Transcend Media Group Limited v Independent Electoral Boundaries Commission & another (Commercial Case E118 of 2020) [2025] KEHC 11080 (KLR) (Commercial and Tax) (25 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E118 OF 2020

A MABEYA, J

JULY 25, 2025

BETWEEN

TRANSCEND MEDIA GROUP LIMITED ..... PLAINTIFF

AND

THE INDEPENDENT ELECTORAL BOUNDARIES COMMISSION .... 1ST DEFENDANT

SCANAD KENYA LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the defendants vide a plaint dated 4/6/2020 in which it sought the following orders: -

    a. A declaration that had tender No. IEBC 452016-2017 been evaluated in adherence to the legal dictates of the procurement laws, the Plaintiff had a real and substantial chance and/or should have been awarded the said tender.

    b. Damages of Kshs. 72,506,664.0 for loss of profits and/or loss of business opportunity.

    c. In the alternativeand without prejudiceto the foregoing, damages for the tort of conspiracy to injure by unlawful means and misfeasance in public office.

    d. Exemplary and/or punitive damages.

    e. Costs of the suit.

    f. Interest on the awarded damages and costs at the court rates from the date of filing of the suit.

g. Any other relief as the Honourable court may deem just and fit to order.

2. The plaintiff's case was that pursuant to a tender award by the 1st defendant to the 2nd defendant, it suffered damages as a result of numerous illegal infractions perpetuated by the defendants in concert.

3. It contended that prior to the 2017 electioneering process, the 1st defendant advertised Tender No. IEBC 45/2016-2017 ("the said tender"), a Request for Proposal for the Provision of Strategic Communication and Integrated Media Campaign Consultancy Services for the financial year 2016 – 2017. That it applied for the said tender by submitting technical and financial proposals to the 1st defendant and that upon undertaking the evaluation of the submitted tenders, the plaintiff and the 2nd defendant were successfully prequalified for the technical and financial stages a demonstration that both met all the preliminary and mandatory requirements.

4. That the plaintiff scored 85.92% while the 2nd defendant scored 86.35% which was considered to be a tie by the Evaluation Committee. In the premises, the 1st defendant resorted to negotiation with both bidders with the objective of achieving the lowest negotiated financial price that resulted in the 2nd defendant reducing its bid to Kshs. 350,003,746/- while the plaintiff made a bid of Kshs. 423,525,836/-.

5. The plaintiff contended that the illegalities perpetrated by the defendants in the procurement process of the Request for Proposal for Tender No. IEBC 45/2016-2017 prompted it to seek legal redress in various cases being the Public Procurement Administrative Review Board (PPARB) Application Nos. 550 of 2017 & 63 of 2017 and HC Judicial Review Application (HCJR) No. 468 of 2017.

6. The plaintiff contended that in PPARB Appln. No. 63 of 2017, the Board noted fundamental infractions and illegalities in the award of the said tender. That were it not for the illegalities perpetrated by the defendants, the plaintiff had a real and substantial chance of being awarded the tender and this amounted to interference with its economic interests and caused it economic loss of Kshs. 72,506,664.05.

7. The 1st defendant filed a defence dated 24/6/2020 in which it denied the plaintiff's claim and raised the defence of res judicata. Its case was that it invited open bids for advertisement and civil education for the General Elections of 8/8/2017. That the process was carried out in accordance with the law.

8. The 2nd defendant filed its defence dated 15/7/2024 wherein it traversed the plaintiff's claim and pleaded res judicata and estoppel. It was its case that pursuant to the disputed tender, the plaintiff and 2nd defendant were invited in April 2017 to bid for the tender of the August 2017.

9. That the plaintiff approached the PPRB 3 times and was dismissed. It proceeded to the High Court twice where the orders sought were declined thereby making the present suit res judicata.

10. At the trial, the plaintiff called one witness, Peter Lai who testified as PW1. He adopted his witness statement dated 4/6/2020 as well as the witness statement of Lai Muthoka dated 4/6/2020 as his evidence in chief. He further relied on his bundle of documents of the even date and the bundle of documents dated 5/6/2020 as his evidence.

11. It was his testimony that when they went before Odunga J (as he was then), the Judge warned the parties not to enter into a contract whilst the matter was still under litigation. That the process was not above board as there were infractions in the evaluation and further that, some clauses therein contradicted the law.

12. In cross-examination, he stated that an open tender was advertised for the 2017 elections. That the plaintiff filed PPARB No. 50 of 2017 to annul negotiations and PPARB No. 63 of 2017 to annul the

tender all of which were dismissed. That the plaintiff filed an appeal in Misc. Appln No. 468 of 2017 but the matter was remitted back to the Review Board which dismissed the review on 6/6/2019.

13. That the 2nd defendant would have not proceeded from the preliminary stage to evaluation as it did not submit the mandatory documents. That the plaintiff had expectation that it would make profits of Kshs. 72 million had it won the bid. He however, admitted that the win rate is low because of competitiveness.

14. In re-examination, he clarified that the urgency of a tender does not necessitate flaunting of the law by the procuring entity. That the plaintiff's contention of conspiracy was supported by the sudden reduction of the 2nd defendant's bid by 60% in order to fit the 1st defendant's budget.

15. On its part, the 1st defendant called one witness in support of its case. DW1, Joyce Ekuam adopted her statement dated 22/6/2023 as her evidence in chief. She told the Court that was a member of the Tender Committee and that all bidders submitted mandatory documents.

16. That the 1st defendant was not aware that the 2nd defendant was a wholly owned foreign company as when they were evaluating the tender, they established that the 2nd defendant was a citizen contractor. That the 2nd defendant's CR 12 was not part of its bid documents.

17. That due to a statistical tie in the bidding process, the 1st defendant invited the plaintiff and 2nd defendant for negotiations during which time the 2nd respondent reduced its budget from Kshs. 764,393,224 to Kshs.350 million.

18. In cross-examination, she stated that in its ruling the Board found nothing wrong with the IEBC entering into negotiations. That Odunga J declined to grant a stay in his ruling.

19. The 2nd defendant called one witness in support of its case. D2W1, Jimmy K. Munene adopted his testimony dated 17/9/2021 as his evidence in chief. In cross-examination, he told the Court that the 2nd defendant did not produce its CR12 at the time of submission of Tender documents. That a CR12 was one way of confirming list of shareholders and directors of a company but that one could provide a list of the same.

20. That after negotiations, the 2nd defendant reduced its budget from Kshs. 768 million to Kshs. 350 million which reduction was not significant in the advertising world. That there was active litigation during the tender period.

21. In re-examination, he clarified that there was no specific requirement for CR12 but that what was asked for was a list of shareholders. That the case against the 2nd defendant was dismissed and there was no appeal pending.

22. The parties filed their respective submissions which are on record. The plaintiff submitted that from the evidence and cross-examination of the witnesses presented by the defendants, the plaintiff had demonstrated on a balance of probabilities, that the defendants jointly and severally commissioned the torts of conspiracy to injure by unlawful means, unlawful interference with trade or economic interests and the tort or misfeasance in public office.

23. That the infractions by the 1st and 2nd defendant were unlawful and thus denied the plaintiff the opportunity over the Tender in question and further that the defendants conspired to injure the plaintiff. That the doctrine of res judicata was not applicable in the circumstances of this case. This is so because, although the issues before the PPARB were in respect to the tendering process, the Board only handled a facet of the dispute and reserved the remainder to the courts.

24. For the 1st defendant, it was submitted that the plaintiff had not proved the elements of the offence of conspiracy which must be committed by two or more persons acting in concert to execute a common intention to defraud.

25. That no evidence was adduced by the plaintiff against any of the 1st defendant's officials with regard to how the tort of misfeasance in public office was committed. That even if the tort was established, it would not lie against the 1st defendant but only against its public officer as was held in the case of Kenya Revenue Authority v Menginya Sali Murgani [2010] KECA 164 (KLR).

26. That having failed to prove any of its allegations, the plaintiff is not entitled to any damages.

27. The 2nd defendant submitted that, on the basis of res judicata and estoppel, the plaintiff cannot re-open the matter and the issues that it raised before the PPARB and thus the court had no jurisdiction to entertain the plaintiff's claim. That matters and disputes arising from the Public Procurement Process have its own Sui Generis procedure and coming to High Court in the first instance is not one of them unless with leave which the plaintiff did not apply.

28. That the plaintiff's claim for general, exemplary or punitive damages is speculative and imaginary and thus not merited. That the tender subject of this suit was in respect of 2017 General Elections and this Court should reject the invitation to revisit closed elections.

29. The court has carefully considered the pleadings, the evidence presented by the parties, their submissions and the authorities relied on. The issues for the court's determinations are as follows;

    i. Whether this court has jurisdiction to entertain the suit, and if so,

    ii. Whether the plaintiff proved its case, and if so

    iii. What reliefs the plaintiff is entitled to,

    iv. Costs.

30. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court of Kenya stated that: -

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"

31. The defendants urged the Court to dismiss the suit on grounds that it was res judicata the proceedings in PPARB Application No. 50 of 2017, PPARB Application No. 63 of 2017 and HC JR Appln No. 468 of 2017.

32. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of res judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

33. In re Estate of Riungu Nkuuri (Deceased) [2021] eKLR, the court stated as follows:

> "The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

34. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction.

35. I have considered the proceedings before the PPARB as well as the Judicial Review proceedings before the High Court. In the present proceedings, the plaintiff is seeking compensation from the defendants as a result of loss it alleges to have sustained following the award of a tender to the 2nd defendant by the 1st defendant.

36. In the previous proceedings, the plaintiff sought to halt the awarding of the tender to the 2nd defendant by the 1st defendant on the grounds that the process was laced with irregularities and illegalities. In those proceedings, there was no claim for compensation and none could validly be raised thereat.

37. In view of the foregoing and looking at the pleadings before this Court, this Court is not satisfied that this suit is res judicata any of the previous proceedings as claimed or at all.

38. Apart from res-judicata, the 2nd defendant impugned this Court's jurisdiction on the ground that matters and disputes arising from the Public Procurement Process have their own Sui Generis procedure and coming to High Court in the first instance is not one of them unless with leave which the plaintiff did not seek and obtain. In essence, the 2nd defendant is impugning this court's jurisdiction on account of the doctrine of exhaustion.

39. In matters where the exhaustion remedies principle is raised, the bottom line is not that the Court lacks jurisdiction in the strict sense, but rather what the Court appreciates is that it must give deference to other institutions which have been legally established and given the primary jurisdiction to resolve such disputes.

40. In Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others, the Court of Appeal expressed itself as follows: -

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews ... The exhaustion doctrine

is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This, accords with article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution."

41. It is discernible from the pleadings that the dispute herein arises from the award of tender no. IEBC 45/2016-2017. The plaintiff had applied for said tender and was unsuccessful in its bid. Throughout the process, the plaintiff approached the Public Procurement Administrative Review Board in Application No. 550 of 2017, No. 63 of 2017 and also sought redress in High Court Judicial Review Application No. 468 of 2017 but was not successful as the tender was awarded to the 2nd defendant.

42. The pleadings before this Court are for compensation as a result of the defendants allegedly committing the tort of conspiracy to injure by unlawful means and misfeasance in public office. The plaintiff has not impugned nor sought to review any actions by the 1st defendant, which if it did, the first recourse would have been the PPARB in line with section 167 (1) of the *Public Procurement and Asset Disposal Act* No. 33 of 2015.

43. Accordingly, this Court is satisfied it is well clothed with the requisite jurisdiction to entertain the instant claim. The defendants' query on this Court's jurisdiction is therefore without merit.

44. The next issue is whether the plaintiff proved its case to the required standard, on a balance of probabilities. The plaintiff's claim is that the defendants committed the tort of conspiracy to injure by unlawful means and misfeasance in public office thereby exposing it to economic loss.

45. Section 107(1) of the *Evidence Act* provides as follows: -

> " 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."

46. And section 108 of that Act provides that: -

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

47. It is trite that in civil case, the burden of proof is on a balance of probabilities. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the court stated that: -

> " The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: - "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

48. The Black Law Dictionary 9th Edition defines conspiracy as follows: -

> " An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement's motive and (in most states) action or conduct that furthers' the agreement; a combination for an unlawful purpose".

49. In criminal matters, to prove a conspiracy, the prosecution has to establish that the accused together with others, agreed by common mind to defraud the complainant. The inference must be made both from the actions of an accused and the evidence tendered in court (see Republic v Anne Atieno Abdul & Others [2017] eKLR).

50. Further Halsbury's Laws of England Vol. 25 observes that: -

> " It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of the minds, a consensus to effect an unlawful purpose."

51. Is criminal conspiracy distinct from civil conspiracy in law? The Court does not think so. In Renault SA v Inokom Corp [2010] 5 MLJ 394, the Malaysian Court of Appeal considered the main elements of tort of conspiracy to be a combination or an agreement between two or more persons; an intent or for the purpose of injuring another; that acts are carried out in accordance with that agreement and that intention resulted in loss or damage to another.

52. This Court will adopt that criteria. The aforementioned elements are close to that constitute the offence of conspiracy in criminal matters. Has the plaintiff then proved that the defendants conspired to cause it injury?

53. The plaintiff contended that the illegalities perpetrated by the defendants in the procurement process of the Request for Proposal for Tender No. IEBC 45/2016-2017 amounted to interference with its economic interests and caused it economic loss of Kshs. 72,506,664.05.

54. The evidence presented before this Court is clear that despite the plaintiff's assertions that had it not been for the irregularities committed by the defendants it would have secured the tender, PW1 admitted in cross-examination that the win rate was low because of competitiveness.

55. The plaintiff cited the failure of the 2nd defendant to attach its CR12 as part of its bid documents and its lowering its bid price by 60% to march the 1st defendant's requirement as evidence of the conspiracy.

56. I need not rehash the aforementioned issues as they have already been litigated at the PPARB and by the Judicial Review Court, a Court of concurrent jurisdiction.

57. The question is whether these alleged acts constituted a conspiracy to injure the plaintiff. This Court is cognisant that it would be absurd to require two or more persons that intend to carry out a conspiracy to injure someone to explicitly write down their intentions and have the same signed, sealed and delivered. That notwithstanding, it was upon the plaintiff to prove the overt acts of the conspiracy from which this Court could infer the existence of an agreement between the defendants to further the common object of the combination.

58. The evidence on record is that, following the decisions by the tribunal and Court, the plaintiff and 2nd defendant were called into negotiations with the 1st defendant. It may or it may not have disclosed its budget for the tender. It is on the basis of these negotiations that the 2nd defendant lowered its bid price. Can this amount to conspiracy to injure. This Court doubts and holds that, it may have been

an act of competition. If there were no open negotiations as happened in this case, then probably such allegations could have held a basis.

59. As regards the issue of economic loss, the plaintiff contended that he it suffered a loss of Kshs. 75 million as a result of the illegalities allegedly committed by the defendants.

60. The Court has already stated that PW1 testified that the plaintiff was not assured of winning the Tender due to the competitive nature of the entire process. Indeed, when the 1st defendant informed the parties of its budget for the tender at the negotiations held, the plaintiff opted not to lower its bid whereas the 2nd defendant lowered its bid and subsequently won out on the bid.

61. It is not clear from the evidence presented by the plaintiff how it arrived at the loss that it incurred as a result of missing out on the bid. Even if this Court was to believe the plaintiff's contentions that the loss arose out of expenses that it had incurred up to the point of missing out on the bid, this would in my view be put down to the cost of doing business, a cost that would be incurred by all parties undertaking the tendering process.

62. In the circumstances, the Court is not satisfied that the plaintiff has proven, on a balance of probabilities, that the defendants conspired to cause it injury by unlawful means.

63. Turning to the second limb of the plaintiff's claim, the Tort of Causing Loss by Unlawful Means, this was considered in the case of Safaricom Limited v Transcend Media Group [2016] eKLR where the court stated as follows:-

> " 48. What are the essential elements of this Tort?
>
> i. There must be an act intended to cause loss to the claimant.
>
> ii. The act must interfere with the freedom of a 3rd Party to deal with the claimant.
>
> iii. The act against the 3rd party must be unlawful.
>
> iv. An unlawful Act for this purpose is one that is actionable by a third party or would be, if it suffered loss."

64. As already held, there was no evidence to demonstrate that the actions of the defendants were meant to cause loss to the plaintiff or that the said acts interfered with the plaintiff's freedom to deal with the 1st defendant. On the contrary, the evidence on record is that the plaintiff took part in the tendering process to its conclusion and made independent decisions that led to the loss of the tender.

65. As regards the lawfulness of the acts against the plaintiff, the same was litigated and settled in the various cases before the PPARB Appln. Nos. 550 of 2017 and 63 of 2017 and HC JR Appln. No. 468 of 2017. There is currently no pending appeal on the said cases and as such, the issue of an unlawful act having been carried out against the plaintiff was long settled.

66. Accordingly, the Court finds that the plaintiff failed to prove the Tort of Causing Loss by Unlawful Means as against the defendants.

67. The final limb in the plaintiff's claim is that the defendants committed the tort of misfeasance in public office. In Ethics and Anti-Corruption Commission v Joseph Oroko Ongera & another [2021] eKLR, the court considered the tort of misfeasance in public office and stated as follows: -

> " The tort of misfeasance in public office has been judicially defined – in a persuasive authority, Jones v. Swansea City Council [1990] 1 WLR 55, at p.71 (per Slade, L.J.):

'The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires."

68. This Court's understanding is that, the aforementioned tort attaches to an individual officer holding public office. Consequently, the subject officer must be cited and evidence brought against him demonstrating that he/she exercised his powers for his personal advantage. In the present case, the plaintiff did not cite any officer nor highlighted any actions that were committed that benefited the particular individual.

69. In view of the foregoing, the Court finds that the plaintiff has failed to prove its case on a balance of probabilities. Accordingly, the suit not having proved, the same is hereby dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb.

JUDGE