



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**CIVIL CASE NO. 6 OF 2018**

**AFRICA MERCHANT ASSURANCE CO. LTD.....PLAINTIFF**

**-VERSUS-**

**MIGORI COUNTY GOVERNMENT.....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This judgment relates to procurement of services by a public entity.
2. The Plaintiff is a limited liability company. It is licensed to provide insurance services within the country. The Defendant is a County Government. It is created under *inter alia* the **Constitution** and the **County Government Act, 2012**. The jurisdiction of the Defendant is within the Migori County No. 044 within the Republic of Kenya.

**The Suit:**

3. The Plaintiff's suit was filed sometimes in 2018. The suit sought the recovery of Kshs. 45,053,478/= with interest of Kshs. 18,922,468/= . The Plaintiff also sought costs.
4. The Plaintiff pleaded that in 2015 it successfully participated in a procurement process with the Defendant. The process was in respect of a tender for *Provision of General Insurance Services for 48No. Migori County Government Vehicles for the Year 2015-2016* (hereinafter referred to as '**the tender**'). A Contract No. MC/SCMS/06/3/VOL.IV (802) dated 13/05/2015 was eventually signed between the parties herein (hereinafter referred to as '**the contract**'). The contract price was Kshs. 19,919,850/=.
5. Pursuant thereto, the Plaintiff insured the Defendant's motor vehicles for the financial year 2015-2016. The Plaintiff further insured the Defendant's motor vehicles for the financial year 2016-2017 as well as other assets of the Defendant.
6. As the Defendant was not keen on making payments for the services rendered the Plaintiff instituted the suit.
7. The suit was defended. The Defendant admitted entering into the contract with the Plaintiff. The Defendant contended that the contract listed specific motor vehicles which were to be covered. It further contended that the Defendant made a payment of Kshs. 7,000,000/= in September 2015 towards settlement of the contract sum.
8. The Defendant further averred that the Plaintiff failed to provide the services in accordance with the contract. In breach of the contract and the law the Plaintiff unilaterally and arbitrarily made a decision to add other policies such as life and general insurance for some of the Defendant's officers which policies were outside of the contract.
9. The Defendant also pleaded that it was only allowed in law to make the payments covered under the contract. The Defendant therefore denied liability of the Kshs. 45,919,850/= as sought for by the Plaintiff.
10. The parties filed witness statements and lists of documents.

**The hearing of the suit:**

11. Each party availed one witness. *Anunda Mandere* (hereinafter referred to as '**Anunda**') testified on behalf of the Plaintiff. He was the Manager of the Plaintiff's Migori Branch. *Christopher Rusanna* (hereinafter referred to as '**Rusanna**') testified on behalf of the Defendant. He was the Defendant's County Secretary.

12. Both witnesses adopted their witness statements as part of their evidence. They also produced various documents in their respective lists of documents as exhibits.

13. Anunda testified on how the Plaintiff participated in the procurement process under the tender. The Plaintiff was the successful bidder. It signed a contract with the Defendant. Anunda stated that the insurance covers which the Plaintiff provided pursuant to the contract were both commercial and private covers. All insurance covers were in the category of '*comprehensive insurance covers*'.

14. It was the further testimony of Anunda that during the financial year 2015-2016 the Defendant purchased some assets and requested for some additional insurance covers. Anunda admitted that the Plaintiff extended covers to the Defendant which were not in the contract. The extension was based on the Defendant's undertaking that the contract will be amended to take into account the additional covers.

15. Anunda also admitted that the Defendant made a payment of Kshs. 7,000,000/= in relation to the insurance services which the Plaintiff provided. According to Anunda the Defendant did not even satisfy the payment of the contract sum. He confirmed that the sum of Kshs. 12,919,850/= was still outstanding under the contract.

16. Having establishing a good working relationship with the Defendant the Plaintiff continued to provide the insurance services for the financial year 2016-2017. According to Anunda that was on the understanding that a like contract for the year 2016-2017 was to be executed by the parties.

17. At the end of the financial years 2015-2016 and 2016-2017 the Plaintiff had provided insurance covers to the Defendant to the tune of Kshs. 45,032,532/=. Various correspondences and computation of the sums were produced as exhibits.

18. In cross-examination, Anunda stated that he had worked in the insurance industry for a period of 13 years. Anunda confirmed full compliance with the law towards the contract. Anunda also confirmed that after the signing of the contract the Defendant issued the Plaintiff with a Local Service Order for the same amount as was in the contract and the award.

19. It was admitted that the Plaintiff did not have a Letter of Award, a contract or a Local Service Order for the financial year 2016-2017. Anunda however confirmed that the Plaintiff participated in the like-tender for the financial year 2016-2017. Anunda further admitted that the Plaintiff issued insurance covers outside the procurement laws. He also admitted that the sum of Kshs. 45,053,478/= in paragraph 5 of the Plaintiff was not particularized.

20. It was clarified that the Defendant used to write letters to the Plaintiff for the additional covers. The Plaintiff acted on the basis of those letters and issued the requested insurance covers.

21. The Plaintiff prayed that the suit be accordingly allowed.

22. Rusanna testified that he was the Defendant's County Secretary since 2017. He confirmed that he was alive to the matters before Court. Rusanna also took the Court through the process towards the signing and execution of the contract. The Local Service Order was only issued after the signing of the contract.

23. The Defendant admitted making the payment of Kshs. 7,000,000/= in respect of the contract.

24. Rusanna was categorical that the Defendant neither amended the contract nor signed any contract with the Plaintiff for provision of insurance services for the financial year 2016-2017.

25. It was clarified that the Defendant was a public entity and was enjoined to comply with all public procurement laws. According to Rusanna a public entity could not make any payments in respect of supply of goods or provision of services which were in contravention of the public procurement laws. To him, the Plaintiff claim could not succeed for want of conformity with the law.

26. At the close of the respective cases, parties filed written submissions.

#### **The parties' submissions:**

27. The Plaintiff submitted that there was ample evidence that it provided insurance covers to the Defendant for the financial years 2015-2016 and 2016-2017. It was also submitted that the Plaintiff proved that a total of Kshs. 36,734,426/= was still outstanding.

28. The Plaintiff admitted that there was no contract for the provision of insurance services for the year 2016-2017. It however argued that there was evidence that the Defendant requested for the services from the Plaintiff and the Plaintiff indeed provided those services. The Plaintiff further argued that the correspondences signified valid contract between the parties.

29. Relying on **GP Jani Properties Ltd vs. Dar-es- Salaam City Council (1966) EA 281** the Plaintiff submitted that the Defendant did not plead any breach of law in its pleadings, but the issue was only raised in evidence. The issue was hence a non-issue. The Plaintiff further submitted that in any event it was the procuring entity and as such it could not be expected to undertake the role of the procuring entity. The decision in **Malindi Court of Appeal Civil Appeal No. 1 of 2015 Beijing Industrial Designing & Researching Institute vs. Lagoon**

**Development Ltd** (unreported) was referred to in support of the submission.

30. On the basis of the Court of Appeal in **Kisumu Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Company Ltd (2014) eKLR** the Plaintiff submitted that it had sufficiently pleaded its claim against the Defendant.

31. The Plaintiff prayed that the suit be allowed against the Defendant. It prayed for interest from September 2015 for the sums payable under the contract and that the interest do run from 8<sup>th</sup> April 2016 for the 2016-2017 covers. The decision in **Shah vs. Guilders International Bank Limited (2002) 1 EA 269** was cited in support.

32. The Defendant's submissions on record appear not to be complete. I have noted that paragraphs 19 to 27 thereof are missing as well as paragraphs 40 to 44. Again paragraphs 50 onwards are missing. I will therefore go by the submissions as they are on record.

33. The Defendant submitted that as the Defendant was a public entity **Article 227** of the **Constitution** mandatorily required it to procure goods and services in a manner that was fair, equitable, transparent, competitive and cost-effective.

34. It was the Defendant's further submission that since the contract was entered on 13/05/2015 then the applicable legal regime was the *Public Procurement and Asset Disposal Act, No. 3 of 2005* (hereinafter referred to as '**the 2005 Act**') which was later repealed by the enactment of the *Public Procurement and Asset Disposal Act, No. 3 of 2005, No. 33 of 2015* (hereinafter referred to as '**the 2015 Act**'). The Defendant reiterated the procedure of procuring goods and services under law.

35. The Defendant also submitted that any services which were rendered to the Defendant by the Plaintiff outside the contract were an illegality. The Defendant contended that the Plaintiff was duty-bound to ensure that it followed the law. The decision in **Pakatewa Investment Company Limited vs. Municipal Council of Malindi (2016) eKLR** was referred to.

36. The absence of the contract for the provision of the services for 2016-2017 was described as a blatant disregard of **Section 135 of the 2015 Act**. The provision called for the signing of a formal contract so as to give effect to the award of the tender to the successful bidder. Surprisingly, the Defendant was at a loss as to how the Plaintiff would render services in a case where there was no bidding process at all for the 2016-2017 financial year.

37. Whereas the Defendant admitted the sum of Kshs. 12,919,850 as outstanding from the contract, the other sums were vehemently denied as it was submitted that they were based on illegal transactions. The Defendant urged this Court not to give effect to an illegal contract. It referred to the Court of Appeal in **Patel vs. Singh (1987) eKLR** and **Joseph Kamau Kiguoya vs. Rose Wambui Muthike (2016) eKLR**.

38. The Defendant also referred to several other decisions on the unenforceability of an illegal contract by Courts. It was submitted that Courts have variously held that such contracts are against public policy. They included **Royal Media Services vs. Independent Electoral & Boundaries Commission & 3 others (2019) eKLR** and **Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards (2017) eKLR**.

39. The Defendant hence prayed for the dismissal of the claim of the sums of money for services allegedly rendered but which were outside the contract.

#### **Analysis and Determinations:**

40. I have carefully perused and understood the pleadings, the proceedings, the written submissions and the decisions tendered. There seems to be one main issue for determination in this matter. It is whether the sums of money for the services allegedly provided by the Plaintiff to the Defendant outside the contract are recoverable.

41. That being the case, there were several uncontested issues. They included the fact that the Plaintiff bid for a tender for provision of insurance services to the Defendant for the financial year 2015-2016 and that the Plaintiff was the successful bidder. That, a letter of award was issued by the Defendant and duly accepted by the Plaintiff and that a contract between the parties dated 13/05/2016 was eventually signed. The Plaintiff also admitted that it did not comply with the procurement laws towards the provisions of the insurance services to the Defendant for the financial year 2016-2017.

42. As said, the Defendant is a public entity created under **Article 176** of the **Constitution** and the **County Governments Act, 2012**. The Defendant therefore exercises the sovereign power of the people at the county level and is bound by the **Constitution** and all the laws of the land.

43. **Article 227(1)** of the **Constitution** states that: -

*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.*

44. By the time the **Constitution** was promulgated the law which guided procurement processes in public entities was **the 2005 Act**.

45. The **2005 Act** provided for very extensive procedures in any form of procurement. **Part IV** thereof provided for the general rules of procurement. **Part V** thereof provided for Open Tendering and how it was to be undertaken. It also provided for the limited instances where the alternatives to open tendering could be sparingly used in procurement processes. Those alternatives modes were Direct procurement, Request for Proposals and Request for Quotations.

46. Under the **2005 Act**, regardless of the mode of procurement used in any procurement process save in direct procurement any successful bidder was to be issued with a notification letter by the procuring entity. The letter sought the acceptance of the bidder. Once the procuring entity obtained the bidder's acceptance then a formal contract for the provision of the specific goods or services would be signed. The contract would then be performed as agreed.

47. **The 2015 Act** was enacted pursuant to **Article 227(2)** of the **Constitution**. It aimed at aligning the **2005 Act** with the **Constitution**. The enactment of the **2015 Act** repealed the **2005 Act**. **The 2015 Act** was assented to on 18/12/2015 and its effective date was 17/01/2016.

48. The Preamble to **the 2015 Act** provides that it is '*An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes*'.

49. By the time the **2015 Act** became operational the contract which had been entered into between the parties herein for the financial year 2015-2016 was already running. The formal contract was however executed on 13/05/2016.

50. **Section 183** of **the 2015 Act** provided for transitional provisions under the **Third Schedule**. **Clauses 1(1)** and **(2)** of the **Third Schedule** provides as follows: -

**1.(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.**

**(2) For purposes of sub paragraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.**

51. The effect of the foregone was that all the procurement processes which had been commenced under **the 2005 Act** were to continue under the provisions of the **2005 Act**. However, any new procurement processes were to be undertaken under **the 2015 Act**.

52. The **2015 Act** retained the steps to be followed in a tender as was provided for under the **2005 Act**. For certainty, the **2015 Act** provided for the invitation of tenders, the submission of bids, the tender opening committee, an evaluation committee, the award of the tender, the communication of the award to the bidders, the acceptance by the successful bidder, the signing of the contract and the execution of the contract.

53. In this case the parties complied with **the 2005 Act** in procuring the provision of insurance services for the period 2015-2016. A contract was eventually signed as required. The contract provided for a specific amount. That was Kshs. 19,919,850/=. A Local Service Order containing the Defendant's vehicle registration numbers for the vehicles which were to be insured within the contract was duly issued by the Defendant to the Plaintiff.

54. The Plaintiff however contended that the Defendant requested for extra insurance covers for some assets it acquired during the period 2015-2016. The Plaintiff further contended that it had agreed with the Defendant that the contract would be amended to include the extra covers. However, the amendment of the contract was not done. That was for the period 2015-2016.

55. Come 2016-2017 the Plaintiff continued providing insurance services to the Defendant. It appears that there was an understanding between the parties that the Plaintiff would be awarded the tender for the provision of insurance services for the period 2016-2017 as well.

56. Apart from letters from the Defendant requesting the Plaintiff to issue insurance covers to some vehicles no formal procurement of those services was undertaken or at all.

57. The above scenario has variously been dealt with by Courts. Before I refer to some of those decisions I wish to reproduce verbatim the provisions of **Section 27** of the **2005 Act** and **Section 72** of the **2015 Act**. The twin provisions related to the role of a contractor, supplier or consultant taking part in a procurement governed by the respective Acts.

58. **Section 27** of **the 2005 Act** provided as follows: -

***(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.***

***(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).***

***(3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.***

***(4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.***

***(5) The accounting officer may use the procurement until and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.***

***(6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or***

procuring agent in the event of delay or in such other instances as may be prescribed.

(emphasis added)

59. Section 72 of the 2015 Act provides as follows: -

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

60. I will now deal with the case law. The general position taken by Courts in instances where public entities did not fully comply with the procurement laws is that the resultant contracts are illegal contracts and are unenforceable.

61. The Court of Appeal alluded to the foregone position in Mapis Investment (K) Limited vs. Kenya Railways Corporation (2006) eKLR, Heptulla vs. Noormohammed (1984) KLR, Kenya Airways Limited vs. Satwant Singh Flora (2013) eKLR, Patel vs. Singh (1987) eKLR among many others.

62. The enforceability of an illegal contract was dealt with by the Court in Patel vs. Singh (supra) as follows: -

*The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."*

63. The Court in Heptulla vs. Noormohammed (supra) further stated that: -

*...No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality...*

63. In Kenya Airways Limited vs. Satwant Singh Flora (supra) the Court while discussing the same scenario which is encompassed in the legal maxim '*ex turpi causa non oritur actio*' had the following to say: -

*Ex turpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indicate offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court not to assist him"*

64. The High Court in Royal Media Services vs. Independent Electoral & Boundaries Commission & 3 others (supra) stated as follows: -

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

65. The above argument was adopted in Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards (supra) and in Pakatewa Investment Company Limited vs. Municipal Council of Malindi (supra).

66. In this case the Plaintiff, as a supplier of services, was called upon under Section 27 of the 2005 Act and Section 72 of the 2015 Act to fully comply with the provisions of the respective Acts and the Regulations.

67. Anunda who testified on behalf of the Plaintiff seemed to know the above legal position. That is why he admitted that the Plaintiff did not comply with the procurement laws. In that case therefore, the Plaintiff and the Defendant were alive that their engagements outside the law were illegal. Both knew that unless their joint engagements were brought within the law a problem would obviously arise. As said by the Court of Appeal in Patel vs. Singh (supra) such a scenario renders the contract unenforceable.

68. The upshot is that the Plaintiff is only entitled to the balance of the contract sum having duly discharged its part of the contract.

69. With the foregone therefore I believe I have sufficiently dealt with the main issue for determination. In the end the following final orders hereby issue: -

**(a) Judgment is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 12,919,850/=;**

**(b) The sum shall attract interest at Court rates from the date of filing of the suit;**

**(c) The Defendant shall shoulder the costs of the suit.**

70. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of May 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered electronically: -**

1. [kerariom@gmail.com](mailto:kerariom@gmail.com) for Kerario Marwa & Company Advocates for the Plaintiff.
2. [info@saganabiriq.com](mailto:info@saganabiriq.com) for Sagana, Biriq & Company Advocates for the Defendant.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

**A. C. MRIMA**

**JUDGE**