



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 9 OF 2016

MULTI-LINE MOTORS (K) LTD.....PLAINTIFF

-VERSUS-

MIGORI COUNTY GOVERNMENT.....DEFENDANT

JUDGMENT

Introduction and Background:

1. The Plaintiff herein, **Multi-Line Motors (K) Ltd**, filed for recovery of a total of over Kshs. 20,000,000/= and General Damages in respect of two tenders. They were **Tender No. MC/23/2015-2016 for Supply and Delivery of Prime Mover and Tender No. MoLH&UD/NMED/NaMSIP/VEH24/2014-2015 for Supply, Delivery and Commissioning of 3No. Water Bowsers.**
2. The Defendant, **Migori County Government**, defended the claim. The suit was then set for hearing where the Plaintiff called its Accountant one **Raphael Mwangi (PW1)** as its sole witness and the Defendant, with the consent of the Plaintiff, adopted the filed Statement of its County Secretary as its evidence.
3. PW1 adopted his statement as part of his evidence. He testified that the Plaintiff successfully participated in the two tenders and was notified of the awards to supply the Prime Mover and the Water Bowser. That, the Plaintiff accepted the awards, supplied and delivered the goods in accordance with the two tenders. To its surprise, the Defendant refused, ignored and neglected to pay the Plaintiff for the services rendered hence the suit. The Plaintiff produced the Notification of Award Letters, the Letters of Acceptance, Local Purchase Orders, Delivery Note, Invoices, Ledger Account for the Defendant as at 07/10/2016 and Demand Letters as exhibits.
4. The Defendant denied the allegations on the tenders and contended that it neither advertised nor participate in the procurement process or at all. That, if anything then the processes were fraudulent and contrary to the Public Procurement and Disposal laws and hence it could not honour any of them. That, resulting from the alleged tenders the Defendant dismissed its Procurement Officer and all those who took part and reported the matter to the Ethics and Anti-Corruption Commission. That, the matter was investigated and the relevant officers charged at Homa Bay Law Courts, tried and convicted and that an appeal is now pending before the High Court.
5. At the close of the respective cases the parties filed written submissions. The Plaintiff submitted that the defence was a mere denial and ought to be disregarded. It relied on **Article 159 of the Constitution, Sections 53(8) and (9) of the Public Procurement and Disposal Act** and the decisions in **Equatorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 others [2014]e KLR** and **Eco Bank Kenya Limited v Bobbin Limited and Others, Nairobi HCC. 606 of 2012** in urging this Court to allow the claim. It also prayed for general damages for breach of statutory duty to pay and relied on the decisions in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016]eKLR**, **Gideon Mutiso Mutua v Mega Weralth International Limited [2012]eKLR**, **Guranty Discount Company Ltd v Oliver Lawrence Ward [1961] EALR 285**, **Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014]e KLR**, **National Social Security Fund Board of Trustees v Sifa International Limited (2016)eKLR**, **Macharia & Waiguru v Muranga Municipal Council & Another (2014) eKLR** and **Provincial Insurance Co. EALtd v Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur)**, **Sande v Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)**, **Douglas Odhiambo Apel & Another v Telkom Kenya Ltd. On interest, the decision in Machakos County Government v Shaneebal HCC NO. 25 of 2016** was cited.
6. The Defendant strongly submitted that the alleged procurement processes were fraudulent and were not undertaken in compliance with **Article 227 of the Constitution, the Public Procurement and Disposal Act, 2005** (hereinafter referred to as '**the repealed 2005 Act**') and the **Public Procurement and Disposal Act, 2015** (hereinafter referred to as '**the 2015 Act**'). That, as a result the tenders were not advertised, there was no competitive bidding, no contracts were executed and the Plaintiff cannot benefit from an illegal engagement. In urging the suit to be dismissed, the Defendant relied on **Patel v Singh (1987) KLR 585 (VOL.2)**, **Mohammed v Attorney General (1990) KLR**, **Nyeri County Government v Monica M. Mwangi, Heptula v Noormohamed (1984)e KLR pg 5 - 10, NBI HC JR NO. 637 of 2016 Republic v I. E. B. C., and Kenya Airways Ltd v Satwant Singh Flora (2013) eKLR**

Analysis and Determinations:

7. This Court has given this matter a careful and keen consideration. To that end it has perused and understood the pleadings, the proceedings, the written submissions and all the decisions and scholarly works tendered.

8. As a starting point, this Court will frame the issues for determination since there was no concurrence of the issues. From the record, the following issues are hereby framed for determination: -

- a) **Whether the procurement processes were undertaken in accordance with the laws;**
- b) **If the answer to (a) above is in the affirmative, whether the Plaintiff is entitled to any remedies;**
- c) **Costs.**

Each of the issues shall be dealt with separately.

Whether the procurement processes were undertaken in accordance with the laws:

9. 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.

10. **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.

11. To attain the above constitutional requirement, **the 2015 Act** was enacted pursuant to **Article 227(2)** of the **Constitution** which repealed the **repealed 2005 Act**. 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*'.

12. According to the record, the dealings between the parties herein were in 2015. By then **the repealed 2005 Act** was operational, but subject to **Part 2** of the **Sixth Schedule** of the **Constitution**. **The 2015 Act** was assented to on 18/12/2015 and commenced on 17/01/2016. **Section 183** of **the 2015 Act** provided for the application of the 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.

13. The **repealed 2005 Act** provided for very extensive procedures in any form of procurement. **Part IV** thereof provided for the general rules for procurement whereas **Part V** thereof provided for how Open Tendering was to be undertaken and the limited instances where the alternatives to open tendering being Direct procurement, Request for Proposals and Request for Quotations modes of procurement could be sparingly used in procurement processes. Regardless of the mode of procurement used save in direct procurement any successful party was to be provided with a notification letter by the procuring entity which sought for acceptance. Once the procuring entity obtained the acceptance then a contract for the specific procurement was to be executed and performed thereby leading towards the completion of the procurement process.

14. In this case the Defendant was very categorical and denied initiating any procurement process for the alleged tenders in issue. It contended that if any of such processes were undertaken then they were so done in contravention of the law and without the approval of the Defendant. Having taken such a clear position, the Plaintiff was then called to substantiate how it dealt with the Defendant. The Plaintiff did not avail any evidence on the mode of procurement process it participated in. This Court remains at a loss as to whether the Plaintiff participated in an open tender or in a request for proposals or in a request for quotations or if it was a case of direct procurement. The Plaintiff only produced the Letters of Notification of the Awards of Tenders and its acceptance. There was no contract executed between the parties. Whereas **Section 45** of **the repealed 2005 Act** provided for all procurements records to be kept by the procuring entity for at least six years after entering into a contract or if no contract was entered into, after the procurement proceedings were terminated, the Plaintiff did not endeavour to either produce such records or compel the Defendant to produce them, if at all available. It seems the Plaintiff only laid a lot of premium on the Letters of Notification of the Awards and its acceptance.

15. What followed was the alleged supply and delivery of the procured goods. The only document in such proof was a Delivery Note dated 14/03/2016. There is no evidence that the goods were inspected and confirmed to meet the unknown specifications. That was the duty of the Inspection and Acceptance Committee of the Defendant.

16. The above is the factual background in this case. There is no doubt the procurement laws were not adhered to. But was the Plaintiff aware of the non-compliance? **Section 27** of **the repealed 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)

17. Clearly provided, under **Section 27(4) of the repealed 2005 Act**, the Plaintiff was under a strict duty to comply with all the provisions of the law and the regulations made thereunder. The Plaintiff was hence legally deemed to be aware of not only the procurement processes but also the need to comply with the law.

18. From the foregone analysis, this Court hereby finds and hold, that the procurement processes subject of this suit were not undertaken in accordance with the laws. The first issue is hence answered in the negative.

(b) Whether the Plaintiff is entitled to any remedies: -

19. Having not adhered to the laws, the Plaintiff willingly and in full knowledge, engaged into illegal contracts. In such a scenario, the law is very clear that such contracts are unenforceable. Several decisions of the Court of Appeal allude to that position including **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.

20. The Court of Appeal was very categorical in **Heptulla vs. Noormohammed (supra)** 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...’ Likewise, the Court of Appeal while discussing the same scenario which is encompassed in the legal maxim ‘*ex turpi causa non oritur actio*’ had the following to say in **Kenya Airways Limited vs. Satwant Singh Flora (supra)**: -

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”

21. The fate of the Plaintiff is therefore sealed. The contracts are unenforceable. There is only one exit herein and is to dismiss the suit. Given that the Plaintiff was well aware of and took part in the illegal procurement processes it shall as well shoulder the costs of the suit.

22. Consequently, the suit is dismissed with costs.

23. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Mbaka Counsel instructed by Messrs. Migos-Ogomba & Company Advocates for the Plaintiff.

Mr. Omonde Kisera Counsel instructed by Messrs. Omonde Kisera & Company Advocates for the Defendant.

Evelyne Nyauke – Court Assistant.