



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO. 25 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

V E R S U S

DR. IBRAHIM HAJI ISSAK DEFENDANT

JUDGMENT

Factual Background

1. Through a Plaint dated 14th September 2016 and filed on 15th September 2016, the plaintiff a body corporate established pursuant to Section 3 of the Ethics and Anti-Corruption Commission, brought this suit against the defendants it's former employee seeking judgment for payment of;

- a) Kshs. 11,500,000/- (Kshs.Eleven million Five Hundred Thousand Shillings)**
- b) Costs incidental to this suit.**
- c) Interest on (a) and (b) at court rates from 30th April 2012 until final payment.**
- d) Any other or further relief that the court may deem fit to grant.**

2. The Plaintiff's case is hinged on the fact that at all material times to this suit, the defendant was working with the Kenya Meat Commission (hereafter referred to as KMC) as the Managing Commissioner and Chief Executive Officer of the Corporation. That by virtue of his position, he was nominated as joint signatory to KMC's First Community Bank Account No.[...].

3. That on or about the 30th day of April 2012, the defendant proceeded to the head office of the aforesaid bank situate at Jamia Mosque and presented a letter requesting for withdrawal of Kshs. 11.5 million. Subsequently, the bank officials approved withdrawal of Kshs. 11,500,000/- from the said account whereof the defendant appended his signature and date on the said letter.

4. Subsequently, the plaintiff received information that the amount withdrawn by the defendant was not accounted for as no surrender by way of paper trail was filed with the KMC office to show how the money requisitioned was spent. That further investigations conducted by the plaintiff revealed that the defendant did not follow the laid down procedure in requisitioning the money. Consequently, the purported withdrawal was termed as fraudulent, null and void and in total breach of trust placed in the office of the defendant by the public.

5. At paragraph 5 of the Plaint, the plaintiff broke down particulars of fraud as follows;

- a) The withdrawal was made purportedly on behalf of KMC but which funds were later used for private gains as no receipts of accounts have been tendered.**
- b) Failure to adhere to the requirements of the Public Procurement and Disposal Act of 2005 and its regulations of 2006.**
- c) Deliberately deceiving KMC and the public by withdrawing monies so as to secure the unfair and unlawful gain.**
- d) misappropriating public funds.**

6. Particulars of breach of public trust were also listed as follows;

a) Acting in a manner incompetent with the purposes and objects of his mandate by failing to use public money in a prudent and responsible way.

b) The expenditure of Kshs. 11.5 million that was withdrawn by use of a letter was not requisitioned by the user department as no vouchers were ever prepared in respect of this expenditure. Therefore, the expenditure was not incurred according to the rules of KMC.

7. It is the plaintiff's further claim that the plaintiff has unjustly enriched himself in the sum of Kshs. 11,500,000/- which money the plaintiff now seeks to recover on behalf of KMC as a form of restitution.

8. In response, the defendant filed his defence on 23rd January 2017 and later amended on 4th June 2018 and filed on 5th June 2018 pursuant to leave granted on 29th May 2018 thus denying the whole claim. He denied the claim that he solely signed the requisition and a cheque for the withdrawal of cash without the signatures from other mandatory signatories. He further stated that, if there was any money withdrawn from KMC account by him, the same was expended for the intended purpose which was the procurement of livestock and accounts thereof fully rendered.

9. He also asserted that, once monies had been requisitioned for or spent, it was the work of the user department or person responsible for the expenditure to account for the same and not the defendant. Further, he claimed that during his period of service, he was never a custodian of accounting documents and that all documents in support of transactions by KMC were in the custody of the Chief Accountant and his staff.

10. He went further to state that, in the absence of a substantive board, the day to day operations of the organisation were still to proceed without hindrance hence some decisions had to be made without board approval. That in any event, on 31st March 2011 the board passed a resolution for direct purchase of livestock which was the main activity of the organisation.

11. He further averred that the practice in purchase of livestock for the factory were generally cash based and in most cases the purchase of livestock was made by several officials from various mini markets for the main markets hence discriminatory to hold him liable alone. He denied claims of fraud, breach of public trust and that he unjustly enriched himself.

12. It was his claim that he diligently and faithfully served KMC by transforming it from a loss to a profit making organisation. He averred that the Auditor General's report for the covered period gave him a clean bill of health. That in any event, the issue of fraud was raised in the plaint in **Industrial Cause No. 1052/2013** which was resolved in his favour. He denied having received any demand notice to sue as claimed by the plaintiff. According to him, the suit is a witch hunt motivated by malice and therefore fit for dismissal.

13. In their rejoinder, the plaintiff filed a reply to the defence reiterating the contents of the plaint. That the defendant having admitted withdrawing and receiving the money as alleged, he was duty bound to follow Public Finance Management and Public Procurement Laws and account for the expenditure. They further stated that there was no cheque presented to the bank for payment of 11.5 million as the procedure required.

14. It was further averred that the defendant's co-accused persons in **Cr. Case No. 9/2015** were discharged hence discrimination against him as he was solely linked to the fraudulent use of the money in question. That the entire amended defence amounts to mere general denials thus disclosing no reasonable defence and it is a scam calculated at prejudicing, embarrassing or delaying a fair trial hence amounts to abuse of the court process.

Hearing of the Plaintiff's Case

15. During the hearing, the plaintiff called a total of 8 witnesses all whom had recorded their witness statements. Pw1 Beth Mwendwa Silas Acting Livestock Manager working with KMC as a Livestock Field Officer basically adopted her witness statement made on 19th August 2014 thus making reference to what her duties entailed inter alia; approving livestock payment vouchers and file statements; organising with field officers on the flow of animals; facilitate field exhibitions, education and extension; manage livestock staff; approve livestock purchase orders and perform any other duties assigned by the Managing Commissioner.

16. The witness gave an elaborate process in procuring livestock as follows; before purchasing livestock, a stock position is prepared by production department which then determines the number and grades of animals to be procured subject to the market demand and supply in the local market. Subsequently, the livestock department will then issue an order for livestock to prequalified suppliers from the data base which includes walk in suppliers."

17. After the supplier receives the order, he / she will proceed for a no objection letter from the District Veterinary Officer of the District from which the supplier will source the intended livestock. That upon delivery, the animals are received by a Livestock Officer otherwise known as a boma supervisor, and security guard who fills the offloading sheet and confirms that the movement permit tallies with the livestock received. The next step will be weighing and slaughtering of the animals the following day in the presence of a representative from accounts, guards and livestock departments who will then sign the weighing sheet.

18. Upon slaughter, production personnel will prepare a kill report showing the carcass weight, grade, yield rates and remarks on the meat condition. Subsequently, the accountant prepares a report on how much the supplier is to be paid subject to endorsement by the livestock manager or his assistant. Consequently, a payment voucher is prepared by the accounts department and then approved by the livestock department to facilitate drawing of a cheque.

19. That in circumstances where suppliers are unwilling to supply livestock due to previous delayed payment, the Commission could engage in cash buying. Similar position applies to a situation where the suppliers are not able to meet the required meat tonnage. In such circumstances, livestock department could procure requests for sales and marketing department to procure livestock mostly for export. Upon receipt of such request, if from the data base there is no supplier willing to supply, they would result to cash buying as a last result.

20. In that case, the Livestock Manager would raise a memo to the Managing Commissioner requesting for approval of cash buying. The memo would also indicate the name of the livestock and accounts officers who will go to the field. Upon approval, the memo goes to Finance to release the funds. It is at this stage that the Finance Department will nominate an accounts officer to be in-charge of the money while in the field and then account for the money spent.

21. After the animals are transported to KMC and slaughtered, the Accounts Officer is then called upon to account for the money reflecting payment for cess with proof of receipts, loaders, transport, animals and where appropriate payment for brokers. The accounts officer would prepare a report on the expenditure of the money received. The receipt would then be signed page by page by the accounts officer and the Livestock Officer who accompanied him to the market.

22. She confirmed that, in cash purchase, there is no voucher raised requiring signing, approval or endorsement. Commenting on the 11.5 million the subject of this suit, she denied knowledge of any purchase made by cash directly by the defendant nor by the Chief Accountant Mr. Bikundo. According to her, following the procedure analysed herein above, the defendant being the accounting officer could not have gone to the market personally to procure livestock.

23. On cross examination, she stated that there was no board in place and that board's approval was not necessary on the day to day activities of the organisation.

24. PW2 Abdenego Rotich Kimutai Chief Internal Auditor KMC adopted the contents of his witness statement recorded on 18th November 2013. Prior to 18th April 2012 when he became an Internal Auditor, he was a Chief Accountant in the same entity. As a Chief Accountant, he had the duty to authorise payment vouchers and was also a bank signatory where he signed cheques and payment instructions to the bank. That in March 2012, KMC's board term expired thus leaving the Managing Commissioner operating alone till October 2012.

25. When he took over the role of Internal Auditor, he carried out Internal Audit checks of the Commission's accounts for the period between December 2012 and January 2013. It was then that he discovered that 11.5m had been withdrawn from First Community Bank account on 30th April 2012 in the name of the defendant with the description that "cheque forgotten". It was shocking to him as the normal procedure required before release of funds with a cheque duly signed by the mandatory authorised signatories was not followed. Surprisingly, the account had no money to cover the intended transaction.

26. According to PW2, the account was not frequently used by the Commission and any withdrawal in form of an overdraft would only be done with the board's approval. At the same time, he discovered that 3 million had been withdrawn from the Commission's KCB bank account by the Company Secretary M/s Irene Mbiti on 18th December 2012 without any supporting documents despite the cash book indicating it was an advance payment to her. According to the witness, the two withdrawals were illegal and not authorised. He further stated that the Managing Commissioner and the Corporation Secretary were not authorised to withdraw cash from the Commission's account.

27. In the course of investigation, he discovered more irregularities concerning payment of one supplier one Dahabu Bindu Wario who was paid twice for supplying livestock valued at Kshs 3,078,364 through cash book manipulation. Consequently, he decided to escalate the matter to the Board Audit Committee for further verification. Subsequently, an audit was carried out thus confirming his fears that the sum of Kshs. 11.5 million withdrawn by the defendant was not accounted for.

28. When he was summoned to appear before the EACC officials, he was questioned with regard to alleged purchase of livestock worth 11.5 million from three livestock suppliers namely; Adan Hussein Ibrahim Kshs. 3,500,000/-, Duale Hassan Ibrahim Kshs. 4,000,000/- and Ali Issack Ibrahim 4,000,000. When he was shown supporting documents for the payment of the three suppliers, he disputed them stating that they were manufactured to cover up the fraud and that most of them were signed by unauthorised persons and others were referring to payments already made and others to payments yet to be made.

29. In support of Adan Hussein Ibrahim's payment of 3.5 million for 147 heads of cattle and Kshs. 86,550 for another bunch of 147 heads of cattle, he was allegedly shown supporting documents among them; order for livestock No. 16336 dated 11th January 2012, Daily Livestock Supplies receipt note and terms of payment undertaking, livestock statement dated 26th January 2012 and letter of FCB Bank dated 30th January 2012 being assignment for payment of Kshs. 3,586,550 in favour of Aden Hussein.

30. With regard to Duale Hassan Ibrahim's payment, he was shown a payment voucher No. 291/2012 dated 8th May 2012 for 4 million for the purchase of 750 heads of cattle. The second voucher he was shown was No. 303/2012 dated 8th May 2012 for Kshs. 2,070,350 for purchase of 250 heads of cattle. In support of those payments, he was shown an order for livestock No. 16329 dated 11th January 2012 daily Livestock Weight Certificate dated 26th January 2012, Livestock supplies receipt note and terms of payment undertaking, livestock statement dated 26th January 2013 and letter to FCB bank dated 30th January 2012 being assignment for payment of Kshs. 6,070,350 in favour of Hussein Ibrahim Duale.

31. In respect of the 3rd payment to Ali Isaack Ibrahim and Abdisatar Mohamed Aga, he was shown payment voucher No. 333/2012 dated 8th May 2012 for 4 million for the purchase of 314 heads of cattle. The second voucher No. 325/2012 dated 8th May 2012 for Kshs. 3,127,500 was for the purchase of 314 heads of cattle. The 3rd payment dated 24th May 2012 was for Kshs. 257,379. Among the supporting documents attached to the voucher were, order for livestock No. 17197 dated 19th December 2011 for 200 heads of cattle, order for livestock No. 16344 dated 19th January 2012 for 50 cattle, order for livestock No. 16356 dated 23rd January 2012 for 200 cattle, Daily Livestock

Weight Certificate dated 24th January 2012 for 102 animals, Daily Livestock Weight Certificate dated 24th January 2012 for 102 plus 1 animals, daily kill % yield certificate No. 369 dated 20th January 2012 for 50 animals, Daily Kill Certificate mob No. 370 dated 23rd January 2012 for 60 animals, livestock supplies receipt note in terms of payment for 204 heads of cattle, livestock supplies receipt note in terms of payment undertaking for 50 heads of cattle, supplies receipt note and terms of payment undertaking for 60 heads of cattle dated 25th January 2013, Livestock statement for 102 heads of cattle dated 24th January 2012 and a similar one dated 24th January 2012 and letter of offer from FCB to Abdisatar Mohamed dated 4th February 2012, letter from Abdisatar Mohamed to livestock Manager KMC on 25th January 2012, change of name to Ali Issack Ibrahim, letter from KMC bank signed by Patrick Mutemi Chief Finance Officer dated 3rd February 2013 being assignment for payment of Kshs 7,414,876 in favour of Abdi Satar M. Asa and a similar letter for payment of similar amount to Ali Issack Ibrahim.

32. He further stated that, as an Internal Auditor, he had scrutinized the above mentioned vouchers after the supporting documents were left by an accountant known as Diana Akinyi at their office gate for onward transmission to the Acting Managing Commissioner (defendant) but by bad luck they were intercepted by Human Resource personnel who suspected foul play hence redirected them to the Commissioner's board who in turn ordered for audit.

33. On review of the documents, PW2 noted a number of irregularities in the documents attached in support of the vouchers. Among the irregularities were; the deposit documents related to livestock supplies already paid for and others were pending payment. That the payment vouchers in question could not have been settled out of Kshs. 11.5 million for reasons that; the amount of Kshs 3.5 million and 86,550 totalling to Kshs. 3,586,550 allegedly paid to Aden Hussein Ibrahim using part of the cash of Kshs. 11.5 million was not true as the same amount had been settled in full by FCB via the Commission's account on 7th June 2012 and therefore it was not possible to have made another payment through cash withdraw by the defendant."

34. Regarding payment of Kshs. 6,070,350 paid to Duale Hassan and split into Kshs. 4,000,000 and Kshs. 2,070,350, the same was paid in full by FCB debiting the commission's account on 13th August 2012 hence it was not possible to pay the same amount twice using the kshs11.5 million.

35. As to payment of Ali Issack Ibrahim Kshs. 4 million, the documents attached were for an amount of Kshs. 7,418,878. The amount was also split into payment vouchers of Kshs. 4 million, Kshs. 3,127,500 and Kshs. 257,378. That some amount is still outstanding as a debt yet to be paid by the Commission.

36. According to the witness, the payment vouchers attached were fraudulently prepared and purported to have been signed by unauthorised persons among them Esther Ngari Quality Assurance Officer who purported to sign on behalf of G M operations on 10th May 2012 and payment authorised by Chief Accountant on 9th May 2012. That at the material time, (May 2012) the position of General Manager did not exist as it was created July 2012 and it was not until August 2012 when he started authorising payment. That the Production Manager in May 2012 was not on leave hence Quality Assurance Manager could not have signed on her behalf. That Ruth Mwangi was in charge of creditors hence could not have signed and examined livestock.

37. Another anomaly noted was preparation of vouchers on 8th May 2012, AIE holder signing on 10th May 2012 and authorised by Chief Accountant on 9th May 2012 yet funds were transferred on 27th April 2013. He questioned why the Chief Accountant authorised payment before the AIE holder and why the documents were prepared before the funds could be transferred.

38. Further, the witness stated that the vouchers used were system generated yet as at May 2012, payment vouchers used were manual F.O.20 central government vouchers obtained from government printer hence the use of computer generated vouchers was intended to conveniently back them to achieve their objective.

39. Another anomaly noted was that the payment voucher bore the stamp of "paid" dated 6th May 2012 and a second stamp at the top of the AIE holder's signature dated 9th May 2012 and the Chief Accountant's signature dated 9th May 2012 while the AIE holder signed on 10th May 2012 thus raising the question why the accountant authorised payment before the AIE holder approved when the practice is the reverse. That on the mode of payment section, it is indicated that 'FCB 27th April 2012' meaning that payment was effected much earlier before processing of the payment voucher.

40. He also questioned the preparation of 130 vouchers in one day with contradictory inconsistencies in serialization raising questions as to the time vouchers were printed.

41. PW3 Molu Halkano then working at First Community Bank (FCB) Wabera House as head of Credit Manager recorded his witness statement on 17th March 2014 and adopted its contents as his testimony. He confirmed that on 30th April 2012, the defendant a person well known to him visited the facility and gave him a letter dated 23rd April 2012 in which a request to withdraw 11.5 million was made and that payment was to be made to one Patrick Mutemi Chief Finance Officer KMC. That the defendant also showed him a copy of an RTGS to prove that KMC was expecting some money from Co-op Bank. That the defendant further informed him that they had ran out of cheque books hence the reason for using written request. Consequently, he approved payment as requested and directed the same to be made to the defendant as Mr. Mutemi Patrick had allegedly stepped out shortly to organise for transport and security.

42. He denied seeing a letter dated 23rd April 2012 addressed to the bank instructing the bank to pay three persons namely; Aden Hussein Ibrahim, Duale Hassan Ibrahim and Ali Isaac Hassan for sums of 3.5 million, 4 million and 4 million respectively. He clarified that KMC always paid suppliers vide cheques.

43. PW4 John Limpaso Marite also adopted the content in his witness statement recorded on 28th November 2014 thus confirming that on 20th April 2012 as KMC driver, he drove the defendant to City centre Wabera Street where he dropped him. Later, the defendant returned in

company of two men with whom they drove to First Community Bank, Westlands. He however confirmed that on that day, Mr. Patrick Mutemi whom he knew very well was not in their company.

44. PW5 Diana Kinyua Ndungu adopted her witness statement dated 3rd February 2014. Although the court recorded the witness as Dianah Kinyua Ndungu the evidence in reference is consistent to the witness statement of one Diana Akinyi Ondongo a witness in the plaintiff's supplementary list of witnesses filed on 16th April 2018. Since I do not have a witness statement of a person know as Diana Kinyua Ndungu, I cannot make reference to her testimony anywhere in the pleadings. However, on cross examination, she confirmed that, on 7th June 2013, Mr. Bikundo KMC Chief Accountant asked her to deliver some documents at their offices at the security gate.

45. PW6 Maurice Navaba Musi did adopt the contents of his witness statement dated 5th February 2014. He stated that as a teller working with First Community Bank on instructions from his bosses one Molu and Abubakar Athman Senior Operations Manager, he paid kshs 11.5 million to the defendant on 30th April 2012.

46. PW7 Simon Indimuli head of Governance and Management Services State Corporation Services Office of the President equally adopted the contents contained in his witness statement recorded on 2nd December 2014 as his testimony. He stated that sometime 2013, he was part of a team constituted to investigate affairs relating to the management of the Kenya Meat Commission (KMC). Among the issues of concern was the irregular payment of Kshs. 3 million to M/s Irene Mbito dated 18th December 2012, purchase of livestock without supporting documents and withdrawal of 11.5 million on 20th April 2012 without a cheque or any form of authorisation.

47. Upon conclusion of their investigations, they recommended disciplinary action be taken against the defendant for irregular manner in which he made himself the requisitioner of livestock, the authoriser of funds withdrawal, sole signatory, receipt of cash and alleged purchaser of livestock. They further recommended for the Managing Commissioner to be held liable for 11.5 million which he withdrew from First Community Bank on 30th April 2012 and Kshs. 15.6 million which was withdrawn on 13th December 2012 at KCB Kitengela Branch. He identified their report marked (PEX. 5).

48. PW8 Rose Callen Githinji a Forensic investigator also adopted her averments contained in her witness statement dated 5th December 2014. She generally investigated the allegation of the defendant's withdrawal of Kshs11.5 million from KMC's account First Community Bank without authorization and further, pursuant to the two Auditor's reports presented to her, the defendant had failed to account for the money.

49. In her testimony, she told the court that sometime in October 2013, she was assigned a case to investigate. She was also given two audit reports (Ex. 4 and 5) prepared by Special Management Audit team from the Inspectorate of State Corporations dated June 2013 and another audit report on review of Kenya Meat commission (KMC) by the Internal General Auditor of the National Treasury dated August 2013 (p.exb.5). Specifically, she was directed to investigate how 11.5 million was withdrawn by the 1st defendant from First Community Bank on 30th April 2012. Upon interrogation of various witnesses among them PW2, she was supplied with various documents which were fraudulently prepared in support of the purported expenditure of the said amount. She reiterated the testimony of PW2.

50. She further stated that some witnesses disowned signatures purported to be theirs on the supporting documents. That two of the suppliers purported to have received cash denied receiving any cash. He also found out that between 1st April 2013 to 31st April, 2013 there were no animal deliveries at KMC to support purchase of livestock during the time in question.

51. Upon close of the plaintiff's case, the defendant took the witness box. He also opted to rely on his witness statement recorded on 4th June 2018 and a list of documents filed on 5th June 2018 together the averments contained in his amended defence and amended list of documents filed on 23rd January 2017 and 22nd October 2018 respectively.

52. He admitted withdrawing Kshs. 11.5 million from First Community Bank on 30th April 2013 owing to the urgency to meet the demand for canned meat for KDF in Somalia and Blue Mountain Co.in Dubai. That upon receipt of the money, they proceeded to Narok and bought livestock worth 5 million and later proceeded to Garissa and bought livestock worth 6 million. That he duly accounted for the money but KMC refused to release the accounting documents even after being served with notice to produce.

53. He also stated that there was nothing illegal in withdrawing the amount of money in question as the same was authorised by the board vide its minutes of 31st March 2011.

54. He confirmed that he bought livestock in cash on 7th May 2012 and 10th May 2012 while in company of Mutemi, Billy, Colonel Daud Sheike and Bikundo the commission's Chief Accountant. That he surrendered the imprest but the documents disappeared from finance department.

Plaintiff's Submissions

55. Through its submissions filed on 13th August 2019, the plaintiff represented by Viola Ocharo submitted on 8 issues broken down as follows;

a) Whether the defendant fraudulently and in breach of public trust withdrew Kshs. 11,500,000/- from KMC Bank Account No. [...] held at First Community Bank

b) Whether the defendant bought livestock using the Kshs 11.5 million withdrawn from the KMC FCB Account No. [...]

- c) Whether the defendant accounted for the money
- d) Whether KMC suffered loss out of the said withdrawn amount
- e) Whether the defendant unjustly enriched himself using the said amount; and
- f) Whether the principle sum of 11.5 million should attract Interest and who should meet the costs of the suit.

56. It was counsel's submission that there was sufficient proof based on the testimony of various witnesses on record that the defendant did withdraw cash 11.5 million and that he was not authorised by the board or the Corporation's management. She further submitted that as the Managing Commissioner, the defendant was neither authorised to make cash withdrawal from the bank nor was he supposed to go to the market to do direct cash purchase of livestock.

57. That the claim that he was accompanied with Patrick Mutemi to withdraw money on 30th April 2012 was false as Mutemi had travelled to South Africa on 29th April 2012 and returned on 4th May 2012 as evidenced by his passport (PEx. 11).

58. Further, counsel submitted that there was no proof that a procurement process preceded the withdrawal of cash from the bank. That the defendant took all roles in requisitioning for the purchase of livestock, authorising for withdrawal of funds and receiving funds contrary to Section 26(3) of the PPDA 2005 hence abuse of office.

59. Ms Ocharo contended that the defendant having admitted withdrawing the money, he did not attach any documentary proof that he indeed spent the money for the intended purpose in compliance with the laid down procedure as elaborated by PW1 Assistant Livestock Manager then at KMC. That cash purchases were only allowed where suppliers were reluctant to supply owing to outstanding debts which was not the case in this case.

60. Counsel submitted that from the animal's stock report concerning the period between 1st April 2012 and 1st February 2013, there was no indication of any animal delivery or entry made by the defendant. That in any event, when cash purchase is made, no payment voucher is prepared. Counsel submitted that the defendant did not call any witness to corroborate his testimony. She contended that, he who alleges a fact must prove it before any court could give the desired judgment.

61. That under Sections 148 and 149 of the Public Finance Management Act 2012, Section 24 of the Leadership and Integrity Act 2012 and Articles 201 and 226 of the Constitution, the defendant as the accounting officer was under obligation to ensure proper and prudent management of public funds which he failed. That failure to follow prudent procedure will attract civil proceedings. In support of this proposition, reliance was placed on the decision in the case of **Royal Media Services v Independent Electoral and Boundaries Commission(2019)eKLR.**

62. Learned counsel further submitted that under the United Nations Convention Against Corruption (UNCAC) to which Kenya is a signatory and therefore applicable pursuant to Article 2(6) of the Constitution, the plaintiff is duty bound to institute proceedings of this nature for purposes of confiscation or forfeiture of such property even without criminal proceedings or conviction.

63. Lastly, counsel submitted that the plaintiff has proved its case over 51% hence on a balance of probability deserves judgment. In support of this proposition, the court was referred to the case of **William Kabogo Gitau v George Thuo and 2 Others (2010)IKLR 526.**

Defendant's submissions

64. Mrs. Githogori, who took over this matter at the tail end of the hearing filed her submissions on 11th November 2019 canvassing on five issues identified as follows;

- a) Whether it was illegal or unprocedural for the defendant to withdraw a sum of Kshs. 11,500,000/-;
- b) Whether the defendant was authorised to make cash payment for purchase of livestock;
- c) Whether the defendant accounted for the sum of Kshs. 11,500,000/- to the accounting officer;
- d) Whether there was any loss of Kshs. 11.5 million hence subject to forfeiture; and
- e) Whether the plaintiff had discharged his evidential burden as against the defendant.

65. It was counsel's submission that vide a board resolution of 29th September 2012, the bank signatory mandate of KMC was assigned to four people with any of the three to sign and the defendant's signatory being mandatory. That among the signatories were; the defendant, Patrick Sau Mutemi, Irene Mbito and Abedinego Rotich(pw2). According to counsel, the signing of a letter authorising withdrawal of 11.5 million from FCB by three of the signatories was sufficient authority thus there was no need for board's approval.

66. In support of the urgency behind the withdrawal of the money, counsel contended that there was need to supply meat to KDF and Blue Mountain a company in Dubai pursuant to a supply agreement signed on 27th April 2012 duly executed by the PS and CS Ministry of Livestock (see agreement pages 22-32 of defendant's supporting list of documents). Learned Counsel submitted that there was no proof that withdrawal of such monies required board's approval yet there was no board in place at the material time. He went further to state that if

there was no authorisation, the other two signatories would have been sued as well as the bank for flouting the mandatory withdrawal rules.

67. Regarding cash purchase of livestock by the defendant, counsel submitted that, cash purchase was allowed as per the testimony of PW1 and the board's management minutes of 31st March 2011. That cash purchase was within the procurement law pursuant to Regulation 20 of Public Procurement and Disposal Regulations 2006 and the Public Finance Management Act.

68. As to whether the defendant accounted for the sum of Kshs. 11,500,000/-, counsel stated that if the money withdrawn was not accounted for within 30 days, Finance Director was supposed to call for the money in default seek to recover the same from the officer's salary pursuant to KMC's regulations. Counsel submitted that, his client never claimed that the money he withdrew was used to pay Hussein Ismail, Duale Hassan Ibrahim or Ali Issack Ibrahim hence the fraudulent documents referred to by PW2 as supporting documents are strange to the defendant. That in any event, the alleged documents used in the alleged fraud were not presented before court.

69. According to counsel, the defendant did surrender all necessary accounting documents but the Chief Accountant maliciously withheld them hence the court ought to draw a negative inference against the defendant for refusing to honour the notice to produce.

70. Counsel equated the obligation imposed on the DPP in supply of evidence to an accused person under Article 50 of the Constitution to supply of material evidence in a civil suit. To that end, he relied on the finding in **Thomas Patrick Gilbert Cholmondeley v. Republic (2008)eKLR.**

71. Counsel further submitted that allegations of fraud must strictly be proved slightly above a balance of probability. In advancing this proposition, counsel relied on the decision in the case of **Jennifer Nyambura Kamau v Humphrey Nandi (2013)eKLR.** Counsel stated that since it was admitted that there were improper financial and record keeping at KMC, that weakness should not be used to penalize the defendant.

72. Concerning the 4th issue as to whether there was loss of kshs11.5 million, counsel submitted that the Auditor General's report dated 9th May 2013 at page 4 of the defendant's supplementary list of documents revealed that, as June 2012, there was no loss of funds at KMC. That the bank statement clearly at page 65-67 of the plaintiff's supporting documents show that Kshs. 11.5 million was used to buy livestock for meat products for Blue Mountain who later paid 11.5 million to KMC. That in any event, the procedure for recovery of any lost money as provided for under Section 19 to 24 of the State Corporations Act was not followed.

73. Turning on to the State Corporation's Audit report, she termed it as a sham as the same was not signed by the 3 Auditors of the report and that the same had been rejected in other courts in related cases. Counsel referred to the position in **Case No. 1052/2003** where the defendant was by consent said to have been illegally dismissed from employment and paid his full terminal benefits as a vindication of his innocence.

74. As to whether the defendant has discharged its burden of proof, counsel contended that the plaintiff had failed to discharge its burden hence the suit is malicious, vexatious, abuse of the court process and that suspicion cannot form the basis of inferring guilt which must be proved by evidence. To support this proposition, counsel made reference to the case of **James Tinega Omwenga v Republic C.A. 59/2011** and **Ethics and Anti-Corruption Commission v. Stanley Mombo Amuti (2015)eKLR** case.

Analysis and determination

75. The suit herein has been instituted by the plaintiff on behalf of the Kenya Meat Commission a government entity which allegedly lost funds through fraudulent activities of its employee the defendant in this case. The suit has been initiated by the plaintiff pursuant to the powers donated to them by Article 79 and 252 of the Constitution, Section 11(j) of the Ethics and Anti-Corruption Commission and Sections 51 and 53 of the ACECA among other provisions.

76. Section 11(1)(j) of the Ethics and Anti-Corruption Commission provides;

“In addition to the functions of the commission under Article 252 and Chapter six of the Constitution, the commission shall institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

77. Section 51 of the Anti-Corruption and Economic Crimes Act also does provide that, a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered. The Commission (plaintiff) is further empowered by Section 53(3) of ACECA which states that-

“an amount for which a person is liable under Section 51 and 52 to a public body may be recovered by the public body or by the commission on its behalf.”

78. To that extent, the plaintiff is constitutionally and statutorily duty bound to institute proceedings in the public interest to recover any money lost through any corrupt conduct the pendency of criminal proceedings over the same subject matter notwithstanding. In any event, Section 193A of the CPC does clarify the position by providing that-

“notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil suit proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

79. The suit herein is basically anchored on the alleged withdrawal of 11.5 million by the defendant in his capacity as the then Managing Commissioner of the KMC from the KMC's account No. 0999241802 held at First Community Bank without authorisation. Secondly, he is accused of having failed to account for the expenditure of the said amount hence an act of fraud and breach of public trust. From the pleadings and evidence of both parties, there is no dispute that the said amount was withdrawn and received by the defendant. The defendant does not deny withdrawing the said amount. He however stated that there was no law or provision requiring authorisation by any other authority leave alone the KMC's board. He claimed that, he personally together with other staff members spent the money and surrendered the supporting documents to the relevant departments in the Commission among them accounts for safe custody. That the said documents have been hidden or deliberately withheld from court hence denying the court an opportunity to interrogate them and question the truth. He therefore shifted the burden to the plaintiff to produce those documents to the court for purposes of confirming that he had duly accounted for the money as required under the Public Finance Management Act.

80. Having analysed the pleadings, evidence of both parties and their submissions, issues that crystallise for determination are;

a) whether the defendant withdrew 11.5 million from the KMC's account No. [...] held at First Community Bank without authorisation;

b) whether the defendant did properly account for the said amount of money;

c) if the answer to (b) above is in the negative, whether the said amount is directly recoverable from the defendant with interest at commercial interest.

Whether the defendant withdrew 11.5 million from the KMC's account No. [...] held at First Community Bank without authorisation.

81. As stated above, the defendant does not deny withdrawing the said amount. He justified the withdrawal owing to the urgency occasioned by the demand for the supply of canned meat to KDF in Somalia and Blue Mountain Company a client based in Dubai pursuant to a contract signed on 27th April 2012 which was also sanctioned by the Minister for Livestock. He stated that there was no provision for authorisation save for signing of the cheque or cash withdrawal documents by the authorised signatories.

82. Both parties are in agreement that the account from which money was withdrawn was an officially designated account for the purchase of livestock for slaughter. They are also in agreement that by 27th April 2012 the time the defendant went to withdraw the said amount, the said account had no money. He and his co-bank signatories wrote and signed a letter dated 27th April 2012 seeking to withdraw the said amount in anticipation of money being transferred to that account vide an RTGS from the KMC's Co-operative account which was serving as a deposit and Dollar account.

83. Among the authorised signatories as per the KMC's letter to First Community Bank dated 5th October 2012 (P.Ex.3 at page 76 of the plaintiff's bundle of documents) were Dr. Ibrahim Haji Isaak – Managing Commissioner, Patrick Sau Mutemi – Chief Finance Officer, M/s Irene Mbito – Company Secretary and Abedinego Rotich. The signing instructions provided that any three of the above to sign but the defendant was a mandatory signatory to all cheques.

84. In the circumstances of this case, the letter dated 27th April 2012 seeking to withdraw 11.5 million from the bank account which had no money was signed by the authorised signatories among them the defendant, Mutemi and Irene Mbito. The other two signatories have not been accused of taking part in the withdrawal of the money without authorisation.

85. It is the plaintiff's claim that the three signatories were not authorised by the board nor the KMC's management to withdraw the money. However, from the pleadings which I have carefully perused including the KMC's minutes of 29th September 2011 which authorised the four named above persons to be signatories, there is no proof nor evidence to suggest that the board which in any event was not in existence at the material time was supposed to give authorisation. PW1 did confirm in her evidence that approval by the board was not required.

86. There is no law or provision cited to show that the mandate to withdraw cash required approval or authority from some quarter leave alone the board. To that extent, I am in agreement with the defendant's counsel's submission that the defendant and his co-signatories being the top most managers of the KMC did not require approval from a board which did not even exist at the time to run its day to day activities. It is trite law that he who alleges the existence of a fact bears the burden to prove the same. See **Vivo Energy Kenya Ltd (initial party Kenya Shell) v George Karunji (2014)eKLR.**

87. Section 107 of the Evidence Act is quite clear on this fact thus providing as follows-

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

88. It is my finding that the plaintiff has not tendered evidence to prove the allegation that the defendant and his co-signatories required authorisation before withdrawing the said amount.

89. I will now proceed to address issues No. 2 and 3 together as they are intertwined.

Whether the defendant did properly account for the said amount and if not so, whether the same is recoverable with interest at

commercial rates

90. It is evident and indeed admitted that the defendant did withdraw the said amount amid allegations of controversies that, as the accounting officer, he was not supposed to cause withdrawal of money from an account which had no money thus occasioning an indirect overdraft. It is also the plaintiff's claim that the defendant did not follow due process in purchasing livestock as elaborated by PW1. Further, that the defendant was not supposed to do direct purchase of livestock nor was he supposed to handle cash and that he did not submit any supporting documents to prove how he spent the money.

91. According to the testimony of PW1 which I have already reproduced in detail herein above, there were two methods allowed in the purchase of livestock namely; cash purchase and supply through the available list of suppliers in the data base (pre-qualified suppliers). In this case, the defendant stated in his testimony that, he personally went to the market to purchase the required livestock. That from Narok he bought Kshs. 5,000,000/- worth of livestock on 7th May 2012 and in Garissa market he bought Kshs. 6,000,000/- worth of livestock on 10th May 2012. He however did not give any explanation as to the expenditure of the balance of Kshs. 500,000/-.

92. As stated by PW1 an acting Livestock Manager then in-charge of livestock purchase from suppliers, there had to be a stock position report from a Livestock Production Department which could then determine the number and the grades of animals to be procured. Upon receipt of this report, the department could place an order and then seek a no objection report from the District Veterinary Officer of the supplier's district. Upon delivery, the animals are then received by the Livestock Officer (Boma supervisor) and security guard and then to the slaughter house where the animals are weighed, graded, rated and remarks made on meat condition in the presence of a Kill Officer, Production Personnel and an accountant who prepares a report on how much a supplier is to be paid. Lastly, a payment voucher is prepared for payment and subsequently a cheque is drawn to the payee.

93. In the circumstances of this case, the defendant claimed that he did cash purchase implying that the procurement was done directly from the market and not from pre-qualified suppliers.

94. In such a scenario, PW1 stated that, where suppliers are unwilling to supply livestock due to previous delayed payments, or where the suppliers could not meet the urgent demand, the livestock department could as a last resort receive requests from sales and marketing departments to procure livestock mostly for export through cash purchase. Upon receipt of such request, the Livestock Manger could raise a memo to the Managing Commission requesting approval of cash purchase. The said memo would then reflect the livestock and accounts officers who would go to the field. Upon approval, the memo would go to Finance to release funds. The Finance Department would then nominate an accountant to be in charge of the funds while in the field and subsequently account for the money.

95. After livestock purchase, the animals are received at the boma before slaughter and the same procedure follows just as in the case of pre-qualified supplies.

96. The accountant who accompanies the livestock officer in the market, is duty bound to prepare payment receipts for cess, loaders, transport, animals and where appropriate payment for brokers. PW1 stated that, in case of cash purchase, there is no voucher raised. She also denied knowledge of any livestock bought using the 11.5 million nor did the defendant deliver any animals for slaughter.

97. Although the defendant had denied receiving the money in his witness statement filed together with his defence, he acknowledged in his evidence in chief that he went to the market to buy livestock which he did at Narok and Garissa using the money in question.

98. The defendant did not dispute nor controvert the testimony of PW1 in so far as it relates to the process of livestock procurement whether through pre-qualified suppliers or cash purchases.

99. Since there is proof that the defendant did personally withdraw 11.5 million from the employer's bank as evidenced by pw3, and considering his admission in his evidence in chief and cross examination that he proceeded to the market to buy livestock, it is incumbent upon him to prove that he did spend the money according to the required procedure.

100. He claimed to have bought livestock in company of Mutemi and one Billy. He however did not call any of those people to confirm their role in the purchase of the animals. On the other hand, the defendant did not tell the court why the procedure as elaborated by PW1 was never followed in purchasing livestock. He did not mention any livestock production officer nor accountant who accompanied him to the market. He also did not state whether the pre-qualified suppliers were not available or whether they could not meet the demand. He did not tell the court whether a memo was raised expressing the need to procure a given number of livestock and then his approval. He equally did not tell the court whether any approval to procure was sought from him and then granted.

101. According to the defendant, he did everything and submitted accounting documents to finance department. He prayed the role of an accounting officer, authorising officer, accountant, livestock production officer and everything.

102. He did not call any of the people who accompanied him to the market or from where he bought the livestock. It is not enough to state that he bought the animals and surrendered all necessary supporting documents without proof. To claim that the plaintiff hid the documents is just but a general statement which is not supported by any witness who took part in the process of the impugned purchase.

103. It cannot be said that every person who took part in that exercise hates him. The plaintiff disputed the claim that the defendant submitted supporting documents. He does not even state the nature of the documents submitted and to who.

104. PW2 one Abedenego the internal auditor told the court that the documents purported to have been used to support payment to some suppliers namely Aden Hussein Ibrahim 3,500,000, Ali Isaack 4 million, Duale Hassan Ibrahim 4,000,000 were forged and fake as they referred to persons already paid debts through the bank or outstanding debts. He stated in his audit report (PEx.5) that the 11.5 million was totally unaccounted for as there was not a single document submitted by the defendant in support.

105. However, in submission, M/s Githogori stated that, the documents relied by PW2 in his audit are not connected with the expenditure of the 11.5 million. She stated that her client was a stranger to those documents. Contrary to his counsel's assertion, the defendant in his supplementary list of documents filed on 23rd October 2018 attached a letter listed as document No. 8 which is a letter dated 27th April 2012 authored and signed by himself (Managing Commissioner) and Patrick Sau Mutemi (Chief Finance Officer) addressed to the Manager First Community Bank, Kimathi Street directing payment of 3.5 million to Adan Hussein, Duale Hassan Ibrahim 4,000,000/- and Jibril Maalim Mohamed 4,000,000/- totalling to 11,500,000/-.

106. What is the import of this letter? Is this the same money they withdrew or another procurement process for a similar amount? If the letter is referring to payment to the said suppliers, the amount specified implies that the suppliers were pre-qualified hence the procedure alluded to by PW1 ought to have been followed. Secondly, if that is the same money being referred to, why was the same withdrawn yet the suppliers would have been issued with cheques as was the case for such withdrawal? The defendant was not able to reconcile the payment authorised by the letter dated 23rd April 2012 and their cash withdrawal and cash payment.

107. It is trite that the evidential burden of proof on any allegation or fact remains with the plaintiff which upon proof shifts to the defendant. In this case the plaintiff has proved that the defendant did withdraw 11.5 million and that there is no evidence produced on how the money was spent. To that extent, the burden automatically shifts to the defendant to justify lawful expenditure of the money in question. In support of this proposition I am guided by the Court of Appeal finding in the case of **Anti-Corruption Commission v Stanley Mombo Amuti** (supra) where the court held;

“The Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so orders.”

108. In view of the evidence adduced by the plaintiff, this court is convinced that the plaintiff has on a balance of probability discharged its burden. It is upon the defendant to prove to the contrary. According to the defendant, he cannot prove his expenditure with the supporting documents in the hands of the employer which he claimed he supplied. On the other hand, the plaintiff denies there was such supporting documents. The defendant cannot run away from his duty of discharging the burden of proof that he lawfully spent the money he received. He should have called witnesses to support his claim. This court cannot just rely on his word of mouth that he submitted documents when it is clear that he flouted every procedure or step laid down in requisition of livestock through pre-qualified system or cash purchase.

109. The defendant dismissed the Internal Auditor General's Audit report which implicated him as unreliable since it was not signed by three auditors. I have looked at the Internal Auditor's report of August 2013, which is signed by five auditors out of six which also confirmed that the 11.5 million withdrawn by the defendant had no supporting documents (see report at page 194 of the plaintiff's supporting documents). I do not see any irregularity in one Auditor out of six not signing the audit report which in any event questioned the manner in which the said amount was spent.

110. The other defence relied on by the defendant is that the Auditor General's financial report for the year ending 30th June 2012 for KMC did not flag any irregularity and that the Commission was given a clean bill of health. I have looked at the Auditor General's financial report attached to the defendant's further supplementary list of documents filed on 23rd October 2018. The Auditor General's Financial report dated 9th March 2012 which is about one page seemed to have not captured any specific expenditure on the account in question. It is also clear from the date both audit reports were prepared (internal and external) they were running a long side each other. The internal audit is a detailed document unlike the Auditor General's report which is one page. It is unlikely that the Auditor General was aware of the internal audit report which was signed on 8th August 2013.

111. The question that begs for an answer is which of the two reports supersedes the other? The role of an auditor's report is to assist the court as corroborative evidence to arrive at a proper and just decision. Its absence or inaccuracy cannot invalidate the otherwise available strong evidence. I have no reason to dismiss the internal audit report which is more detailed and which virtually captures the amount in question. The Auditor's report is not *per se* conclusive. If there is other available strong evidence to hold a party liable, a court cannot be swayed by an auditor's report especially where they are conflicting. The court can as well in the circumstances of this case make a determination based on the evidence on record if it finds it sufficient and just so to do.

112. Taking into account the evidence and circumstances surrounding the whole episode in the withdrawal of the sum in question and unaccounted expenditure, I am left with one conclusion to make and that is, the defendant has not to the satisfaction of this court explained on how he spent the amount of money withdrawn.

113. The claim by the defendant that a sum of 11.5 million paid to the Commission by Blue Mountain Foods on 30th May 2012 as per the bank statement attached at pages 65-67 of the plaintiff's bundle of documents does generally have a nexus with the money withdrawn on 30th May 2012 is farfetched and an excuse intended to escape liability.

114. Concerning the claim by the defendant that there were several other cases including **Industrial Court Case No. 1502/2013** in which by consent the defendant was allowed to resign with payment of all benefits, they have no nexus with this case. The facts and reliefs sought are unrelated hence one case cannot gag the other.

115. Having held that the defendant has not substantiated expenditure of the amount withdrawn to the satisfaction of the court, one would be left wondering whether the actions complained of amount to fraudulent acts or breach of public duty. As commissioner to the Commission, the defendant was ultimately a state officer bound by Chapter six of the Constitution which underscores personal integrity, competence and suitability, selfless service based solely on the public interest demonstrated by honesty in execution of public duties and declaration of any personal interest that may conflict with public duties, accountability to the public for decisions and actions made.

116. It is incumbent upon the plaintiff to prove the claim that indeed the defendant did engage in acts of fraud. In the case of **Nancy Kahoya**

Amadiva v Expert Credit Limited and Another (2018)eKLR the court held as follows:-

“In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding”.

117. The plaintiff has established by evidence on a balance of probability that the plaintiff withdrew funds from the KMC’s account but failed to account for it. What that means, the defendant dishonestly spent the money without proper accountability hence an act of fraud and breach of public duty. I have no doubt, in my mind that the defendant failed to account for the public funds to which he was duty bound to refund to the corporation (KMC) through the plaintiff.

118. As regards whether the money is to be refunded with interest at commercial rates, I will use my discretion and direct that the money be refunded with interest at court rates.

119. As to costs, they follow the event unless for good reason the court decides to waive. In this case I have no good reason to do so. To that extent, the defendant shall meet the costs of the suit.

120. In a nutshell the plaintiff has proved its case on a balance of probability and Judgment is thus entered in favour of the plaintiff against the defendant for payment of-

a) Kshs. 11.5 million with interest at court rates with effect from 30th April 2012 till full payment.

b) Costs awarded to the plaintiff.

DATED, SIGNED and DELIVERED by EMAIL at NAIROBI THIS 29TH DAY OF APRIL, 2020

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J. N. ONYIEGO

JUDGE