



Chairperson, Secretary & Treasurer B.O.M Elite Girls Bumamu Secondary School & another v Ben Olubakaya Namonywa t/a Benamos E. Africa & another (Civil Appeal E077 & E078 of 2023 (Consolidated)) [2025] KEHC 4712 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E077 & E078 OF 2023 (CONSOLIDATED)**

PJO OTIENO, J

APRIL 8, 2025

BETWEEN

**CHAIRPERSON, SECRETARY & TREASURER B.O.M ELITE GIRLS BUMAMU
SECONDARY SCHOOL APPELLANT**

AND

BEN OLUBAKAYA NAMONYWA T/A BENAMOS E. AFRICA ... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E078 OF 2023

BETWEEN

**CHAIRPERSON, SECRETARY & TREASURER B.O.M ST. MICHAEL MULUWA
SECONDARY SCHOOL APPELLANT**

AND

BEN OLUBAKAYA NAMONYWA T/A BENAMOS E. AFRICA ... RESPONDENT

JUDGMENT

Background

1. The Appeal is against the judgement of the trial Hon. Senior Resident Magistrate G. Ollimo delivered on the 20/04/2023 in Butere PMCC NO. E001 of 2022. Vide a Complaint dated 12/01/2022, the Respondent sought for judgment against the Appellant in the sum of Ksh.500,054.00/= plus costs and interest.



2. It is pleaded that the parties entered into a contract for the supplied of stationeries and other office equipment between the years 2017 and 2020. It was the respondents case that it did supply as contracted but the appellant failed to pay as agreed hence the suit.
3. In response, the Appellants filed a statement of defence dated 16th February, 2022 and denied the averments in the plaint and urged the court for its dismissal.
4. After full trial, the lower court found the Respondent to have proved its case on a balance of probability. The court held that there existed an informal contract between the parties; that the Respondent indeed supplied the Appellants with stationery and office equipment; that the Appellants partially made payments for the delivered goods and the balance was promised to be settled on instalments terms. The trial court thus entered judgement in favour of the Respondent against the Appellants and granted the orders sought.

The Appeal

5. Being aggrieved by said decision, the Appellant lodged this appeal Appeal vide Memorandum of Appeal dated 12th May 2022 and challenged the entire decision by the trial court. The four broad grounds raised in the memorandum of Appeal upon which the Appeal is premised are, THAT;
 - i. The learned trial Magistrate erred in law and in fact in upholding a transaction that went contrary to *the Constitution* and the Law.
 - ii. The learned trial Magistrate erred in law and in fact when she failed to analyse the issues in contention as raised by the Appellants:-
 - a. Whether the alleged supply of books and stationery by the Respondent to the Appellants complied with the mandatory provisions of Article 227 (1) of *the Constitution* and Section 103 and 104 of the Public Procurement and Assets Disposal Act 2015
 - b. Whether the Respondent had an equal Responsibility to ensure that the alleged procurement and supply of books and stationery complied with the Law?
 - c. Whether there existed a valid oral or implied contract between the Appellants and the Respondent for the supply of books and stationery vis a vis the provisions of section 5 (1) 103 and 104 of the Public Procurement and Assets Disposal Act 2015?
 - d. Whether a contract that contravenes statute and public policy is void ab initio for all purposes and intends?
 - iii. The learned trial magistrate erred in law and in fact in failing to appreciate the principle that public documents should be produced by the makers in which case the person producing the same should have the copies properly certified and or/sealed thus perpetrating an illegality by ignoring clear provisions of the *Evidence Act*.
 - iv. The learned trial magistrate erred in law and in fact in failing to consider the evidence of the Appellant.

Plaintiff's Case

6. The plaintiff testified as PWI and adopted his witness statement dated 12/1/2022 as his evidence in chief. He stated to have been supplying stationery and other equipment to St. Elite Girls secondary school as and when called upon to supply. He presented that the school used to make their orders on



- full-scarps not through LPOs and demonstrated by way of cheques and that as at 15/1/2020 when the suit was filed, the school had made partial payments with an outstanding balance of Ksh.500,054/=.
7. The Plaintiff contended that he first supplied the defendants with books in the year 2017 and all the deliveries to the school were accompanied by delivery notes which were signed by the school after verifying that all the items were in order. He relied on the witness statement of Lilian Amilo for confirmation of the deliveries. Towards the proof of requisition for supply of books, the Plaintiff relied on a document by the school principal for demand of supply.
 8. On cross-examination, he confirmed that there was no request made to him specifically to supply books indicating that the school never used to give them official documents when making requisitions but made such requisitions on full-scarps.
 9. He admitted to be aware that an LPO is usually generated from a tender document but insisted that in their case at times they were asked to make supplies without going through the tender process particularly when there was an emergency.
 10. PW2 Caleb Watiangu an employee of Benamos adopted his statement dated 20/6/2022 and confirmed that the company indeed supplied the books to the school. He told court that they tended delivery notes to the school and he physically delivered the same to the school. On re-examination, he affirmed that the school never furnished them with LPOS but instead made hand-written requisitions on full-scarps, through SMS or through phone calls.

Defence Case

11. DW1 adopted her witness statement dated 9th February, 2022 and denied that the handwritten requisition emanated from the school. She stated that the school didn't request for the text books and could not receive books that the school hadn't requested for adding that the store keeper never informed them that she had received books.
12. On cross-examination, she stated that Lilian Amolo was not authorized to receive deliveries on behalf of the school insisting that the debts the school owed to Benamos were settled vide cheques in 2109 and 2020. She however admitted that Benamos was a supplier to the school.
13. DW3 Lilian Amolo on her part stated that she indeed she was forced to receive some books by the plaintiff having been abandoned on the verandah for two weeks. She stated that the delivery guy delivered the books and picked some books that he left with but that she cannot tell how many books the delivery guy left behind.

APPEAL NO E078 OF 2023

14. Vide Plaintiff dated 12/1/2022, the Plaintiff (now the Respondent) filed suit praying for judgment against the Appellants for payment of Ksh.243, 052/= and Ksh.10, 000/= being cost of demand letter plus costs of the suit and interest.
15. The Respondent alleged to have supplied the Appellants with books and other stationeries between the years 2017 and 2020. The defendants filed their statement of defence dated 30th March, 2022 and denied all the averments in the plaintiff and asked the court to dismiss the suit with Costs.
16. The matter underwent full trial and the trial court in its judgment found the Respondent to have proved on a balance of probability that there existed a contract between the parties pursuant to which the respondent supplied the Appellant with books and stationery for which payment was partly made by the Appellants. The court entered judgement in favour of the Respondent against the Appellants



in the sum of Ksh.243, 052/= and disallowed the claim of Kshs.10, 000/= for demand notice for being special damages and was not proved.

The Appeal

17. Being dissatisfied with the trial courts judgement, the Appellant lodged an appeal vide memorandum of appeal dated 12th May 2022 appeal against the whole decision on the grounds, THAT;
- i. The learned trial Magistrate erred in law and in fact in upholding a transaction that went contrary to *the Constitution* and the Law.
 - ii. The learned trial Magistrate erred in law and in fact when she failed to analyse the issues in contention as raised by the Appellants: -
 - a. Whether the alleged supply of books and stationery by the Respondent to the Appellants complied with the mandatory provisions of Article 227 (1) of *the Constitution* and Section 103 and 104 of the Public Procurement and Assets Disposal Act 2015.
 - b. Whether the Respondent had an equal Responsibility to ensure that the alleged procurement and supply of books and stationery complied with the Law?
 - c. Whether there existed a valid oral or implied contract between the Appellants and the Respondent for the supply of books and stationery vis a vis the provisions of section 5 (1), 103 and 104 of the Public Procurement and Assets Disposal Act 2015.
 - d. Whether a contract that contravenes statute and public policy is void ab initio for all purposes and intends?
 - iii. The learned trial magistrate erred in law and in fact in failing to appreciate the principle that public documents should be produced by the makers in which case the person producing the same should have the copies properly certified and or/sealed thus perpetrating an illegality by ignoring clear provisions of the *Evidence Act*.
 - iv. The learned trial magistrate erred in law and in fact in failing to consider the evidence of the Appellant.

Plaintiff's Case

18. The plaintiff testified as PW1 and adopted his witness statement dated 12th January, 2022 wherein he stated to have been supplying stationeries and other equipment to St. Michaels Muluwa Secondary school as and when called upon to supply. He told court that the school had partially made the payments with an outstanding balance of Kshs.243, 052/=. He presented a summary of payment records (Pext.2) which he received from the school from the period 1st January 2017 to 30th January, 2018.
19. It was his case that vide an LPO dated 19th October, 2018, the school requested him to supply text books. That he subsequently delivered stationery and text books on diverse dates as evidenced by delivery notes but only part payments had been made. He further stated having served a demand letter to the defendants whereupon the defendant paid him ksh.30, 000/= on 30th December, 2021. He told court that he started transacting with the school in the year 2016 and was never issued with any tender notices at any given time.



Defence Case

20. DW1 and the school principal stated that she took over as principal in the school in May 2021 and that she may not be aware of any tender for supply. She adopted her witness statement dated 8th May, 2022 wherein she stated, that the supplies to the school are done through tender notices inviting eligible suppliers to submit their sealed bids.
21. She indicated that for the period allegedly supplied goods to defendants, the institution never issued tender notices inviting eligible suppliers including the Plaintiff and further that the defendants never received a non-refundable fee of Ksh.1,000/= from the plaintiff.
22. DW1 further stated that the school did issue LPOs upon award of tender but never knew how the plaintiff was allegedly awarded LPO dated 19th October 2018 without compliance with procedural law on tendering.
23. On cross-examination, she confirmed that the plaintiff was a supplier of only stationery to the school as evidenced by the copies of cheques paid to him. She stated that she may not be in a position to tell the value of the stationeries the plaintiff supplied and that they had been paying him progressively with the last payment having been made in December 2021.
24. Her position was however that the plaintiff supplied text books which the school didn't order for. She stated that the school has not refused to pay the plaintiff but clarified that funds are released termly and when released the same is for running operations within the time and not for paying debts.
25. On further cross-examination, she stated that the Plaintiffs exhibits 3 – 8 demonstrated the stationeries having been received by the store keeper of the school and when referred to copies of cheques, exhibits 1 -4, she confirmed that the school indeed issued the plaintiff with cheques. She further confirmed that the school made payments without advertisement or tender awards stating that at times goods would be directly sourced.

Analysis and Determination

26. The court has considered both the memoranda of appeals, the pleadings by the parties, the evidence taken at trial and the corresponding judgements and submissions filed. The genesis of the appeals are common in the sense that they all arise from an alleged contract whereby the Respondent asserted having supplied to the Appellants stationery and other office equipment.
27. The grounds set forth in the two memoranda of the appeals are similar as well as issues raised for determination in the submissions, save for the appellants and the case numbers. The court discerned the similarity on issues, consolidated the appeals and as such will dispose the appeals by a joint decision to affect both appeals.
28. Unlike in the defence filed at the trial court, there is no contention on the fact of delivery of the goods by the Respondent. Failure to deliver the goods has not been raised and is not a ground in either of the appeal. In fact, in the first appeal, DW3 confirmed to have received the books by the Respondent with claims that they had been abandoned at the verandah for a fortnight. In the second appeal, the fact that the delivery was made was confirmed by the evidence of DW1 who stated on cross-examination that the Respondent had supplied to the school stationery but couldn't tell the value of stationeries supplied. In both cases part payments were made and an admission also made that there was an owing debt but the same could not be paid immediately but depended on exchequer releases. The receipt and consumption of the goods was equally not disputed.



29. The only point of contention is whether the alleged supply of books and stationery by the Respondent to the Appellants gave rise to a valid contract between the parties; and if so, whether the contract between the parties is enforceable so that the respondent be entitled to the reliefs sought before the trial court.
30. It is the foundation of the Appellants' case that the delivery by the Respondent did not comply with the provisions of Article 227 (1) of *the Constitution* which obligates state organs and public entities to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Further, that the supply was in contravention to the framework within which policies relating to procurement are to be implemented in line with Section 103 and 104 of the Public Procurement and Assets Disposal Act 2015.
31. The Appellants submit that there was neither valid nor informal contract between the parties. It is presented that the provisions of Section 5 (1) of the Public Procurement and Assets Disposal Act of 2015 read together with those of the *Sale of Goods Act* cannot be read into this case so as to find that there was an implied contract between the parties. They submit that there having not been a fair, competitive, transparent and equitable tendering process, there couldn't have been a resulting contract.
32. The Respondent on the other hand does not dispute the fact of there had not been a due and validly consummated contract, under the *Public Procurement and Asset disposal Act*, between him and the appellants. Its case is that the Appellant having benefited materially from the goods delivered at the expense of the respondent, it would be unjust to allow the Appellant to retain that benefit. The respondent invokes the doctin of unjust enrichment to his benefit.
33. The Respondent places reliance in the words of Lord Wright, in *Fibrosa vs Fairbairn*, [1943] AC and submits that the law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit so as to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.
34. With the submissions by both parties duly appreciated, the court finds that the pertinent issue for determination is the legality of the alleged contract and whether the same is enforceable.
35. The court notes that the Respondent in both instances was issued with LPOs from the respective Appellants prior to the supply of the goods, a justification that the Respondent had been awarded tender for such delivery.
36. By way of cheques, the Appellant demonstrated that soon after it had supplied the goods, the Appellants did partially make payments for the goods delivered but the full sum due was never settled. The outstanding balance in both occasions was agreed to be paid progressively by way of instalments, based on availability of funds.
37. The Appellants contend that the respective LPO's awarded to the Respondent were not in compliance with procedural law on tendering and as such no contractual obligations arose from the dealings being the law applicable to public procurement expressly required the contract to be in writing and that the Respondent only furnished the LPO's as a proof of tender award with no proof of any formal contract of supply entered by the parties. The court takes the learning that the legal demand that a contract be in writing does not prescribe that the writing be in a single document called a contract. A contract may as well be in a series of documents, or documents and conducts or just conduct alone. Provided the court discerns a contract with clear terms, the court has a duty and an obligation to enforce the intentions and bargains of the parties.



38. What transpired in this matter, however, is that the Respondent made deliveries of the goods to the Appellants. The Appellants received the goods put the same to schools' utilization, paid substantial part of the sum due and promised to pay the balance progressively in instalments in each case. The Appellants having materially benefited from the goods supplied by the Respondent now tries to seek refuge behind the procurement laws with claims that the Respondent breached the law by short-circuiting the system and supplying goods without a formal tender/contract.
39. Unjust enrichment is as a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.¹ A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.
40. The doctrine of "unjust enrichment" is based on equity. Equity being aimed at doing justice between the parties, the doctrine of unjust enrichment can be invoked to deny the benefit to which a person is not otherwise entitled.² In *Fibrosa vs Fairbairn*, [1943] AC, the court in expounding the principle stated that:
- "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi- contract or restitution."
41. The tests in in deciding claims of unjust enrichment proceed from three suppositions;³ first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.
42. In the instant circumstances, the court notes that Respondent did supply goods to the Appellants in the course of normal business under the mistaken belief that the orders issued to him were valid and legal and on the belief that he would be paid for the goods. The Appellants having been aware that there had been no tenders properly floated and processed in favour of the Respondent kept pursuing and urging the Respondent to make deliveries. They even made partial payments to the Respondent for the sams supply after utiling the goods. Good conscience, justice, fairness and equity dictate that the appellants not be allowed to use their own own initiated schemes to circumvent the law to unfairly deprive and harm the respondent while unjustly benefitting and enriching themselves
43. The court holds that the continued payments by the Appellants following the LPO was a clear indication that the Appellant encouraged the relationship. It is the Appellants, being state organs and as a procuring entity who had the obligation of ensuring compliance with the law in the award of tenders of supply.
44. This in line with the nature of the parties relationship justifies that the Appellants indeed were aware of the existence their legal right which was inconsistent with the right claimed by the plaintiff. Even DW1 and the school principal in the 2nd appeal confirmed that the institution at times received goods and

¹ The Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573.

² see Supreme Court of India in *Sahakari Khand Udyog Mandal Ltd. vs Commissioner of Central Excise & Customs*, 2005 AIR SC 1897

³ Goff and Jones in their treatise, *Law of Restitution*, page 11:



made payments for the same without advertisement or tender awards following the direct sourcing of the goods and as such there was no way the Respondent would have known that that was one of the incidences when a proper procedural law was to be complied with.

45. The court finds that it would be contrary to public policy on a state agency like the Appellant to obtain goods or services from a citizen, utilize the same then raise the propriety of the process to the detriment of the supplier and to the benefit of the school. To upset the judgement of the trial court and then allow the Appellant to keep the material supplied without paying for the price would not only be unfair but also unjustly benefit and enrich the school.
46. In the upshot, the court holds that the Respondent at all times was an innocent supplier who was issued with respective LPO's for the contract awards, effectively made supplies in effect, was partly paid with a promise to settle the balances progressively by way of installments. The schools must be held to their promise to pay and that is what the court discerns to have been done by the trial court. To upset the judgment would run affront every sense of justice as a norm. The Appeal is therefore determined to lack merit and is thus dismissed with costs.
47. One last point however deserve a comment from the court even though it may not have any consequence on the decision already reached. It concerns the claim of Kshs.10, 000 being the costs of the demand letter. The court holds that the same is a claim on costs of litigation and is not due for recovery as part of the principle sum. Costs unless agreed on in writing are not recoverable by a suit but by a bill of costs either party and party bill of costs or an advocate and client.
48. In the circumstances, the claim for fees in serving the demand letter/letter before action must remain part of the party and party bill of costs and only due for claim and recovery after the judgement and by a bill of costs filled in the suit. While the court notes that the claim was disallowed on the basis that it was a special damage claim, the principle of disallowance was erroneous. The claim ought to have been properly disallowed for not being a claim in the suit but a claim for costs after the suit and only upon success of the suit and being awarded by the court.
49. All in all the appeal fails and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL, 2025.

PATRICK J O OTIENO

JUDGE

