. As the contracts were executed by the officer of the defendant, who was authorized to sign them, the contracts were validly entered into. They were legal. Whether they complied with the relevant procurement legislation was another issue. Non-compliance with the said legislation did not per se make them illegal, perhaps it only made them invalid or void, if at all. There was nothing that prevented or barred the plaintiff and the defendant from entering into the contracts in the first place. The plaintiff had been pre-qualified by the defendant to supply certain goods and services, and the plaintiff had previously dealt with the defendant, and supplied goods and services, for which it was paid. Nothing, therefore, made it illegal for the plaintiff and the defendant to enter into the contracts. There can be nothing illegal about a contract entered into between a pre-qualified contractor and the procuring entity, to supply goods and services, the subject of the pre-qualification. The only issue arising is whether the contracts were entered into in compliance with the relevant law and regulations. Non-compliance is not an incidence of illegality. It can lead to invalidity of the contracts, or to exposing them to being rendered void, but a non-compliance does not render them illegal. An illegality and a non-compliance or an irregularity are two different things. An illegal contract is void, but not all void contracts are illegal.

48. Perhaps more needs to be said about illegal contracts and contracts that are void or invalid. Illegal contracts are those that are barred or forbidden by statute or by common law. The applicable statutory law is the Public Procurement and Disposal Act. I have read and re-read the provisions of the Public Procurement and Disposal Act, and I have not come across any that forbids or forbade, or bars or barred the contracts that the plaintiff was entering into with the defendant. The defendant and the interested party did not point me to any provision of the Public Procurement and Disposal Act, which forbade or barred the impugned contracts. With regard to bars by the common law, it would be about contracts that the courts have rendered illegal for offending public policy. Such would include contracts to commit a crime or a tort (see *Bigos vs. Boustead* [1951] 1 All ER 92 (Pritchard, J)); or prejudicing public safety (*Foster vs. Driscoll* [1929] 1 KB 470 (Sankey, LJ)) and *Regazzoni vs. KC Sethia* [1958] AC 301 (Viscount Simonds, Lords Reid, Cohen, Keith of Avonholm & Somervell of Harrow)); or affecting the administration of justice (see *Keir vs. Leeman* [1846] 9 QB 371 (Tyndal, CJ)); or tending to promote corruption in public life (*Parkinson vs. College of Ambulance* [1925] 2 KB 1 (Lush, J)); or to defraud national or local revenue (*Miller vs. Karlinski* [1945] 62 TLR (Parcq, LJ) and *Napier vs. National Business Agency Ltd* [1951] 2 All ER 264 (Sir Raymond Evershed, MR)); or contracts having a sexually immoral base (see *Pearce vs. Brooks* [1866] LR 1 Ex. 213 (Pollock CB, Pigott, Bramwell & Martin BB)). The impugned contracts do not fall under any of these categories. The plaintiff and the defendant were not contracting to commit a crime or a tort, nor to prejudice public safety, nor to affect administration of justice, nor to promote corruption in public life, nor to defraud local or national revenue, neither did they intend to enter into a contract with a sexually immoral base. Neither the defendant nor the interested party sought to demonstrate that the impugned contracts were illegal in accordance with the common law categorization of illegal contracts. Perhaps, if some evidence was adduced, which pointed to fraud on the part of the persons who executed the contract documents, there would have been basis to conclude that the contracts were tainted with illegality. Fraud has elements of criminality, and proof of it, in civil cases, has to be to a standard higher than balance of probability, tending towards proof beyond reasonable doubt. Proof of fraud to a standard higher than balance of probability was not provided, by the defendant and the interested party.
49. Issues arose over the execution of the relevant contract documents. As indicated above, virtually all the witnesses, presented by the defendant and the interested party, were in agreement that the former Clerk, Mr. Musambayi, signed them. The other 2 signatories were Mr. Oloo and Mr. Okwatsa. Mr.



Okwatsa testified. He conceded that he signed the documents on the date indicated, 26th November 2014, and that he signed to authenticate the document, and facilitate payment of the plaintiff for supply of the equipment tendered for. I am conscious that he gave evidence in a rather cagey manner, but am alive to the fact that he had been made to record a statement by the interested party. The other witnesses were clear that Mr. Oloo signed the documents, as they were familiar with his signature. Some of the parties sought to discredit the 2, saying that they were cronies of the former Clerk, Mr. Musambayi. Mr. Musambayi was removed as Clerk, but the 2 retained their jobs, and have not been prosecuted to date, for any wrongdoing with respect to the contracts. Mr. Oloo did not testify, but I was told that he never recorded any statement with the interested party. The designations of Mr. Oloo and Mr. Okwatsa were contested by some of the witnesses. However, the burden lay with the witnesses to demonstrate that the 2 did not occupy the positions that they were purported to in the documents that they signed. The defendant, as their employer, had custody of their employment records, but no effort was made to place documents on their designations before the court.

50. The law governing the contracts was the public procurement legislation cited above. Sections 7, 27 and 69 of the Public Procurement and Disposal Act, sets out the procedures for procurement under that law, and the role of accounting officers in procurement processes, where there is urgent need. These provisions provide a guide to the procuring entity, in this case the defendant, with respect to procurement processes.
51. The procurement that the defendant engaged in was no doubt direct, which is provided for under section 74 of the Public Procurement and Disposal Act. The procuring entity may engage in direct procurement so long as the same is not intended to avoid competition. It may be adopted where only one person can supply the goods or the services sought, and where there is no alternative. It may also be adopted where there is urgent need for the goods or works or services being procured, where, because of the emergency, the other available methods of procurement are impractical, and where the circumstances that give rise to the urgency were not the result of dilatory conduct on the part of the procuring entity.
52. Of course, it is the procuring entity that should have explained why it had to resort to direct procurement. The procuring entity in this case was the defendant. It ought to be the one explaining why it opted to take that route. It did not. Instead, it denied the contracts, hence it fell upon the plaintiff to explain itself. One explanation is that the plaintiff was the sole and exclusive supplier or distributor of the particular Hansard equipment for Africa and Middle East, and, therefore, the defendant was justified to engage it directly. I am not persuaded that there is material on record, which demonstrates that the plaintiff was the sole distributor of the said equipment in the region. No documents on this were produced. Neither was it demonstrated that there was no reasonable alternative or substitute for the goods, works or services. In any case, only the defendant could deal with these matters, and the plaintiff might not have had reason to explain it.
53. The second explanation could be more plausible, for there was support for it from the testimonies of the witnesses presented by the interested party, in particular Mr. Chengenye. It was explained that the contracts were entered into within the transition period. The country had just emerged from a general election in 2013, which ushered in a new system of governance, where the old local authorities were phased out, and replaced with another module of devolved government. Mr. Chengenye explained that the facilities and infrastructure, that the new devolved unit inherited from the defunct local government, were inadequate to accommodate the needs and demands of the new devolved unit, were dilapidated, and internal governance structures were lacking. There was need to acquire equipment to upgrade services, and to renovate and refurbish the facilities and infrastructure. Several witnesses mentioned that the defendant had to relocate to a space offered to it by Vihiga High



School, temporarily, to facilitate the renovation and refurbishment of the Chamber. The 2 contracts appear to have had something to do with the said renovation and refurbishment, and their timings coincided with the relocation and refurbishment that the witnesses referred to. There was the urgency contemplated in section 74 of the Act, for the goods works or services in the circumstances, to have the facilities and infrastructure upgraded in good time to enable the new devolved unit operate within a conducive environment. The defendant was operating from a school environment, which was not conducive for it, and for the school community. The circumstances made it impractical to pursue other methods of procurement, and the circumstances were not occasioned by dilatory conduct of the defendant, but by the change of governance under the new Constitution.

54. In view of the foregoing, I find and hold that the mode of procurement adopted did not violate the Act, and did not make the contracts illegal nor invalid nor void.
55. *Pakatewa Investment Company Limited vs. Municipal Council of Malindi* [2016] eKLR (Chitembwe, J), *Royal Media Services vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR (F. Tuiyott, J), *Noa Investment Limited vs. County Government of Nyamira* [2021] eKLR (Maina, J) and *Grana Limited vs. National Social Security Fund* [2022] KEHC 61 (KLR)(Majanja, J) were cited to advance the argument that the contracts were illegal or invalid, for contravention of or non-compliance with the relevant procurement law and regulations.
56. Of the decisions cited above, the most relevant, to the matter at hand, is the *Royal Media Services vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR (F. Tuiyott, J), which principally turned on section 75(4) of the Act, which states that “contractors, suppliers and consultants shall comply with this Act and the regulations.” It was held, based on that, that contractors and suppliers had a duty to comply with the law, and it required them to make enquiries into whether the procuring entity had complied with the said law. With respect, I differ. The contractor and supplier should only be required to comply with the law to the extent that that law demands of them, and not what it demands of others. In the instant case, the defendant and the interested party have not pointed out any non-compliance on the part of the plaintiff. The non-compliances pointed out were on the part of the defendant, the procuring entity, and the plaintiff should not, in all fairness and justice, be made to blame for the shortcomings of the other party. The plaintiff should not be made, as it were, to carry the cross for the defendant, who has failed to comply with the law. I am not inclined to accept an interpretation of section 75(4) which imposes a burden on contractors or suppliers to ensure that the internal processes on the part of the procuring entity comply with the law. To do so would be to expect too much of the contractors and suppliers, who, in most cases, may have little or no access to the internal affairs of procuring entities, and in some cases balance of power between the parties may militate against the contractor or supplier accessing such information from the procuring party, who may be in a stronger bargaining position.
57. It was submitted that where a contract is rendered illegal by non-compliance with the public procurement law, the contract becomes unenforceable, and no damages are recoverable, and *Heptulla vs. Noormohamed* [1984] eKLR (Simpson CJ, Kneller JA & Nyarangi Ag JA) and *Kenya Airways Limited vs. Satwant Singh Flora* [2013] eKLR (Maraga, M’Inoti & J. Mohammed, JJA) were cited to support those contentions. Firstly, non-compliances with regulations do not render the contract illegal, it would merely render it void or invalid. Secondly, even where the contract is rendered illegal, there exist exceptions to the general rule, that damages or monies paid or spent on the basis of the contract would not be recoverable. That would be the case where the 2 parties were not equally to blame or were not in *pari delicto*. The innocent party would be entitled to recover. See *Kiriri Cotton Co. Ltd vs. Dewani* [1958] EA 188 (Lords Denning, Jenkins, & Mr. de Silva) and *Bai Sakinabai Mohamed Valli Dharsi vs. Ghulamhusein Versi* 4 ZLR 28. The innocent party stands a better chance of recovering



where the contract is merely void or invalid, rather than illegal. If the contracts herein were illegal, on account of irregularities or non-compliances, which is not the case here, the plaintiff would be the innocent party, who would be blameless, for the irregularities cited, of not subjecting the contracts to the processes set out under the relevant public procurement law, have nothing to do with the plaintiff, but were internal to the defendant, as the procuring entity. The duty to have tender committees, tender processing committees, acceptance committees, inspection committees, and any other requirements, in place, are to be complied with by the procuring entity, not the supplier. Where there are non-compliances with respect to that, the supplier would be blameless, and the supplier, as innocent party, should be able to recover any moneys paid by it or expended by it on the contract. The second exception would apply where the plaintiff repents before the contract is performed. See *Taylor vs. Bowers* [1876] 1 QBD 291 (Mellish LJ, Baggallay JA & Grove J). Such repentance can only be expected to arise where the plaintiff is privy to the illegality, which has not been demonstrated to be the case here.

58. I have stated above, that the affidavit, sworn by Charles Kiptanui, is the only filing by the interested party with the semblance of a pleading. That being the case, it was expected that the interested party would mount a case founded on it. The case stated in there was that the contract for the Hansard could not be valid, for a similar contract had been entered into, performed and was paid for. I expected that evidence would have been led on that contract, to demonstrate that the Hansard contract, the subject of the suit, was the same as the earlier Hansard contract that had been performed and paid for. No evidence was adduced at all on this. In the said affidavit, 3 documents are attached, being an unclear document, which appears to be a payment voucher for Kshs. 4,470,000.00; a first payment certificate dated 6th January 2014, from the defendant, for Kshs. 4,470,000.00, in favour of the plaintiff; and a letter dated 25th November 2013, on appointment of temporary tender, procurement and ad hoc committees of the defendant. None of the witnesses presented by the interested party bespoke these documents, and no attempt was made to draw the connection between them and the impugned contracts.
59. Should I grant the prayers in the plaint in the circumstances? I do not think I should. Public procurement contracts are subject to stringent statutory requirements. The validity of such contracts is necessarily dependent on compliance with the statutory requirements. The evidence that was adduced by the 3 parties did not demonstrate that these requirements were met. I am persuaded that there was justification for direct procurement, but thereafter the defendant did not follow the steps required of it by the law. No evidence was presented to demonstrate that the relevant committees of the defendant, or of the County Executive, whichever was applicable at the time, handled the matter as required by the law. As the procurement process did not meet the statutory standards, the 2 contracts were not valid.
60. The next consideration would be whether the plaintiff should recover the monies it spent on the contract, on the basis that it was not in *pari delicto* with the defendant so far as the non-compliances were concerned. The onus was on the plaintiff, to prove that it performed the 2 contracts as alleged, more particularly, in terms of placing on record material demonstrating that there was delivery and installation of the equipment the subject-matter of the contracts. I have seen delivery notes, suggesting that the equipment or materials in question were supplied. What I find curious is that the equipment was received by the Clerk to the defendant. Under normal circumstances, such delivery would be to subordinate officers, particularly those in the relevant departments. I find it curious that the chief executive officer of the defendant was the one to receive the items allegedly delivered. That ought to raise eyebrows, and it is little surprise that the contracts were discounted by the defendant. Secondly, although delivery notes were availed, and in view of the fact the delivery was contested, it was expected that the plaintiff would have provided proof that it had capacity to deliver what it alleges it delivered. That would have been done through provision of documents that demonstrate that the plaintiff had the equipment or material delivered in the first place, by showing that it had procured them, after



which it delivered them. That the plaintiff did not do. It did not furnish the court with material to demonstrate that it had the equipment in store or had procured the same ready for delivery to the defendant. Thirdly, I have noted that the alleged delivery notes were not supported by invoices. If the plaintiff delivered the equipment or materials, as alleged in the delivery notes, were any invoices raised? It is standard accounting procedure that payments are made against invoices, not delivery notes. In view of that the plaintiff did not prove that it had the capacity to deliver the equipment or materials that it alleged to have had delivered; and that it sought payment for the same through invoices, which the defendant had failed to honour.

61. Overall, I am not persuaded that the plaintiff has established a case, on a balance of probability, based on the documents placed on record, and the testimonies of the witnesses presented by both sides, that it delivered the items that are the subject of the suit herein. I am persuaded, from the documents placed on record, and the oral testimonies, that there was an exchange of documents between the plaintiff and officers of the defendant, which could found basis for a conclusion that there were contracts, which did not reach the threshold for validity, for the reasons given above; what I am not persuaded about is the alleged performance of the said contracts. The plaintiff has not presented a case, on a balance of probability, to support its entitlement to the sums of money that it claims. In the end, I dismiss the prayers sought in the plaint, dated 1st September 2016, with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THI 28TH DAY OF SEPTEMBER 2023.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Makokha, instructed by Messrs. Makokha Wattanga & Luyali, Advocates for the plaintiff.

Mr. Aringa, instructed by Messrs. Muniyao Muthama & Kashindi, Advocates for the defendant.

Mr. Koskey Robert Kimutai Bii, Advocate for the interested party.

