



**Indigo Telecom Limited v Independent Electoral and Boundaries
Commission & 5 others (Civil Case 391 of 2015) [2022] KEHC 13263 (KLR)
(Commercial and Tax) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 391 OF 2015
A MABEYA, J
SEPTEMBER 30, 2022**

BETWEEN

INDIGO TELECOM LIMITED PLAINTIFF

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
DEFENDANT**

EZRA CHILOBA 2ND DEFENDANT

MARJAN HUSSEIN MARJAN 3RD DEFENDANT

BETTY SUNGURA- NYABUTO 4TH DEFENDANT

OSMAN HASSAN IBRAHIM 5TH DEFENDANT

PRAXEDED TORREY 6TH DEFENDANT

Government entities were not obliged to honour procurement contracts entered into unprocedurally. *In this case the High Court deviated from its ruling in Brite Print (k) Ltd v Attorney General, Civil Case 1096 of 2000; [2001] KEHC 674 (KLR) where the court held that the government was obliged to honour contractual arrangements entered into by the outsiders/third parties even if the contracts were a result of illegal activities by agents of the government. The court held that such a position would be to assist private entities hell bent in circumventing the law to flourish; such a position would lead to runaway corruption.*

Reported by John Ribia

Public Procurement Law – direct procurement – procedures – circumstances allowing direct procurement by public entities - what were the circumstances in which a public entity was permitted to source for direct procurement – what was the purpose of direct procurement - Public Procurement and Disposal Act, 2005 (Repealed) (Act No 3



of 2005), sections 27, 74, 75 and 84; *Public Procurement and Disposal Regulations, (2006) (Repealed) regulations 58 and 62*

Public Procurement Law - procedures – where a public entity entered into a contract with a third party unprocedurally – duty of the public entity to honour the contract - whether the government was obliged to honour contracts entered into with third parties that arose out of illegalities in the procurement process by governmental officials - *Brite Print (k) Ltd v Attorney General, Civil Case 1096 of 2000; [2001] KEHC 674 (KLR)*

Brief facts

In 2013 the plaintiff entered a quotation to the 1st defendant for the supply of satellite communication equipment. The plaintiff received an LPO from the 1st defendant ordering several equipment for the sum of Kshs 36,364,273/30. The plaintiff delivered the goods on March 1, 2013 and sent Invoice No 066620 on 11/0/2013 which was payable before March 31, 2013. To supply the equipment, the plaintiff sought a short term financing for two weeks. The plaintiff contended that the defendants failed to settle the debt which forced the plaintiff to settle the loan leading to financial hardships. The plaintiff prayed for judgment against the defendants for Kshs 39,364,272/30 plus interest at 2% per month from March 31, 2013 when the said amount became due until payment in full, plus costs of the suit.

The 1st defendant denied the claim. It contended that the LPO was issued illegally in contravention of fair administrative action and in contravention of and the *Public Procurement and Disposal Act, 2005 (Repealed) (Act No 3 of 2005)*. The 1st defendant further contended that there was no contract between it and the plaintiff. That it would be against public policy to settle the unlawful claim.

Issues

- i. What were the circumstances in which a public entity was permitted to source for direct procurement?
- ii. Whether the government was obliged to honour contracts entered into with third parties that arose out of illegalities in the procurement process by governmental officials.

Held

1. Section 74 of the *PPDA* allowed a public entity to use direct procurement as long as the process was not to avoid competition. That included in circumstances such as where there was only one supplier and no reasonable alternative for the goods and where there was an urgent need for the goods being procured. However, even where there was justification for the use of direct procurement, section 75 of the *PPDA* provided for the procedure to be followed. That was in addition to regulations 62 as read with regulation 58 of the *PPD Rules*.
2. Section 75 of the *PPDA* and regulation 62 58 of the *PPD Rules* provided a strict requirement on the part of a public entity to ensure compliance with certain requirements before resorting to direct procurement. Before a direct procurement was effected under sections 74 and 75 of the *PPDA*, negotiations should involve at least two members of the tender committee.
3. The provisions were meant to avoid circumstances where rogue individuals in public institutions would singly cut deals with third parties and circumvent the constitutional imperatives of transparency, accountability and competition. The provisions avoided the possibility that private entities desirous of beating the strict procurement requirements could cut deals with rogue officers of a public entity and bind a public entity. The procurement rules presupposed that once a need arose in a public entity, the entity kicked off the process of procurement, be it competitive or direct as the case could be, following the set procedures.
4. The *PPD Rules* required a public entity using direct procurement to refrain from any negotiations until the tender committee approved the successful proposal. Thereafter, the entity entered into negotiations through two members of its tender committee who would then prepare a report of the negotiations and submit the same to the tender committee for decision making. The rules did not envisage a situation where the contractor initiated negotiations.



5. Whereas such procedures were internal and public entity had the duty to ensure, through its officials, that procurement requirements were strictly complied with in order to meet the outlined objectives.; the officials of the public entity had to at all times have the public policy and public good in mind when they undertook any action of a public entity.
6. The decision of the Brite Print (k) Ltd v Attorney General, Civil Case 1096 of 2000; [2001] KEHC 674 (KLR) (where the court held that the government was obliged to honour contractual arrangements entered into by the outsiders/third parties even if the contracts were a result of illegal activities by agents of the government) was persuasive. However, taking that route would be to assist private entities hell bent in circumventing the law to flourish. They would cut deals with rogue public officers and then bind the concerned public entities. It would be fodder for the runaway corruption in our society. That had to stop.
7. There was no evidence that a need had arisen in the 1st defendant for the subject equipment for which its procurement committee gave approval for direct procurement. There was no evidence that any negotiations were carried on. The plaintiff initiated the process by issuing a quotation to the 1st defendant for its equipment. An LPO was issued to the plaintiff to deliver the same, then an invoice followed.
8. Apart from the plaintiff's quotation and the LPO, there was nothing to show that the deal was for the benefit of the 1st defendant. There was also no explanation why the deal never followed the procedure. The contract was unenforceable. The plaintiff perpetrated and assisted an unnamed official of the 1st defendant to break the law. The plaintiff could not be allowed to benefit from a wrong it initiated.
9. The 2nd to 6th defendants were not liable. They were not involved in the transaction. The plaintiff knew who it dealt with in the transaction but it shielded them by not joining them in the suit. It wrongly dragged the 2nd to the 6th defendant to the instant suit.

Suit dismissed with costs.

Citations

Cases

1. Brite Print (k) Ltd v Attorney General (Civil Case 1096 of 2000; [2001] KEHC 674 (KLR)) — Cited in Dissenting Opinion
2. Royal Media Services v Independent Electoral & Boundaries Commission & 3 others (Civil Suit 352 of 2014; [2019] KEHC 8239 (KLR)) — Followed

Statutes

1. Constitution of Kenya, 2010 — Article 88; 47; 227(1) — Interpreted
2. Public Procurement and Disposal Act, 2005 (Repealed) (Act No 3 of 2005) — Section 27, 74, 75, 84 — Interpreted
3. Public Procurement And Disposal Act, 2015 (Act No 33 of 2015) — In general — Cited
4. Public Procurement and Disposal Regulations, 2020 (Act No 33 of 2015 Sub Leg) — Regulation 58, 62 — Interpreted

Advocates

None mentioned

JUDGMENT

1. The plaintiff is a satellite-based telecommunications service provider which offers satellite services. The 1st defendant is a constitutional Commission established under article 88 of the [Constitution](#) while the 2nd to 6th defendant were its officials between February 1, 2015 and May 6, 2016.



2. The plaintiff's case as set out in its amended plaint dated December 19, 2016 is that on February 21, 2013, it submitted a quotation to the 1st defendant for the supply of satellite communication equipment. On February 25, 2013, the plaintiff received LPO No 1905534 from the 1st defendant ordering several equipment for the sum of Kshs 36,364,273/30. The plaintiff delivered the goods on March 1, 2013 and sent Invoice No 066620 on 11/0/2013 which was payable before March 31, 2013.
3. It was the plaintiff's case that due to the short notice, it sought a short term financing for two weeks. That the defendants failed to settle the debt which forced the plaintiff to settle the loan leading to financial hardships.
4. In the premises, the plaintiff prayed for judgment against the defendants for Kshs 39,364,272/30 plus interest at 2% per month from March 31, 2013 when the said amount became due until payment in full, plus costs of the suit.
5. The 1st defendant denied the claim vide its amended defence dated March 27, 2019. It's case was that the LPO was issued illegally and in violation of the procurement principles envisaged by Constitution 2010. That the LPO was issued in contravention of the fair administrative action in article 47 of the Constitution and the Public Procurement and Asset Disposal Act.
6. The 1st defendant further contended that there was no contract between it and the plaintiff. That would be against public policy to settle the unlawful claim.
7. The 2nd-6th defendant filed their respective statements of defense all dated February 27, 2018 in which they denied the plaintiff's claim in total.
8. In the reply to defence dated October 26, 2015, the plaintiff denied that the LPO was illegally obtained nor that it contravened the Constitution and the Public Procurement and Asset Disposal Act.
9. At the hearing, the plaintiff called one witness Julius Mwatu. He adopted his witness statement dated August 7, 2015 and produced the bundle of documents filed on August 11, 2015 as PEx1. He testified that he was the Chief Finance Officer of the plaintiff at the time. That the defendant issued him with a legitimate LPO that was received and acknowledged. The plaintiff delivered the goods as per the LPO. He was unaware of any internal conflict in the plaintiff regarding the issue.
10. On cross examination, he told the court that the plaintiff had previously supplied goods to the 1st defendant and other government bodies and that he was aware that the 1st defendant was a public entity and a legal regime existed which governed public procurement.
11. That the plaintiff was requested to submit a quotation for the subject equipment a few days to the 2013 general election. At the time, the plaintiff was the only provider of satellite communication in Kenya through Thuraya. He stated that he was unaware of the legal process of a sole dealer in procuring public services.
12. The defendants called four witnesses. DW1 was Marjan Hussein Marjan, the 3rd defendant. He testified that he joined the 1st defendant on April 15, 2015 and was the 1st defendant's acting Commission Secretary and CEO. He testified that he was wrongly joined as a party as the 1st defendant was a body corporate capable of suing and being sued in its own name. That when the LPO was issued, he was not an employee of the 1st defendant.
13. That the LPO was illegally issued by the 1st defendant and it was in breach of the principles of preferential treatment and was therefore unenforceable. That there was no contract between the parties for the supply of goods as required by law. That applying public resources to settle unlawful claims was against public policy.



14. In cross-examination, he admitted that public entities could procure goods directly from an entity if it was a sole supplier of such goods. That the plaintiff was a sole dealer and sole supplier of the subject equipment. That funds for the said equipment had been committed.
15. In re-examination, he stated that there was no communication for direct procurement and there was nothing to indicate that the tender committee of the 1st defendant was involved in the process.
16. DW2 was Osman Hassan Ibrahim, the 5th defendant. He was the Director of Risk and Audit of the 1st defendant. He testified that he joined the 1st defendant on May 11, 2015. He was wrongly enjoined in the suit. That the LPO was illegal and unenforceable as there was no contract between the parties for the supply of goods. According to him, the procurement had not been followed in this case.
17. DW3 was Praxedes Tororey, the 6th defendant. She retired from the 1st defendant in 2017. She stated that she had been wrongly joined in the suit. She played no role in the transaction.
18. DW4 was Betty Sungura Nyatuto, the 4th defendant. She also protested her joinder in the case. That there was no competitive process with respect to the subject LPO thus it was unenforceable.
19. The issues that fall for determination are three; whether there was any contract for supply of goods between the parties and if so, whether it was lawful. The other peripheral issue is whether the 2nd to 6th defendants were proper parties to this suit.
20. The first issue is whether there was any contract of supply of goods between the parties. A contract is consummated where there is an offer and acceptance. There should be consideration which may be evidenced by part performance.
21. In the present case, the plaintiff submitted a quotation to the 1st defendant for the supply of satellite communication equipment. The quotation was produced at page 2 of PEx1. This was followed by the 1st defendant issuing the plaintiff with a local purchase order No 1905534 (“LPO”) ordering equipment for a total sum of Kshs 9,364,273.30. The LPO was produced at page 3 of PEx1. The goods were delivered vide delivery note No 066620 and duly received. An invoice No 066620 for Kshs 39,364,272/30 was issued in respect thereof.
22. It is clear from the foregoing that there actually existed a contract between the parties.
23. The second issue is whether the contract was lawful and enforceable. The defendant’s case was that the process through which the LPO was issued was in contravention of the Constitution and the then Public Procurement and Asset Disposal Act, 2005 (“the PPDA”).
24. The defendants’ case was that in as much as the Procurement Act provided for direct procurement for sole dealers, there was due process to be followed as provided for under sections 74 and 75 of the PPDA. That that procedure was not followed when the subject LPO was issued.
25. The defendants submitted that section 27 of the PPDA imposed 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 PPDA and its Regulations. The case of Royal Media Services v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR was cited in support of those submissions.
26. On the other hand, the plaintiff submitted that the alleged procedures were internal to the 1st defendant. That the transaction was a direct procurement which is allowed by law as the plaintiff was the sole dealer with the subject equipment. That the then existing urgency necessitated direct procurement.



27. It was not in dispute that at the time, the plaintiff was the sole dealer of the subject equipment. It was also not in dispute that there was urgency in procuring the subject equipment as the 2013 general elections was barely two months away. The dispute however, is on whether the LPO was legally issued so as to bind the 1st defendant.
28. Section 74 of the PPDA allowed a public entity to use direct procurement as long as the process was not to avoid competition. This included in circumstances such as where there was only one supplier and no reasonable alternative for the goods and where there is an urgent need for the goods being procured.
29. However, even where there is justification for the use of direct procurement, section 75 of the PPDA provided for the procedure to be followed. This was in addition to regulations 62 as read with regulation 58 of the PPD Rules.
30. Section 75 provided: -
- “The following shall apply with respect to direct procurement—
- (a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;
- (b) the procuring entity shall not use direct procurement in a discriminatory manner; and
- (c) the resulting contract must be in writing and signed by both parties”.
31. On the other hand, regulation 62 of the PPD Rules provided:
- “(1) A procuring entity that conducts procurement using the direct procurement method pursuant to section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.
- (2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 74 of the Act has been satisfied.
- (3) A procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.
- (4) The procedure for negotiations for proposals set out in regulation 58 shall apply mutatis mutandis to negotiations relating to direct procurement pursuant to section 75(a) of the Act.
- (5) A procuring entity shall not enter into a contract under section 75(c) of the Act unless it is satisfied that the offer—
- (a) meets the requirements of the procuring entity as specified under paragraph (2); and
- (b) is at the prevailing real market price.”
31. It is clear from the foregoing that there is a strict requirement on the part of a public entity to ensure compliance with certain requirements before resorting to direct procurement.



32. Further to the foregoing, there are further requirements which must follow such direct procurement. Regulation 58 of the PPD Rules provided that: -

“(1) A procuring entity shall not enter into any negotiations pursuant to section 84 of the Act until the tender committee has approved the successful proposal.

(2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit.

(3) The members of staff conducting the negotiations under paragraph (2) shall prepare a report of the negotiations and submit it to the tender committee for decision making.

(4) The report prepared under paragraph (3) shall form part of the records of the procurement.”

33. The totality of the foregoing is that, before a direct procurement is effected under sections 74 and 75 of the PPDA, negotiations should involve at least two members of the tender committee.

34. The view this court takes is that, the provisions referred to hereabove were meant to avoid circumstances where rogue individuals in public institutions would singly cut deals with third parties and circumvent the constitutional imperatives of transparency, accountability and competition. It is possible that private entities desirous of beating the strict procurement requirements could cut deals with rogue officers of a public entity and thereby bind a public entity and this is what the above provisions sought to avoid.

35. In this regard, the procurement rules presuppose that once a need arises in a public entity, the entity kicks off the process of procurement, be it competitive or direct as the case may be, following the set procedures.

36. To this court’s mind, the PPD Rules required a public entity using direct procurement to refrain from any negotiations until the tender committee approves the successful proposal. Thereafter, the entity enters into negotiations through two members of its tender committee who would then prepare a report of the negotiations and submit the same to the tender committee for decision making. The Rules do not envisage a situation where the contractor initiates negotiations.

37. In Royal Media Services vs Independent Electoral & Boundaries Commission & 3 others (*supra*), the court held: -

“It would seem to this court that the objective of these strict rules is to guard against the abuse of direct procurement. Reasons for adopting the method should be readily apparent and available to scrutiny. The method should not be employed in a discriminatory manner or to avoid competition or to achieve any other collateral reason. In addition, the public entity and by extension the public should get the best deal in the circumstances. These are safeguards that ensure that even in the exceptional circumstances where statute permits direct procurement, the overall objective of sound procurement practices contemplated by article 227 (1) of the Constitution are not trampled over or defeated. In essence parties to a direct public procurement must ensure an irreproachable compliance with the law.”



38. The court reiterates the foregoing here. This is in consonance with article 227(1) of the Constitution which provides: -

“(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.

39. It may be argued that these procedures are internal. That it is the public entity to ensure, through its officials, that procurement requirements are strictly complied with in order to meet the outlined objectives. The officials of the public entity must at all times have the public policy and public good in mind when undertaking any action of a public entity.

40. The question is whether a private entity dealing with a public entity is bound by the aforesaid requirements. The court’s opinion is in the affirmative. Every citizen of this country is bound by its laws. It is expected that all persons are to uphold the law. They are not to assist in the public officials abusing their positions and break the law with impunity for private gain.

41. This court is aware of the decision in HCC No 1096 of 2000 Brite Print (k) Ltd v Attorney General. In that case, the court held: -

“The Government acts through its human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Government ... An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Government servants.

But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime, the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry can only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the government, or if it is shown that he had exercised undue influence or played fraud or tricks in the matter.”

42. The above case is only persuasive. However, taking that route would be to assist private entities hell bent in circumventing the law to flourish. They will cut deals with rogue public officers and then bind the concerned public entities. It will be fodder for the runaway corruption in our society. That must stop.

43. In the present case, there was no evidence that a need had arisen in the 1st defendant for the subject equipment for which its procurement committee gave approval for direct procurement. There was no evidence that any negotiations were carried on by Pw1 and any two members of the 1st defendant’s procurement committee.



44. All that happened is that, the plaintiff initiated the process by issuing a quotation to the 1st defendant for its equipment. Then out of nowhere, an LPO was issued to the plaintiff to deliver the same. Then an invoice followed.
45. The plaintiff's witness admitted that he had dealt with public entities and knew the procurement procedures well. In the instance case, apart from the plaintiff's quotation and the LPO, there is nothing to show that the 'deal' was for the benefit of the 1st defendant. There was also no explanation by PW1 why the deal never followed the procedure which he very well knew.
46. Accordingly, the contract was unenforceable. The plaintiff perpetrated and assisted an unnamed official of the 1st defendant to break the law. The plaintiff cannot be allowed to benefit from a wrong it initiated.
47. As regards the liability of the 2nd-6th defendant, I see none. They were not involved in the transaction. The plaintiff knew who it dealt with in the transaction but it shielded them by not joining them in the suit. It wrongly dragged the 2nd to the 6th defendant to this suit.
48. Accordingly, the plaintiff has failed to prove its case to the required standard and the suit is therefore dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

A MABEYA, FCIarb

JUDGE

