



REPUBLIC OF KENYA



**KENYA LAW**  
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**Principal/Board of Directors Lirhanda Girls High School v Lutta t/a Sigma Telecoms  
(Civil Appeal E058 of 2024) [2025] KEHC 2650 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E058 OF 2024**

**AC BETT, J**

**MARCH 5, 2025**

**BETWEEN**

**THE PRINCIPAL/BOARD OF DIRECTORS LIRHANDA GIRLS HIGH  
SCHOOL ..... APPELLANT**

**AND**

**MANASSES MUKOLWE LUTTA T/A SIGMA TELECOMS ..... RESPONDENT**

*(Being an appeal arising from the Judgement of Hon. Caroline Cheruiyot (RM/Adjudicator)  
in Kakamega SCCOM. No. E014 of 2024 delivered on the 12th day of March 2024)*

**JUDGMENT**

**Background.**

1. The Respondent filed a statement of claim in the Small Claims Court in which he prayed that judgement be entered in his favour as against the Appellant School for the sum of Kshs. 640,000/= plus interest being the balance due and owing from the Appellant to him on account of CCTV surveillance equipment supplied and installed in the school and for which he had received part payment of Kshs. 331,000/= out of the contract sums of Kshs. 971,000/=.
2. The Appellant filed a response which it later amended and denied there being in existence a contract between the two parties for the installation of CCTV surveillance equipment at an agreed price of Kshs. 971,000/=.
3. The Appellant further contended that the payment of Kshs. 331,000/= that was made to the Respondent was made sans the approval of the Board of Management. Additionally, the Appellant contended that if at all an installation was done, it was made in violation of the Public Procurement and Asset Disposal Act. The Appellant also averred that the documents relied upon by the Respondent were fictitious.



4. After a hearing in which both parties testified, the Adjudicator delivered a judgement in favour of the Respondent.
5. The Appellant was aggrieved with the decision of the Adjudicator and lodged an appeal in which it set down the grounds of appeal as follows:-
  1. That the learned trial Magistrate/Adjudicator erred in law and fact in finding the Respondent had proved his case against the Appellant.
  2. That the learned trial Magistrate/Adjudicator erred in law and fact in failing to consider that the Respondent had breached the provisions of the *Public Procurement and Asset Disposal Act*, 2015 as pleaded by the Appellants in their response.
  3. That the learned trial Magistrate/Adjudicator erred in law by relying on the *Sale of Goods Act*, Cap 31 Laws of Kenya and failure to appreciate that the *Public Procurement and Asset Disposal Act*, 2015 overrides the provision of the *Sale of Goods Act*, Cap 31 Laws of Kenya in matters public procurement.
  4. That the learned trial Magistrate/Adjudicator erred in law and fact by creating a non-existent contract out of a fraudulent venture that flouted existing procurement laws and relying on invoices as proof of a contract between the Appellant and the Respondent.
  5. That the learned trial Magistrate/Adjudicator erred in law and fact by settling on a contractual amount without proof of an express term on the same.
  6. That the learned trial Magistrate/Adjudicator erred in law and fact by failing to consider that there was no valid contract between the Appellant and the Respondent for the supply of goods and services.
  7. That the learned trial Magistrate/Adjudicator erred and misdirected herself in law and fact by failing to consider the Appellants' position as set out in their pleadings, evidence and written submissions thus reaching a manifestly erroneous finding against the Appellants.
6. Directions were issued that the appeal be disposed of by way of written submissions. The Respondent did not file any submissions.

### **Appellant's Submissions**

7. The Appellant submits that the learned Adjudicator erred in law and in fact in holding that there was a valid contract entered between the Appellant and the Respondent for the installation of CCTV Surveillance equipment at the Appellant institution when the Respondent never produced any form of written contract as the invoices produced by the Respondent in support of his claim were disputed by the Appellant. The Appellant submits that the purported oral request for installation by the Appellant's former Principal cannot be construed to be a contract. The Appellant relies on the case of *Noa Investment Limited v. County Government of Nyamira* [2021] eKLR.
8. Secondly, the Appellant submits that the alleged payment to the Respondent was a fraudulent venture in that it was never approved by the Board of Management of the School.
9. The Appellant further submits that the learned Adjudicator erred in law in failing to consider that services in public institutions such as the Appellant are governed by the provisions of the *Public Procurement and Asset Disposal Act* 2015 ("the Act"). The Appellant relies on the case of *Muguye & Associates Advocates v Kiambu County Assembly Speaker* [2018] eKLR.



10. The Appellant submits that the procurement method used by the Respondent is not prescribed in Section 93 of the Act.
11. It is the Appellant's further submissions that the Adjudicator's reliance on the provisions of the *Sale of Goods Act* was in error as the provisions of the *Public Procurement and Asset Disposal Act* overrides that of the *Sale of Goods Act* in matters of public procurement.

### **Analysis and Determination**

12. The issues for determination arising from the seven grounds of appeal can be compressed into one. This being a first appeal, the duty of the court is to review and re-analyze the evidence so as to determine whether the trial court's decision must stand by arriving at an independent decision. See *Selle v. Associated Motor Boat Co. Ltd & Others* [1968] 123.
13. The Appellant is a public school that is managed by a Board of Management on behalf of the Cabinet Secretary for Education. I have evaluated the documents produced by the Respondent. There were no tender documents and no LSO as conceded by the Respondent. The Respondent claimed to have received an oral order by phone from a former Principal. This a strange way of dealing with public procurement and more so for a supply and installation of the magnitude the Respondent was dealing with.
14. The law relating to public procurement was enacted to bring into effect the provisions of Article 227 of *the Constitution* which state as follows:-
  - “(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
  - (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
    - (a) categories of preference in the allocation of contracts;
    - (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
    - (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
    - (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.”
15. Section 93 of the *Public Procurement and Asset Disposal Act* (the Act) provides as follows:-
  - “(1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.



- (2) Pre-qualification shall be for complex and specialized goods, works and services.
- (3) in conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified.
- (4) the invitation referred to in paragraph (2) shall include—(a)the name, address and contact details of the procuring entity;
  - (b) outline of the procurement requirement, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
  - (c) statement of the key requirements and criteria to pre-qualify;
  - (d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and
  - (e) instructions on the location and deadline for submission of applications to pre-qualify;
  - (f) applicable preferences and reservations or any conditions arising from the related policy;
  - (g) declaration that it is open to bidders who meet the eligibility criteria; and
  - (h) requirement that only bidders with capacity to perform can apply.”

16. The act is couched in mandatory terms. Failure to adhere to its provisions renders the transaction arising from the failure an illegality.

17. It is trite law that courts should not condone illegality by enforcing it. The Court of Appeal case of Kenya Airways Limited v Salwant Singh Flora [2013] KECA 545 (KLR) quoted with approval the case of Scott v Brown, Doering McNab & Co, p1892] 2 QB 724 Lindley LJ at p. 728 when it stated:-

“Ex turpi causa non oritur actio. 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 indictable 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 ought not to assist him.”



18. The failure by the Respondent to comply with the Act renders any purported contract between him and the Appellant an illegality that cannot be cured by the *Sale of Goods Act*. Section 5 (1) of the *Public Procurement and Asset Disposal Act* provides that:-

“This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.”

19. The Respondent did not demonstrate that the supply and installation of CCTV Surveillance cameras was a professional service that enjoys the exemption envisaged by Section 5 (1) of the Act.

20. In *Board of Management Obera Boys High School v Nancy Anchieng Odhiambo T/A Flovin General Merchants* [2021] eKLR, the court, faced with similar circumstances to the instant appeal, declared the Respondent’s contract unenforceable for failure to comply with the provisions of the *Public Procurement and Asset Disposal Act*.

21. Additionally, in the case of *Shabwali Secondary School v. Vwinah* [2024] KEHC 6206 (KLR), P. J. Otieno J, cited the case of *Royal Media Services v. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR where the court held 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 enquiries 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.

46. The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being overlooked. Non-compliance could easily be seen. For this reason this Court is unwilling to hold that RMS should be excused from the flawed process.

47. But an argument had been made that not to allow the claim would be to hurt RMS and to allow IEBC to get away with services without paying for them. This Court is not unsympathetic to this argument yet there is a greater public



good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *Ex turpi causa non oritur action*, that is from a dishonorable cause an action does not arise. There may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless. I reasoned as follows in *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards* [2016] eKLR:-

57. The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.
58. If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.”

22. It is evident that the *Public Procurement and Asset Disposal Act* obligates a public entity to strictly adhere to the provisions of the Act on its procurement process. It was the duty of the Respondent to ensure due process was followed in procuring his supplies and services as he was not dealing with an individual but a public entity.
23. Having said that, I find that there did not exist a valid contract capable of enforcement between the parties herein.
24. The upshot is that I allow the appeal in its entirety with costs to the Appellant.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5<sup>TH</sup> DAY OF MARCH 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

No appearance for Mr. Tarus for Appellant



Mr. Khayumbi for Respondent

Court Assistant: Polycap

