Kenya Anti Corruption Commission v Mututho & another (Anti-Corruption and Economic Crimes Case 25 of 2016) [2022] KEHC 11975 (KLR) (Anti-Corruption and Economic Crimes) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11975 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CASE 25 OF 2016

JN ONYIEGO, J

JULY 26, 2022

BETWEEN

KENYA ANTI CORRUPTION COMMISSION ..... PLAINTIFF

AND

JOHN NJENGA MUTUTHO ..... 1ST DEFENDANT

COUNTRY SIDE SUPPLIES ..... 2ND DEFENDANT

JUDGMENT

1. This suit commenced through a statement of claim dated December 8, 2005 and filed on December 9, 2005 vide Nairobi High Court Civil Suit No. 1477/2005 which later acquired a new registration No the ACEC Misc. Cause No 25/16 following the formation of the Anti-Corruption and Economic Crimes Division. The plaintiff is a statutory body corporate established under the relevant *Anti-Corruption and Economic Crimes Act* No 3 of 2003 which body has instituted the suit herein on behalf of Kenyatta National Hospital Management Board (hereafter the KNH) for recovery of monies allegedly paid to the defendants illegally, irregularly and or unlawfully after lodging a false tax reimbursement claim to the said KNH using forged documents.

2. The 1st defendant was at all material times to this suit the Managing Director to the 2nd Defendant a private limited liability company duly registered under the *companies Act*.

3. Brief facts of this case are that, sometime around November, 1999, a need arose at Kenyatta National Hospital for acquisition and therefore supply of 1,600 bed side lockers. Consequently, a tender No KNH/USAID/T/4 3/1999-20000 sponsored by USAID was floated inviting tenders for the supply of the said items.

4. On September 6, 2000, the second defendant worn the tender award for the supply of the said items at a cost of Ksh 71,344,00. Consequently, a contract award was executed and the 2nd defendant was to supply the goods in question within 180 days. Among the terms of contract was clause 31.1 which stipulated that KNH was to apply for tax exemption upon submitting the requisite documentation to the relevant department. In the alternative, clause 31.2 provided that in the event Kenyatta national hospital failed to apply for tax exemption, the second defendant was to pay the necessary duty and VAT charges in clearing goods and thereafter seek reimbursement. Further, the hospital (KNH) was to pay an additional 2 % to cover banking charges and other incidentals. Apparently, the hospital did not secure tax exemption as per clause 31.1. Consequently, the 2nd defendant supplied the contracted items as per the contract and thereafter sought reimbursement of the amount paid as import duty or taxes in compliance with clause 31.2 of the contract.

5. On December 27, 2001 the second defendant through the 1st defendant invoiced the hospital for payment of the contracted sum inclusive of Kshs 40,550,308.15 being reimbursement of the taxes and duties paid before clearing the goods supplied plus Kshs 811,206.20 being the 2% taking care of other levies, banking charges and incidentals thus totaling to Kshs 41,371,515.15.

6. In support of this claim, the second defendant through the 1st defendant attached several import declaration and clearance documents plus KRA invoice and payment receipts which the plaintiff later claimed were non- existent and or forged documents thus necessitating this suit for recovery of Kshs 41,371,515.15 being the amount claimed and Paid to the second defendant vide a cheque drawn on December 28, 2001.

7. However, it is important to mention at this stage that, before full performance or completion of the specific contract by delivery and supply of lockers, the procuring entity (KNH) did introduce some contract variation and or specifications in which various adjustments in the contract had to be included. This was necessitated by the need for KNH to comply with category B in compliance with ISO 90002 specifications for supply of lockers. Consequently, the unit price per locker was revised from the original Kshs 44,590 per unit making a total of Kshs 71,344,000 to Kshs 54,000 per unit making a total of Kshs 86,4000 as the new contractual sum. Prior to that, the KNH had made advance payment of Kshs57,075,200 on September 15, 2000 to the second defendant being advance payment to facilitate quick delivery as per the contract.

8. While installing the lockers, the KNH called out for additional supplies being curtains, bedside screens and specialized marking of the lockers through sand blasting method and therefore engraving the name KNH thereof. As a consequence, the said changes called for some civil works alterations to accommodate fixation of the curtains. In the course of installing the said lockers, a dispute arose between the two parties thus stalling implementation of the remaining part of the contract. Subsequently, KNH's new management refused to honour the remaining part of the contract culminating to a suit by way of lodging arbitration proceedings against KNH.

9. Frustrated by KNH's refusal to honour the contract (alleged breach of contract), the second defendant moved to enforce clause 27 of the contract by filing a statement of claim before the arbitrator. Through the amended statement of claim dated 7th September 2005, the second defendant claimed the following from KNH.

    a. Supply & delivery of 1600 bedside

       lockers@54,000 =86,400-

       57,075,200 29,324,800

b. Sand blasting as per item 13.....180,800

c. Interest on 29,324,800 @2% as per item 15..14,093,819

d. Security as per item 17.....1,200,000

e. Insurance.....950,000

f. General damages.....8,000,000

g. Legal costs per scale.....950,000

h. Consultancy.....500,000

i. Storage.....7,000,000

j. Gross total claimed..... 56,319,299

k. Total VAT @16%.....9,011,087.85

l. Net total claimed.....72,330,386.85

10. On 14th June 2006, the arbitrator E.H. Nyakundi made his award thus ordering KNH to pay the second defendant a total sum of Kshs 141,018,171.05 comprising of breach of contract in three categories as follows;(a) interest on delayed payment of 29,324,800,demurrage 3,2000,000, liquidated damages at 8,640,000 and 16% VAT 4,240,384;(b) 10,949,262.43 delayed payment of service contract; (c) 99,326,124 being payment of window curtains and bedside screens, general, liquidated, punitive and further general damages. The award was later adopted as an order of the high court and judgment entered. These amount was later paid in instalments by consent of both parties.

11. Prior to the institution of the arbitration proceedings, the 1st defendant had been arrested and arraigned in court on October 27, 2005 facing nine charges of uttering false documents which related to the import entry documents and KRA receipts submitted by the second defendant to KNH for reimbursement of import and custom duty. He was acquitted of all charges for lack of sufficient evidence. The court found that the accused was not charged with making or forging any false documents and that there was no proof that the accused did not import any lockers and if he did, there must have been duty paid as nine containers could not have escaped payment of duty

12. Meanwhile, KACC as it then was vide its quarterly annual report of 2008, made through gazette notice number 6502 did recommend closure of a file it had opened investigating how 4million payment was made by KNH through garnishee order proceedings after disobeying a court order directing it to pay on behalf of Countryside Suppliers (2nd defendant) A freight company freight charges incurred in airlifting curtains and lockers for country side from Dubai to Nairobi.

13. The plaintiff's claim therefore against the defendant in this suit is for recovery of Kshs 41,371,515, costs of the suit and interest thereof. The claim is hinged on the allegations that on December 27, 2001, the defendant fraudulently and unlawfully claimed the said amount being reimbursement for importation, clearance and hauling charges, custom duties, VAT, banking charges and incidentals for importation of bed side lockers which expenses were never incurred.

14. The plaintiff particularized acts of fraud as follows;

    1. Submitting false import receipt in support of their claim with knowledge that they were not issued by KRA

    2. Knowingly submitting false import entry documents in support of their claim

3. With Knowledge made a false declaration on importation of bed side lockers.

4. Knowingly submitting false clearing and handling invoices.

5. Knowingly presenting false documents to the hospital

6. Knowingly founding their claim for reimbursement on documents they knew to be false

7. Tendering false documents constituting a representation that the contents of the same were true and accurate.

8. Making a fraudulent misrepresentation in respect of the false documents intending them to be relied upon and as a matter of fact relied upon.

15. In their response, the defendants entered appearance on December 28, 2005 and filed defence on 16th January, 2006 denying the claim and allegations of fraud. They stated that they lodged an official and genuine claim supported by authentic documents among them importation and clearance documents plus payment receipts officially issued by KRA. They further challenged the legality of the proceedings being commenced by the plaintiff instead of the KNH itself as the procuring entity and that there was a pending case being CR.C No 2400/2005 then pending against them. They contended that the money in question was their legal and lawful entitlement

Plaintiff's case

16. The plaintiff called 7 witnesses and closed its case. Pw1 Daniel Igoro Methu a finance manager then working at the Kenyatta National Hospital confirmed receiving a tax reimbursement claim from the 2nd defendant for a sum of Kshs 41,371,515.15. That accompanying the invoice request dated December 27, 2001 (pex.3) were various receipts from KRA and a letter from the Director Procurement KNH approving the said payment (letter marked P Ex.2)

17. He identified the said documents accompanying the invoice as follows;

1. Original receipt from KRA receipt No 451145 dated 22nd August, 2000 (PEx.4) and import entry No 2314 (P.Ex.5) worth 5,185,055

2. Receipt No 451152 worth 2,590,029 (P Ex.6) dated 22nd August, 2001 and import entry No 2315 (P. Ex .7;

3. Receipt No 475218(P.EX.8) worth kshs 5,596,258 dated 19th September, 2001 and import entry no 2255 (P.Ex.9)

4. Receipt No 475223 worth kshs 5,197,509 dated 19th September, 2001(P.Ex.10) and import entry number 2256 (P.EX.11)

5. Receipt No.475229 worth 5,197,509 dated 19th September, 2001 (P.Ex 12) and import entry number 2258(P.Ex.13).

6. Receipt No 481312 worth kshs 5,194,395 dated 15th October, 2001 (P ex 14) and import entry No 1639 (P ex 15)

7. Receipt No 481316(P.Ex.16) worth kshs 5,194395 dated 15th October, 2001 and import entry No 1641 (P.Ex. 17)

8. Receipt No 482145(P.EX.18) worth kshs 5,194,395 dated 20th November, 2001 and import entry No 2009 (P. Ex.19)

9. Receipt No 482147 (P.Ex. 20) worth kshs 2,594,698 dated 20th November, 2001 and import entry No 2010 (P. Ex. 21)

18. Upon receipt of the said documents, Pw1 prepared a cheque No 0002445 dated December 28, 2001 (Pex.22) in favour of the 2nd defendant. To confirm the basis upon which he paid, the witness produced the contract document marked and produced as P Ex.23. According to him, he had no reason to doubt the authenticity of the documents as the Director internal audit and procurement had approved the claim for payment.

19. Pw2 Elijah Chimera, a cashier at the Kenya Revenue Authority then was on 2nd September, 2002 confronted by CID officers who had some documents which they wanted him to confirm whether they were from their office or issued by him and therefore authentic. One of the documents shown was import entry No 1639(Pex.24) which he confirmed was officially issued from their office. Attached to that import entry was receipt No 445013 (Pex.25) worth 188,982. At the same time, he was shown another set of import entry No 1639(Pex.15) and receipt No 481312 (P.Ex.14) worth 5,194,393 as import duty. According to him, this receipt was forged as it was not issued from their office and the stamp impression was not his nor from their office.

20. He also confirmed the initials reflected in the forged receipt (P Ex. 15) as ECN were contrary to his which had ENC. He was again shown a second set in respect of import entry No 2010(P ex.26) with receipt No 467363(P ex 27) worth 148,649 which he recognized as official and authentic.

21. When he was shown another set bearing the same import entry No 2010(P.Ex 21) with receipt No 482147 (P Ex 20) worth 2,594,698 purporting to be issued by him, he disowned the documents terming them a forgery and that the signature and stamp impression was not official.

22. Basically, he disowned P.Ex. Nos 4 up to 22 as being forged documents bearing his name. He identified some documents with genuine import entry and receipt which he confirmed were official. His testimony was further corroborated by Pw6 the Document Examiner Mr. Kenga who confirmed that the signatures in the questioned documents were not in agreement with the sample and specimen signatures of Pw2 implying that he was not the author of the said documents.

23. The document examiner further analyzed the stamp impression in the questioned documents and compared the same with those from the customs and exercise duty department thus confirming that they were made of different instruments. That the prints in the bill of lading purportedly issued by Pacific International Lines (PIL) and a known copy of lading issued by PIL confirmed that they were not made by the same instrument.

24. During cross examination by Mr. Mirie, he stated that, he was not in-charge of granting import entry numbers as he was a cashier working on documents issued by other officers. He could not explain how two receipts came up in respect of one import entry No. He however confirmed that there were several offices granting receipts but one import entry could not have two receipts generated.

25. Pw3 Muthoni Ondieki a cashier with KRA confirmed processing documents in respect of import entry No 2256 (P.Ex 28) and issued receipt No 4339021 (P.Ex 29) worth Kshs 751,293 all in respect of importation of Bales of used clothes and shoes. She however disowned handling documentation with corresponding import entry No 2256 (P Ex 11) with receipt No 475223(P. Ex 10) worth Kshs 5,197,509. She stated that import entry numbers were then running serially hence one import entry No. could not have two sets of documents nor receipts.

26. Pw4 Sammy Davis Mathenge was at the material time a cashier working with KRA. He confirmed handling official import entry No 2009 (P Ex 32) and receipt No 467397 which bore similar import

entry marked PEx Nos18 and 19 which were not genuine. He also confirmed officially handling import entry No 2314(P Ex 34) and issued receipt marked P.Ex 35. However, when he was shown similar import entry (PEx 4) and receipt attached (P.Ex.5), he disowned the same referring to them as not genuine. Equally, he was shown yet another set in respect of import entry No 2315 (PEx.36) with receipt marked (P Ex.37) which he confirmed were genuine bearing his signature. He nevertheless disowned P. Ex Nos 6 and 7 bearing similar import entry nos which documents were not genuine. On cross examination, he denied knowledge on how import entry Nos were being generated.

27. Pw5 Joseph Ashmalla Assistant Inspector General of police investigated the claim and compiled evidence from witnesses which revealed that a claim for reimbursement of taxes and duties by the defendants was based on fraud and forged documents. That officials from KRA denied clearing goods for countryside suppliers.

28. He obtained all questioned documents and specimen handwriting and signatures of the KRA officials who purportedly handled the questionable documents. He forwarded the said documents to the document examiner who confirmed that they were not authored by hands purported to have issued them at KRA office. On cross examination, the officer said that he did not know the person who authored the questioned documents.

29. PW6 Emmanuel Kenga Doc. Examiner did examine the questioned documents against the specimen signatures of one Chimera(pw2) and found that they were made by different hands. He also examined the stamp impression on the questioned documents against the official stamp of customs and exercise duty department and found the same incompatible. He produced his report as P Ex.No. 48.

30. Pw7 Taylor Wambua head operations and logistics of KB Freights Ltd a clearing and forwarding company confirmed that he was involved in clearing goods in respect of entry No 2314 (Ex.34) with attached receipt marked P Ex 35. When the investigating officer showed him similar import entry No. marked P Ex No4 with receipt attached (P Ex 5) purportedly used by 'Aims Cargo' he disowned the same as they did not bear the official revenue stamp for the officer Kilindini (officers' allocated no). He dismissed the suggestion that there can be two similar import entry numbers in respect of two different transactions.

Defendants' case

31. On his part, Dw1 Mr. John Muthutho adopted the content in his witness statement. He denied authoring any forged documents. He denied knowledge that the documents were forged and that it was upon KRA to answer those questions as well as the clearing agents. He singled out Mr. Chimera Elijah (PW2) as the author of those documents and therefore the culprit who should be held answerable.

32. He further stated that it was not uncommon to have disciplinary proceedings against KRA officers for flouting rules of procedure. According to him, similar proceedings were conducted through arbitration pursuant to clause 27 of the contract in which he sued KNH for breach of contract. That as result, the outstanding contractual sum and reimbursement of taxes was settled in his favour and the full amount paid in instalments by consent. He also asserted that he was cleared off similar allegations by the criminal court which acquitted him. He further referred to Kenya gazette notice dated 18th July 2008 being KACC'S quarterly report submitted to the AG then in which he was allegedly cleared of any wrong doing and therefore the closure of any further proceedings against him in respect of the same subject.

33. He also stated that the 2nd defendant imported goods in nine containers which were cleared by Mr. Mathai of Aims Cargo Freighters limited who processed documents for import tax and custom duties.

He went further to state that the suit herein is politically instigated. After close of the case, parties agreed to file submissions.

Plaintiff's submissions

34. The plaintiff filed its submissions dated 10th November, 2020 submitting on six issues identified as hereunder;

    (a) Whether the defendants sought tax reimbursement based on forged documents;

    (b) Whether the 1st and 2nd defendants were unjustly enriched by the receipt of Kshs 41,371,515 at the expense of the public;

    (c) Whether the 1st defendant is liable;

    (d) significance if any, of acquittal of the defendants

    (e) Whether the claim has been determined through arbitration and is therefore res-judicata;

    (f) Whether the claim herein was investigated by the plaintiff and found to have been properly paid.

35. Regarding the 1st issue, Mr. Murei counsel for the plaintiff submitted that the evidence of Mr. Chimera (Pw2) as corroborated by the document examiner (Pw6) confirmed that the documents submitted by the 2nd defendant for reimbursement did not emanate from his office and that his purported signature on those documents was forgery. Counsel further contended that the defendant's exhibits (42) being a bill of lading from Pacific International Lines (PIL) were forged as evidenced by the Line Manager PIL letter's dated 16th October,2002 attached at page 61-62 of the defendant's list of documents. That the defendants never supplied the court with any proof that money actually left the 2nd defendants account towards payment of taxes.

36. That the defendants did not tender proof that they had engaged and paid Aims Cargo the sum of Kshs 40,550,308 for clearance of taxes.

37. Mr. Murei contended that the document examiner's report was not challenged thus confirming that the documents submitted were forgeries and therefore the burden of proof that they were not forgeries lay with the defendants. In support of this proposition. Counsel relied on the decision in the case of *Alexander Muteti Mutinda & another Vs Republic (2015)* eKLR where the court held that where evidence reveals and is confirmed by the document examiner that documents were forged, it was not necessary for the prosecution to actually prove as to who forged them.

38. Further reliance was placed on the case of *Ali Mohamed Sunkar v Diamond Trust Bank (K) Ltd (2011)* e KLR where the court held that a document examiner's report can only be challenged by another document examiner's report. As to the defendant's claim that they paid the then clearing agent Aims Cargo to clear goods and if there is any blame it is Aims Cargo to blame, Mr. Murei opined that the fraudulent acts of Aims Cargo are binding on the defendants as their principal.

39. Concerning the question whether the defendants ever imported the bedside lockers from Lee curtain house of Singapore, Mr. Murei submitted that there was no proof of importation and that in any event the Lee Curtains did not deal with hardware products then. That there was no proof of payment made to Lee curtains House Singapore by the defendants. That there was not proof on how those items were procured and whether the 1st defendant ever travelled to Singapore to procure the said goods.

40. It was counsel's further submission that the shipping line PIL (Kenya) Ltd disowned the bill of lading in respect of the importation of lockers (See D.Ex. 4 at page 61-62 defendant's bundle of exhibits). Counsel contended that the defendants having been paid Kshs 57,075,200 as advance payment, it was expected that they would have imported the lockers at once to meet the 180 days' dead line and not in piecemeal as reflected from the forged receipts.

41. Concerning the second issue on unjust enrichment, counsel submitted that the payment of Kshs 41,381,515 to the defendants without paying tax and custom duties amounts to unjust enrichment hence recoverable by way of restitution. To justify this proposition, the court was referred to the case of *Chase International Investment corporation and another V Laxman Keshra and others (1978)* KLR 143and *Fibrosa Spolka Akayina V Fairbarn Lawson Combe Barbour Ltd* (1943) A.C in which the court held that it is clear that in any civilized system of law, it is bound to provide for remedies for cases of unjust enrichment or benefit

42. Turning into the 3rd issue whether the 1st defendant is liable, Mr. Murei contended that as a Managing Director and Majority shareholder to the 2nd defendant, the 1st defendant was the sole person running the defendant's activities and therefore a beneficiary. That where acts of fraud are proved against a Co-Director the corporate vail is lifted and such Director held liable. To support this assertion, the court was referred to the case of *Jones and another Vs Iipman and another* (1962) 1All ER 442 and *Trustor A B vs Smallbone and others* (No.2) (2001) 3 ER 987 where the court stated that it was entitled to pierce the corporate veil and recognize the receipt of money by a company as that of the individuals in control of it if the company was used as a device or facade to conceal true facts thereby avoiding or concealing any liability of those individuals.

43. That in this case, the 1st defendant cannot hide behind the corporate veil as he was personally liable having benefited from the money in question. That the company had no hands to commit the fraud and did use the 1st defendant to commit the fraud.

44. As to the 4th issue on whether the defendant's acquittal in the criminal case automatically exonerates the 1st defendant from liability, counsel submitted to the contrary arguing that determination of a civil suit is on a balance of probability. Counsel submitted that the acquittal of the 1st defendant has no relevance in civil proceedings. To buttress this proposition, counsel referred to the case of *Standard Chartered Bank Vs Pakistan National Shipping Corporation and others* (No2) (2003) 1All ER 173.

45. As to issue No. five whether the suit is res- judicata on grounds that the same has been determined on arbitration, counsel submitted that the arbitration proceedings in question did not concern the subject at hand as they were in relation to additional claims on the main contract which contracts the defendant claimed to have executed but not paid.

46. Counsel submitted that the arbitral proceedings were a sham as they were intended to fleece KNH through recording of consents dated 15th October, 2001 (D. Ex 66)

47. Lastly, Mr. Murei submitted on the 6th issue arguing that, the gazette notice dated 18th July, 2008 relates to garnishee proceedings between countryside supplies and a shipment company referring to consignment of goods from Dubai. That this gazette notice is not relevant to this case.

Respondent's submissions.

48. Through the firm of Gichuki King'ori and company advocates, the defendants filed submissions dated 13th November, 2020. It was the defendants' submission that the award for the contract was not in

dispute and that the supply of lockers was to be done within 180 days but that was not to be due to several variations in contractual specifications.

49. Regarding the question whether the 2nd defendant imported lockers, learned counsel submitted that the user department (KNH) acknowledged receipt of the contracted items and through its quarterly reports, the plaintiff published a gazette notice in 2008 thus recommending closure of the file after being satisfied that lockers were supplied to KNH. Further, counsel submitted that the arbitration proceedings where breach of contract was the subject between the defendants and KNH had concluded the matter after the arbitrator entered an award in favour of the defendants which was later adopted by the high court.

50. Learned counsel further submitted that the plaintiff's officers did visit Singapore to confirm the source of the lockers. Regarding document examiner's report, counsel submitted that the cause of the differences in the print in the bill of lading was the use of different typing machines hence no proof that the lockers did not emanate from Singapore. That the bill of lading submitted for examination analysis was printed from PIL(K) Ltd and not Pacific International limited (PTE). Counsel submitted that there was no proof that the lockers were manufactured locally.

51. Submitting on whether the defendant relied on false documents to illegally claim Kshs 41,371,315, counsel opined that KNH honoured the claim after being satisfied that the necessary supporting documents were attached and that the arbitral proceedings, criminal proceedings against the defendants, and KACC gazette notice of 2008 exonerated the defendants from any wrong doing. He contended that the defendants were not charged with forgery of any documents anywhere.

52. As regards the import entry documents and payment received, counsel submitted that they were all issued by KRA and that the discrepancies in issuing port numbers was a responsibility of the KRA staff. That a clearing agent had no capacity to guess pool numbers which was a preserve of the KRA staff at the strong room. Counsel contended that the document examiner did not confirm that the alleged false documents were indeed forged.

53. Commenting on the aspect of payment of taxes, counsel asserted that there was no proof that money in clearance of tax was not received from the second defendant. That the plaintiff having confirmed that tax payment was made by cheque failed to confiscate those cheque books. Counsel contended that duty was properly paid and the documents in question officially issued. He further contended that the plaintiff did confiscate several documents belonging to the defendants thus making it impossible to retrieve some relevant documents to further prove that the defendants did their part of the contract.

54. In regard to allegations of rampant fraud within KRA, Mr. Mirie relied on D.Ex 1 being a report on disciplinary cases involving KRA staff on the aspect of fraud by manipulating receipts by staff with the original receipts showing actual amounts but with the duplicate receipt reflecting a lesser amount, release of goods without payment of customs duty and substitution of cheques. Learned counsel shifted blame to KRA staff for manipulating documents.

55. Referring to the consequences of the defendant's acquittal in Cr. Case No 2400/2005, counsel submitted that the alleged forged documents were tendered in evidence but the defendants were acquitted.

56. As to whether fraud was committed, counsel submitted that allegations of fraud must specifically and strictly be proved. In this regard, the court was referred to the case of *R .G Patel Vs Lalji Makanji*

(1957) E.A 314 , at page 317 and *Vijay Morjaria Vs Nansing Madhusingh Darbar & another* (200) e KLR where it was held that:

> " It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to have fraud to be inferred from the facts".

57. Touching on the doctrine of restitution, counsel contended that the defendants have not unlawfully enriched themselves at the expense of the plaintiff as what they received was their lawful entitlement. To demonstrate under what circumstances restitution is applicable, the court was referred to the holding in *Owen V Tate* (1976) GB 402 and Goff and Jones' law of Restitution where it was held that restitution could be denied where; the benefit was conferred pursuant to a valid common law, equitable or statutory obligation owed by the claimant to the defendant; by a claimant while performing an obligation owed to a third party; in submission to an honest claim, under process of law or a compromise of disputed claim; and by the claimant acting voluntarily" or officiously"

58. On the question whether this court has become functus officio, Mr. Mirie submitted that, the arbitral proceedings having been concluded and a decree entered by a court of equal status, this court has been rendered functus officio on account of the doctrine of *res-judicata*.

Analysis and Determination

59. I have considered the plaintiff's case *viz a vis* the defendant's case. I have also carefully considered both written and oral submissions by both parties' respective counsel. On 17th March, 2013 parties agreed on 10 issues for determination as follows;

    1. Whether or not the 2nd defendant was awarded a tender for the supply of 1,600 bedside lockers to the Kenyatta National Hospital at an agreed consideration of Ksh 71,344,000.00

    2. Whether or not after notification of the award, the contract was drawn and executed a term of which inter alia required the 2nd defendant to deliver the bedside lockers within 180 days.

    3. Whether or not the defendants unlawfully claimed and received in payment the sum of Kshs 41,371,515.15 purportedly in respect of reimbursement for import, clearing and handling charges, custom duty, VAT, bank charges and incidentals incurred in the importation of lockers (hereafter the disbursements).

    4. Whether or not the second respondent imported any bed side lockers.

    5. Whether or not false or forged documents were relied upon to lay claim for refund of the disbursements.

    6. Whether or not the particulars of fraud set out in the plaint are true.

    7. Whether or not the 1st defendant was the principal actor and author of the aforesaid fraudulent transactions.

    8. Whether or not the 1st defendant employed the second defendant as a sham, cloak, and or an instrument to accomplice his purpose.

    9. Whether or not as a result of the aforesaid fraudulent transaction, the defendants have been unjustly enriched with receipt of the sum of Kshs 41,371,515.15 at the expense of the hospital.

    10. Whether or not the defendants jointly and severally are liable to restitute Kenyatta National hospital the sum of Kshs 41,371,515.

Whether or not the 2nd defendant was awarded a tender for the supply of 1,600 bedside lockers to KNH worth Kshs71,344,000 within 180 days (See issue 1 and 2)

60. From the evidence on record and as indeed admitted by both parties, the second defendant worn a tender contract for the supply of 1,600 pieces of bed side lockers to KNH at a consideration of Kshs 71,344,000. The contract was as a matter of fact entered on 9th September, 2000 (P Ex 23). It was also a term of the contract admittedly that the said items were to be supplied within 180 days which never happened due to some variations on the contract specifications thus resulting to arbitration proceedings for alleged breach on part of the contract. Nevertheless, the entire lot of 1,600 lockers were eventually supplied as confirmed by PW1 Mr. Mathew Daniel Igoro KNH's Finance Manager who processed the payment. To that extent, issue number one and two are not in dispute.

Whether or not the defendants unlawfully received in payment(reimbursement) the sum of Ksh 41,371,515.15 from KNH and whether or not the second respondent ever imported the said lockers (issues 3&4)

61. The crux of the matter herein lies on the claim by the plaintiff that the 2nd defendant did not import the lockers supplied and therefore was not entitled to tax relief amounting to Kshs 41,371,515.15 which he allegedly claimed and was paid after presenting false and forged documents namely; import entry documents and customs and exercise duty payment receipts.

62. According to clause 31 (1) of the contract, KNH the procuring entity was supposed to seek tax exemption to facilitate the 2nd defendant import the said items duty free. However, clause 31(2) did provide an alternative that, in the event the procuring entity failed to obtain tax exemption, the 2nd defendant would import, pay import taxes and custom duties and them later seek imbursement of the same. Further, under the same clause, the second defendant was to get 2% additional pay to cater for banking charges and other incidentals.

63. It is not in dispute that KNH did not obtain exemption hence the 2nd defendant was free to import the goods, pay taxes and seek reimbursement. The 2nd defendant claimed to have paid a total of Kshs 40,550,308.95 as import and custom duties. He also claimed Kshs 811,206.20 being the 2% provision catering for banking charges and other incidentals making a total of Kshs 41,371,515 the amount he claimed and got paid.

64. It is also not in dispute that in support of their claim, the 2nd defendant submitted import entry documents and receipts marked P Exhibit Nos 4 to 21. Allegedly, these import entry forms and receipts purportedly issued by a KRA official one Chimera (Pw2) were disowned by the said Chimera who claimed the signature by initial on the corresponding receipts and the stamp print were not his. Further, that he (pw2) had handled similar transactions in respect of same import entry numbers and that it was not possible to have two similar import entry numbers generated in respect of the same transaction. Chimera however identified some other official and genuine import entry transactions bearing different official receipts.

65. Pw2 disowned the parallel import entry numbers and payment receipts attached thereof referring to them as false documents. The document examiner Pw6 confirmed this aspect stating that the hand writing on the contested documents which the defendants do not deny having submitted as compared with specimen signatures were not made by the same hand. Further, that the stamp impression on those disputed documents was not consistent with the official stamp impression then in use in the customs and exercise duty department.

66. The key questions then begging for answers are; did the 2nd defendant import lockers in the first place to be able to pay for their import duty? If so, from which supplier? Did he pay the supplier? By what method or mode of payment did he pay the supplier? Was the tax alleged to have been paid ever received and acknowledged by KRA? If so, how and where did the money paid go? Through what method did the second defendant pay the said import and custom duty?

67. Before answering those questions, I would like to address the issue as to whether the 2nd defendant ever imported lockers to enable him seek tax exemption. The plaintiff claimed that there was no such importation while the defendants claimed the contrary.

68. The 1st defendant claimed that the 2nd defendant imported lockers from a company known as Lee Curtain House Singapore. That clearance was then done by Mr. Mathai of Aims Cargo Freighters limited.

69. The defendants produced an invoice dated 9th October, 2001 from Lee Curtain House drawn to the attention of John Mututho as follows;

> " Partial shipment and partial payment allowed as per advanced TT 20 Ft container number PCIU 571471-9 seal number, M656148 (D.Ex.29)

70. He produced several Bills of Lading from Lee Curtain House dated 15th October, 2001 (D. Ex 30), Bill of lading dated 13th August, 2001(D.Ex.39) Bill of lading dated 5th September, 2001(D. Ex 44) and Bill of lading dated 13th August, 2001(D. Ex.50). Accompanying the Bills of lading are Curtain Lee invoices dated 6th August, 2001(D. Ex 23), 9th October, 2001 (D.Ex.29), 9th October, 2001(D. Ex33), 11th July, 2001 (D. Ex40). In support of each of the invoices and Bills of lading are Aims Cargo invoice No 1256 dated 23rd November 2001(DEX.18), No 1204 dated 17th October, 2001 (D Ex.19), No 1255 undated and with No full particulars (D Ex 34) and another invoice 1179 undated with no full particulars (D. Ex 38)

71. From the above referred documents together with the attached import entry declaration forms which are in question, the defendants contended that they did import the lockers which he claimed are not available locally.

72. To counter the aspect of import documents, the plaintiff claimed that the Bills of lading from Pacific (PIL) were forged. The court was invited to the letter dated 16th October, 2002 written by one Niroshan Jayasinghe Ass. Line Manger PIL(Kenya) (Pacific International Lines) Ltd (D.Ex. 5) at page 62 of the defendant's list of documents in response to the Mombasa office Banking fraud's letter dated 16th October 2002 investigating fraud claims in the importation of hospital bed side cabinets.

73. In the said letter, Niroshan confirmed that the Bills of lading submitted by the defendants and then submitted to them for verification was not genuine on grounds that;

    1. None of the given OBL's are carrying the ultra-violate logo which is a security mark on all PIL OBL's
    2. Container number given on the OBL's are not in the fleet of PL containers
    3. Any PCIU container starting with 5 are reefer containers
    4. First three characters of OBL numbering reflect port of origin. In this case it should start as SIN and not BNA.

5. That on the above grounds, "we as the agents for Pacific International Lines (PIL) confirm that the given OBL's are not genuine"

74. The above evidence was further corroborated by the evidence of the document examiner (Pw6) who examined the questioned Bills of lading and concluded that he did not find any agreement between the specimen instruments given by PIL and those contained on the alleged Bills of lading presented by the defendants as proof of importation of the lockers. However, Mr. Mirie for the defendants submitted that the PIL instruments the document examiner examined was not the original one from Singapore but one from a local agent typed by a different machine. In other words, the document examiner's report concluded that the Bill of lading relied on by the defendants did not emanate from PIL the shipment agents.

75. Unfortunately, as submitted by Mirie, the report of the document examiner is not conclusive as it only dealt with a sample of PIL local agents' bill of lading and not the one from Singapore the source of the questioned document. Further, the said Niroshan as the Line Manager did not comment on the payment invoices allegedly drawn by Lee Curtain House in recognition of the importation of lockers by Countryside Suppliers. That evidence remains unchallenged. This court is therefore left with other sources of evidence confirming that there is a high probability that the defendants did import the goods in question.

76. To further prove that the said lockers were imported, the defendant produced KACC's second quarterly report for the year 2008 commencing the period 1st April, 2008 to 30th June, 2008. Item 3 of the said report made reference to Kenyatta National Hospital's loss of 4,000,000 arising from disobedience of a court order and the consequent liability to the decree holder and the attaching auctioneers. In the said report KACC made reference to arbitration proceedings between KNH and Countryside over breach of contract out of which KNH was ordered to pay 129,936,7778.54 to be paid in instalments. The said report stated as follows;

> "Inquiry into allegations that Kenyatta National Hospital lost more than Kshs 4million arising from disobedience of a court order and the consequent liability to the decree holder and the attaching auctioneer. Kenyatta National Hospital had contracted Countryside Suppliers LTD for the supply, delivery and installation of window curtains, patient's bedside screens and patient's bed side lockers. A dispute arose between KNH and Countryside Suppliers and an arbitrator was engaged who ultimately awarded the said Company Kshs 129,936,778.84. KNH arranged to pay the amount in instalments. In the meantime, the freight company that airlifted the consignment of curtains and lockers on behalf of country side supplies Ltd from Dubai to Nairobi, sued the said company for failure to pay the freight charges totaling to Kshs 5,095.000. A judgment was awarded and a decree was finally issued to the freight company. The freight company later obtained garnishee orders entitling it to attach debts owed to Countryside suppliers by KNH. Investigations further established that KNH challenged the garnishee orders in court but its application failed. KNH therefore had to pay the sums owed by Country side suppliers to the Freight company in accordance with the garnishee orders and thereafter recovered the said sum together with auctioneer's charges from the sums due to country side suppliers Ltd. The investigation did not establish any wrong doing on the part of KNH".
>
> The file was forwarded to the Attorney General on 20th June 2008 with the recommendation that the file be closed. Advice of the Attorney is awaited"

77. From this report by KACC now EACC, it is acknowledged that vide a court order, Country side suppliers was condemned to pay freight charges to the company that assisted in the airlifting of the consignment of curtains and lockers. With this bid of evidence, one would be convinced to conclude that it is true that the defendants did import the subject lockers. Otherwise, they could not have been sued to pay freight charges if they did not import the goods concern. KACC must have been satisfied with the explanation surrounding the importation of lockers and subsequent payment by KNH for them to have closed the file. From this KACC report, one would be left with the conclusion that the 2nd defendant did import lockers both by air and sea a fact that did not come out clearly in the pleadings nor submissions.

78. Having found as above, I will now turn to the question of suspicious payments of import and custom duty alleged to be over 40 million. According to the plaintiff, the import entry declaration forms submitted by the defendants did not emanate from the KRA customs and excise duty department. In particular, Pw2 one Chimera who was alleged to have issued the payment receipts in question denied issuing the same. Secondly, he confirmed that the import entry receipts in question were not issued by him as similar entry numbers were used in clearing genuine claims which he identified in court.

79. Pw2, Pw3 and Pw4 all KRA staff (clerks) denied ever clearing imports in relation to the import declaration forms allegedly submitted by the defendants. They also said it was not possible to have two entry numbers generated. This fact was confirmed by the document examiner that the handwriting contained in the payment receipts purported to have been issued by Chimera were not issued by the same hand when compared with Chimera's specimen handwriting /signature. From the evidence of Pw2 and Pw3, it's clear that the import entry documents and payments receipts submitted by the defendant to KNH were not issued by the officers.

80. Having held as above, the question then is, were those documents genuine from KRA or manufactured to fleece KRA revenue or to justify a false tax reimbursement claim by the defendants?

81. According to the defendant, he made payments for clearance of lockers. He produced payment receipts which were disowned by the purported processing cashiers. Could goods imported fail to attract duty before being released at the port of entry? The answer is no. Who then bears the responsibility of ensuring that taxes are paid? Obviously the taxman in this case KRA. With that in mind, the burden then shifts to KRA to explain how and who released the goods and under what terms or circumstances.

82. As to whether the defendants did purchase the goods from Lee curtain House, the payment invoices were not challenged which evidence still remains uncontroverted. Unfortunately, parties agreed by consent to produce all documentary evidence without calling their authors. With this risky agreement, documents from Lee curtain reflecting receipt of payment for supply of lockers to countryside suppliers is a fact which confirms that the defendants did import the lockers. As to the mode of payment through which payment of taxes was made, the defendants stated that it was their Agents Aims Cargo who cleared the goods. The fact that goods were delivered without any claim that they were locally manufactured, there is sufficient primafacie proof on a balance of probability that the lockers were imported and supplied as per the specifications to which the procuring entity was satisfied. As to how the goods left the port, it is up to KRA to unlock the mystery and false issuance of double import entry declaration forms and subsequent payment receipts.

Whether acts of fraud were proved.

83. From the manner in which two identical import entry documents were processed and receipts purportedly issued, it is possible that KRA did not receive its actual dues in form of taxation. It would also appear that there was some form of foul play and collusion amongst the KRA officers or in

collusion with the importer (defendants) or clearing agents. Acts of collusion in public offices by staff to defraud their employer are not uncommon. In this case KRA staff knows what happened and it must have been a syndicate. The production of double entry forms and unaccounted for receipts was a KRA inside job to which KRA should own up and seal up loopholes in its taxation system. One cannot conclusively hold that there was totally no tax paid by the defendants. KRA may have lost the actual tax but for purposes of the defendant's claim a receipt of the actual payment had to be issued to justify reimbursement. This was a syndicate most likely involving all parties including the defendants but difficult to fix them without evidence.

84. It is no wonder the KRA have had various cases of staff indiscipline involving manipulation of payable taxes, conspiracy to defraud and extortion. See KRA disciplinary cases 2004,2005 report at page 258 of the defendant's bundle of documents (D. Ex61)

85. To that extent, it is hard to strictly apportion liability of fraud on the defendants. There is no way KRA would have released imported goods without demanding for payment of tax. It is trite that he who alleges must proof. See Section 107 of the *evidence Act* which provides;

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

86. In the case of *Susan Mumbi V Kefala Grebedin* (Nairobi) HCC No. 332 of 1993 Juma J had this to say;

> " The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges must prove. It's the plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial"

87. In the instant case, it is incumbent upon the plaintiff to prove that the defendants committed acts of fraud. Indeed, acts of fraud must be specifically pleaded and strictly proved. See *Vijay Morjaria Vs Nansingh Madhusingh Darbar and another* (Supra) and *John Mbogua Getao V Simon Parkoyiet Mokare & 4 others* (2017) e KLR and *Emfil Ltd V Registrar of Titles Mombasa & 2 others* (2014) eKLR where the court of appeal held that;

> " allegations of fraud are allegations of a strong nature normally required to be strictly pleaded and proved on a higher standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without much regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence".

88. It is highly probable that the receipts and entry numbers claimed to be forged were produced by or made with the knowledge of KRA dishonest staff. The investigating officer herein the plaintiff, did not prove that the texture of the KRA receipt and import entry documents (paper used) does not tally with the type of receipts ordinarily used for purposes of paying taxes with the requisite security features.

89. In view of the above stated reason, I am not convinced that the receipts relied on to claim reimbursement did not emanate from KRA. The most likely scenario is that KRA may not have received its proper tax which problem must be resolved by KRA management.

Whether or not the 1st defendant was the principal actor of the aforesaid fraudulent transactions and if so, whether he employed the second defendant as a claim instrument to accomplish this purpose (issues7&8)

90. It is a fact that the 1st defendant was the Managing Director of the 2nd defendant with a majority shareholding at 90%. In his witness statement, the 1st defendant admitted procuring all necessary paper work concerning the contract on behalf of the 2nd defendant and that he was the one who imported the goods. Basically, he was the company and the company was himself by action. It is trite that a company is a separate legal entity distinct from its *Directors. See Salomon V Salomon (1897) A C 22.*

91. However, where allegations of fraud are made against a company and the Directors are involved in perpetrating the fraud, a court will not hesitate to lift the corporate veil to expose such Director/s to ensure he is personally answerable for acts of fraud allegedly committed by the company. In this regard I am guided by the holding in the case of *Jones and Another Vs Lipman and another* (1962) all ER 442. Similar position was held in HCC NO 416 of 2012, *Director of o'Jays investment v Loise Mukunya* (2015) ECLR In which the court held that;

> " ...However, I agree with the applicant the same courts have also pierced the corporate veil to see what is happening behind it if there is evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the shareholders and or the controllers of the company"

92. In view of the serious allegation of fraud levelled against the 2nd defendant (company) and its Managing Director, it was necessary to pierce the veil to expose the fraud and rot behind it. It was therefore proper to have sued the 1st defendant.

Whether or not as a result of the alleged fraud the defendants have unjustly enriched themselves and whether the amount received should be recovered (issue no.9)

93. The sum being sought for recovery or restitution was paid through a validly executed contract after obtaining requisite clearance and approval for reimbursement. To the extent that due delivery of the lockers was made and payment effected by the procuring entity, there cannot be a claim of unjust enrichment and therefore restitution.

Whether the suit amounts to Resjudicata

94. According to the defendants, the suit herein has been litigated upon before an arbitrator in favour of the defendants and the award adopted by the high court as an order of the court and thereafter the amount in question paid by consent. Mr. Murei for the plaintiff argued that the arbitral proceedings have no bearing with the suit herein as their subjects are distinct. I however wish to clarify on the issue as follows. The institution of the said arbitral proceedings under clause 27 of the contract came as a result of allegations of breach of contract and non-payment of outstanding balances. The claim for breach of contract Against KNH arose after the contract variation and change of specifications to include supply of curtains and processing of civil works to accommodate the new changes in fixing curtains and locks and also labelling or marking the locks a fact that meant extension of the contractual period and revised contractual sum.

95. From the arbitration proceedings, it would appear that, due to some misunderstandings between KNH senior officials over the implementation of the contract, the contract could not be executed in time. At

some point, the 2nd defendant's workers installing the lockers and curtains were allegedly chased away by KNH management thus stalling completion of the process.

96. After the KNH refused to pay for the revised changes and the outstanding balances, the defendant instituted arbitration proceedings culminating to entry of an award against KNH on 14th June, 2006 directing KNH to pay the 2nd defendant (claimant) Kshs 141,018,171 which money was paid by consent dated 14th September, 2006 (see page 251-192 of the defendants bundle of documents). From the amended statement of claim seeking the award, there was no claim for any outstanding tax reimbursement. In any event, the said reimbursement had been paid way back on 28th December 2001.These amount could not have been part of the claim in the arbitral proceedings as the same was not outstanding as at the time arbitration was conducted in the year 2006.

97. Ideally, the subject in this case substantially does not touch on the same subject before the arbitrator and between same parties which elements must be established when dealing with the issue of *res-judicata* under Section 7 of the *Civil Procedure Rule Act*. The supreme court in the case of *Independent Electoral and Boundaries Commission Vs Maina Kiai &5 others* (2017) eKLR stated that Section 7 of the *civil procure rules* envisages existence of the following elements.

(a) the suit or issue was directly and substantially in issue in the former suit.

(b) The former suit was between the same parties or parties under whom or any of them claim

(c) Those parties were litigating under the same title

(d) The issue was heard and fully determined in former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

98. Indeed, litigation must come to an end at one point or the other. Where a matter has been litigated upon, file closed and decree honoured, the matter should be left to rest. See *John Florence Maritine services limited and another Vs Cabinet Secretary for Transport and Infrastructure and 3 others* (2015) e KLR where the court had this to say;

> " the rationale behind the *resjudicata* is based on the public interest that there should be an end to ligation coupled with the interest to protect a party from facing repetitive ligation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases...".

99. However, in this case the defendants have failed to establish existence of the necessary ingredients for the doctrine of resjudicata to apply. The suit before me herein is totally different from the subject before the arbitrator which dealt with breach of contract. I will therefore not delve so much on that subject and Mr. Mirie's argument on the subject of resjudicata is misplaced as the issues in the arbitration proceedings have no nexus with those in this case. To that extent the court is not *functus officio*.

Whether the acquittal of the 1st respondent in the Cr. case no 2400/2005 is of any consequence in this case

100. It is trite law that criminal proceedings are distinct from civil proceedings despite section 193 B of the *Criminal Procedure Code* providing that civil proceedings and criminal proceedings over the same subject matter can proceed concurrently. Under the criminal proceedings, the burden of proof is that of beyond reasonable doubt while under civil cases it is on a balance of probability. The fact that the defendants were acquitted in the said criminal case does not automatically exonerate them from liability

in a civil suit. See *Assets Recovery Agency vs Quorandum limited & 2 others* (2018) e KLR in which the court with approval cited *Teckla Nandjila Lameck Vs President of Namibia* 2012) (1) NR 25 (HC) where the court stated that

> " ...asset forfeiture is, as is stated in 50 *POCA*, a civil remedy directed at confiscation of the proceeds of crime and not punishing an accused. chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the state to invoke whether or not there is a criminal prosecution "

101. Therefore, I do not see any wrong in prosecuting a civil case which has a *nexus* with continuing or already determined criminal proceedings. The acquittal in Criminal Case No 2400/2005 has no effect in these proceedings. However, judicial proceedings in one case are admissible in any court proceedings without calling for the judge or magistrate who took the proceedings or delivered the judgment.

102. In a nut shell, it is my finding that the plaintiff has not proved its case on a balance of probability as required in law. Accordingly, the suit is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26TH DAY OF JULY 2021

J. N. ONYIEGO

JUDGE