



**Grana Limited v National Social Security Fund (Civil Appeal E028 of 2020)
[2022] KEHC 61 (KLR) (Commercial and Tax) (31 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 61 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E028 OF 2020
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

GRANA LIMITED APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. W. Mburu, SPM dated 7th May 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 6845 of 2018)

JUDGMENT

1. Introduction and Background

The Appellant has filed an appeal with the court challenging the judgment of the Subordinate Court dated 7th May 2020 which dismissed the Appellant's suit against the Respondent.

2. In that suit, the Appellant, as plaintiff, stated that sometime in September 2016, the Respondent requisitioned and contracted it to supply panels for the Respondent's exhibition stand at the Nairobi Trade Fair at a cost of KES 362,500.00. The Appellant undertook the works and was paid by the Respondent. Subsequently, the Respondent, through one of its employees/agents, Mr Christopher Khisa, instructed the Appellant to undertake additional works that included wall branding of the Respondent's 'Arena Gate D', Paying Booth and Arena Roof at the same Trade Fair at a cost of KES 850,000.00 ("the subsequent works"). The Appellant claimed that despite carrying out the subsequent works to the Respondent's satisfaction, the Respondent failed and/or declined to settle the amount due to it. It claimed KES 850,000.00, interest at 14% p.a from 6th October 2016 until payment in full and costs of the suit.



3. In its Defence, the Respondent denied entering into any legal contract with the Appellant for the subsequent works and that even if it did, the same was done without following the relevant procurement laws and policies. That there being no contract of works and service between the parties, the Appellant was not entitled to any payment. The Respondent denied any invoices, claims and demands against it.
4. In its Reply to the Defence, the Appellant reiterated its case and added that failure by the Respondent to follow their own internal procurement procedures could not defeat the Appellant's claim.
5. The suit was set down for hearing. The Appellant called its director, Grace Ruguru Kayi (PW 1) as its witness while the Respondent called its Public Relations and Communication Manager, Christopher Khisa (DW 1). After hearing the case and the parties' arguments, the learned trial magistrate delivered judgment dismissing the suit.
6. The trial court determined that the procurement of the subsequent works was in breach of the *Public Procurement and Asset Disposal Act, 2015* ("the Act"). The court noted that from the evidence, the procurement of the subsequent works was neither in writing nor signed, which offends the minimum and mandatory provisions and requirements of the Act. The trial court also ordered each party to bear its own costs of the suit. It is this determination that forms the basis of the instant appeal which is grounded in the Appellant's Memorandum of Appeal dated 28th July 2020. The appeal was canvassed by way of written submissions with the parties advancing their respective positions.

The Appellant's submissions

7. The Appellant melds the six grounds in its Memorandum of Appeal into one issue for determination. Whether, despite the finding by the trial court that services were procured, rendered and utilized, the Respondent can escape liability on account of its own failure and/or refusal to comply with statutory provisions and its internal procedures on procurement and whether the Respondent should pay the Appellant for the services procured and utilized.
8. The Appellant submits it honoured its obligations under the contract by rendering services thus the Respondent was bound to pay for them. It reiterates its submissions before the trial court based on the rule propounded in *Royal British Bank v Turquand* [1856] 6 E&B 327 ("the rule in Turquand's Case") that a company or corporation should not be allowed to escape liability on account of its officers' non-compliance of statutory provisions and internal management regulations. It urges that that Respondent should not be allowed to escape liability on this account. The Appellant also cites *Hydro Water Well (K) Limited v National Water Conservation & Pipeline Corporation* ML HCCC No. 251 of 2011 [2017] eKLR and *East African Safari Air Limited v Anthony Ambaka Kegode & another* NRB CA Civil Appeal No. 42 of 2007 [2011] eKLR in support of this submission.
9. The Appellant submits that its position is buttressed by the fact that the trial court did not find any fault for the role played in the procurement process or make any finding that it was an accomplice to the breach of internal regulatory procedures by Respondent's officers. The Appellant submits that in the absence of undue influence or fraud, it should not be denied the benefits accruing from the contract on account of non-compliance by the Respondent as it acted in accordance with the Respondent's instructions.
10. The Appellant faults the Respondent's assertion at the trial court that it was upon it to ensure that proper procurement procedure was followed before acting on the instructions given by the Respondent. The Appellant submits that the statute on procurement does not give a public entity the right to consume services and then refuse to pay for them on the ground that the procurement rules



were not followed. It adds that public entities cannot lure a person by holding out representations to supply services and upon consuming them, refuse to pay.

11. The Appellant submits that having procured the Appellant's services, fairness dictates that the Respondent ought to pay for those services and the Respondent is not permitted in law and equity to turn around and plead invalidity of the contract and claim the procurement of the services did not create a legal obligation and the Appellant cites the case of *Kabuto Contractors Limited v Attorney General* NRB HCCC No. 284 of 2008 [2018] eKLR to support this submission. It reiterates that it will be inequitable, unconscionable and unfair for the Respondent to benefit from its own irregularities yet the trial court did not fault the Appellant for any role it played in procuring the services the subject matter of the proceedings before the trial court.

The Respondent's Submissions

12. The Respondent supports the conclusions of the trial court. It submits that the trial court did not err as PW 1's evidence was that it normally gets orders in writing from the Respondent and that it was paid for works done pursuant to the purchase order it had received. The Respondent admits that the Appellant was a prequalified supplier of the Respondent but that the Appellant only produced an invoice and no other document to back up its case.
13. The Respondent submits that it neither compromised its denial of the Appellant's claim nor accepted or made part payment of the claim/invoice and that the trial court correctly held that no contract was signed by the parties as there was none. The Respondent states that the Appellant and the Respondent being a pre-qualified supplier and public entity respectively are bound by the Act and that section 72 thereof obligates the Appellant as a supplier to comply with its provisions. Further, that both parties are bound by the provisions of Article 227 of the *Constitution* which provides for prescription of a policy framework to provide for among other sanctions against contractors that have not performed according to the professionally regulated procedures, contractual agreements and legislation.
14. The Respondent further relies on section 104 of the Act which provides for a signed contract even where direct procurement is applied and that lack of a signed contract is an illegality that the court cannot take lightly and or ignore. It stresses that the Appellant, being a pre-qualified supplier for the Respondent, should have been more diligent and ensured the relevant provisions of the Act are complied with. The Respondent relies on several cases including *Heptulla v Noormohamed* NRB CA Civil Appeal No. 62 of 1983 [1984] eKLR where the Court of Appeal stated that "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality."
15. According to the Respondent, the Appellant should have declined to comply with instructions until it established that it had a purchase order or any other form of contract and that a telephone conversation was insufficient. The Respondent cites *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* ML HCCC No.352 of 2014 [2019] eKLR to submit that the courts in this country frown upon illegal contracts and submits that the court must enforce the doctrine of captured in the Latin maxim; *ex turpi causa non oritur actio* which implies that no court should enforce an illegal contract nor allow itself to be made an instrument of enforcing obligations that arise from illegal transactions.
16. The Respondent submits that the trial magistrate did not err in interpreting sections 72 and 104 of the Act as it expressly provides that a contract resulting from direct procurement must be in writing and signed both parties. It urges that it is a fact that the Appellant participated in the illegality by not ensuring it had signed a contract before commencing the subsequent works. Thus, the trial court



did court did not misinterpret or misapply the law to warrant interference with the lower court's judgement and the Respondent also underpins the requirement of a contract in procurement by a public entity.

Analysis and Determination

17. As this is a first appeal, the duty of the first appellate court is to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
18. In my view, the main issue for determination in this appeal is whether the trial court erred in finding that the Appellant was not entitled to claim for payment for the subsequent works it undertook. From the record, it is not in dispute that the subsequent works were carried out by the Appellant without following procurement laws and procedures under the Act which governs and guides procurement by public entities such as the Respondent. In fact, the Plaintiff admitted that it carried out with the works without a written Purchase Order which was always issued by the Respondent's Procurement Manager and not DW 1.
19. Resolution of the matter therefore turned on whether the relevant provisions of the Act were mandatory or merely directory. The trial court took the view that under section 135(4) of the Act, no contract could have been formed between the parties unless the same is reduced in writing and signed by the parties. The mandatory requirement of having a written contract also applies to goods or services sourced by way of direct procurement as is provided by section 104(d) of the Act and that under section 72 of the Act, the Appellant has an obligation to comply with provisions of the Act. These provisions provide as follows:

72. Responsibility for complying with Act, etc

Contractors, suppliers and consultants shall comply with the provisions of this Act and the Regulations.

104 Procedure for direct procurement

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

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

135 Creation of procurement contracts

- (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer



authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.
- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.
- (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.
- (6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—
 - (a) Contract Agreement Form;
 - (b) Tender Form;
 - (c) price schedule or bills of quantities submitted by the tenderer;
 - (d) Schedule of Requirements;
 - (e) Technical Specifications;
 - (f) General Conditions of Contract;
 - (g) Special Conditions of Contract;
 - (h) Notification of Award.
- (7) A person who contravenes the provisions of this section commits an offence.

20. From the aforesaid provisions, it is clear that under section 72 of the Act, there is a statutory responsibility on the supplier of services, like the Appellant herein, to comply with the Act and Regulations made thereunder. Further that the contract formed between the parties must be in writing signed by both parties. In this case, the supply of subsequent works was not supported by a contract in writing is not disputed. Finally, compliance with section 135 of the Act, is underpinned by a criminal



sanction. The trial magistrate therefore came to the correct conclusion by rejecting the Appellant's claim.

21. In addition to the statutory provisions, there is ample authority relied on by the trial magistrate and which was binding that support this ultimate conclusion. Although the *Royal Media Services Case (Supra)* dealt with the Public Procurement and Disposal Act, 2005, the dicta therein applies equally to this case as the provisions are similar to the current legislations. Tuiyott J., had this to say;

It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.

22. The same conclusion was also reached in *Centurion Engineers and Builders Limited v Kenya Bureau of Standards* ML HC Misc. No. 506 of 2012 [2017] eKLR where the court held that a contractor cannot benefit from failure to comply with the procurement law.

57. The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

23. The Plaintiff relied on the cases of *Hydro Water Well Case (Supra)* and *Kabuito Contractors (Supra)* to state that the Respondent cannot escape liability for the subsequent works undertaken. These cases can be easily distinguished on the ground that the decision in this case is based on statutory provisions and on the facts where there was admittedly no contract in writing signed by the parties. In the *Hydro Water Well Case*, there was a valid written contract for the projects undertaken by the plaintiff therein and that part payment was made for those services. In the *Kabuito Contractors Case*, the contract therein was executed in 1997/1998, before the enactment of the repealed *Public Procurement and Disposal Act, 2005* that required procurement contracts to be in writing and the court rightly held that the same could not be applied retrospectively. Finally, the common law principle encapsulated in the rule in *Turquand's Case* cannot supplant or override clear statutory provisions.



24. I am not unsympathetic to the Appellant's plea that it provided services but was not paid however, the Constitution and its values must prevail over any personal loss or benefit. Article 227 of the Constitution which provides, inter alia, that procurement must be done in a system that is fair, equitable, transparent, competitive and cost-effective gives procurement a constitutional significance given that Kenya spends huge public resources in procuring goods and services. The Act, which is based on the constitutional imperatives must be given effect as the authorities cited have shown. Of course, non-compliance with the provisions of the Act may result in criminal sanction for the officer involved and the said officer may be held personally liable for the loss but this is not the issue here.
25. In conclusion, the trial magistrate correctly analyzed the evidence and made a determination that was consistent with the law and binding authorities.

Disposition

26. The appeal is dismissed. Since both parties did not comply with statutory provisions, they shall bear their respective costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D. S. MAJANJA

JUDGE

Mr Orenge instructed by Mbugua Ng'ang'a and Company Advocates for the Appellant.

Ms Mbabu instructed by P. K. Mbabu and Company Advocates for the Respondent.

