



**Kenya Anti-Corruption Commission v Nguku & another
(Civil Case 23 of 2017) [2024] KEHC 1348 (KLR) (Anti-
Corruption and Economic Crimes) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL CASE 23 OF 2017
EN MAINA, J
FEBRUARY 8, 2024
FORMALLY COMMERCIAL CIVIL CASE NO.739 OF 2010**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION APPLICANT

AND

DR. DANIEL MULWA NGUKU 1ST DEFENDANT

JANET KAVULWA MULWA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit for the recovery of public property, to wit, Kshs. 8,000,000 alleged to have been corruptly acquired through a fraudulent procurement for a parcel of land known as LR NO. 14759/2 intended for use by City Council of Nairobi as a public cemetery. It is alleged that the consideration for the land was exaggerated and that the Defendants unlawfully benefitted from the fraudulent transaction and are therefore liable to the Council for the said amount.

The Parties

2. The Plaintiff is a body corporate established under Section 3 of the Ethics & Anti-corruption Commission Act, 2011 mandated to institute and conduct proceedings for the purpose of recovery of or protection of public property.
3. The 1st Defendant was, at all times material to this case, the Medical Officer of Health in the City Council of Nairobi (hereinafter referred to as “the Council”).
4. The 2nd Defendant was and is the 1st Defendant’s spouse.



The Plaintiff's case

5. The Plaintiff avers that payment totaling to Kshs. 283,000,000 was made by the Council towards the procurement of L. R. No. 14759/2 to the account of E. N. Omoti & Company Advocates in favour of Henry Musyoki Kilonzi who was the Vendor. Kshs. 281,300,000, part of the Purchase price was subsequently paid into a joint account in the names of Mutinda, Onduso & Osiemo Advocates, Account Number 01XXXX06, Bank of Africa, Taifa Road Branch.
6. The Plaintiff avers that the land was not suitable for use as a cemetery and that the purchase price was also exaggerated and contrived to defraud the Council as only a sum of Kshs. 110,000,000 was paid to the vendor while the difference was paid to various persons, among them the Defendants.
7. The Plaintiff further avers that on 23rd February 2009, the Defendants received a total sum of Kshs. 8,000,000 which they utilized to purchase properties, to wit, L.R. Number 337/3495 (registered in the name of the 2nd Defendant), a Plot No. 102 (Not formally registered) in Mwingi Town and which they also used to construct a residential house on the plot in Mwingi. The Plaintiff contends that L.R. Number 337/3495 was registered in the name of the 2nd Defendant to conceal, distort and perpetuate the corrupt nature of the transaction.
8. The Plaintiff further avers during the impugned procurement that the 1st Defendant was a member of the Tender Committee and a representative of the Department of Public Health which was the user department and that made him privy to privileged, insider and confidential information. It was averred that he was among the persons that made the award of the expression of interest for sale of the cemetery land; that he induced the City Council to enter into the contract knowing the land was not suitable for use as a cemetery and that the price was fictitious and grossly exaggerated; that he did not raise any objection to the award of the expression of interest and hence he used his position to unlawfully enrich himself at the expense of the Council.
9. The Plaintiff further avers that the Defendants were jointly and severally party to the conspiracy which arose from the 1st Defendant taking part in the fraudulent transaction and to both Defendants receiving the funds and using the same to acquire and develop property.
10. The Plaintiff contends that the Defendants participated in the fraud by receiving money for no consideration, unlawfully acquiring public property, unlawfully conferring benefits to themselves, receiving money in breach of the 1st Defendant's duty to the Council, that the 1st Defendant being rewarded for recommending and fore bearing to object to the purchase of the land by the council and utilizing some of the purchase money from the Council with knowledge that the money was fraudulently and unlawfully obtained.
11. The Plaintiff also avers that the 1st Defendant took part in Misfeasance of office and breach of trust by improperly conferring a benefit on another person and himself; knowingly dealing with proceeds of crime; corruptly receiving money against the interest of the Council; using proceeds of crime to purchase property; awarding a tender for land that was not suitable as a cemetery, withholding the true nature of the transaction; misleading the Principal on whose behalf he was appointed in office and breaching the trust bestowed upon him by his employer.
12. Further or in the alternative, the Plaintiff contends that receipt of the tainted money amounted to a reward to the 1st Defendant for facilitating the purchase of the cemetery land, which is an illegal consideration and therefore refundable to the City Council. It is further contended that the Defendants unjustly enriched themselves at the expense of the City Council and are therefore liable to



- restitution of Kshs.8,000,000/- together with interest from 23rd February 2009 which was the date of receipt of the money till payment in full.
13. The Plaintiff quantified Special damages as the accrued interest at reasonable commercial rates and/or interest on the loss of usage of the Kshs. 8,000,000/-.
 14. The Plaintiff further avers that the property acquired through the unlawful acts is liable to legal and equitable claim of tracing, and is recoverable from the Defendants.
 15. The Plaintiff prays for judgment as follows: -
 - a. The sum of Kshs. 8,000,000/- as per paragraphs 11, 19 and 20 of the plaint.
 - b. Interest on item “a” at court rates per annum from the date of receipt till full payment,
 - c. Costs of the suit and interest thereon,
 - d. A declaration that the Plaintiff is entitled to trace and recover L.R No. 337/3495 and Plot No. 102 located in Mwingi Town with all developments thereon;
 - e. A permanent injunction restraining the Defendants by themselves, their servants, agents, or any other person whatsoever from leasing, charging, subdividing wasting, transferring or in any other way dealing with L.R No. 337/3495 and Plot No. 102 located in Mwingi Town off Garissa Road together with all developments thereon;
 - f. A mandatory injunction directing the Defendants, their servants or agents, to vacate forthwith L.R No. 337/3495 and Plot No. 102 located in Mwingi Town off Garissa Road.
 - g. An order that L.R No. 337/3495 and Plot No. 102 Mwingi Town off Garissa Road, be sold in partial satisfaction be of the Plaintiff’s claim as set out in prayers “a” and “d” above.
 - h. General damages, exemplary damages and punitive damages.”
 16. To prove its case, the Plaintiff called 12 witnesses. Samuel Kariuki Mungai testified that at the time relevant to the case he was the Operations Manager at Bank of Africa Limited; that there were two cheque remittances, first one of Kshs 175,000,000 on 23rd December 2008 and second one of Kshs. 108,000,000 on 16th January 2009. By 11th February 2009 the account No. 01XXXX06 had a total of Kshs. 281,300,000. Subsequently, a sum of Kshs.117,000,000 was sent to the National Bank Harambee on instructions of D. O. Osiero Advocate in a letter dated 13th February 2009. An internal transfer of Kshs. 102,000,000 was also made to the firm of Mutinda & Co. Advocates. PW1 clarified that he had never met the Defendants and that the transactions he mentioned did not involve the Defendants.
 17. Pravin Jamnadas Kakad Charda (PW2) testified that he was an Advocate practicing in the name and style of PJ Kakad & C0, Advocates; that he acted for both the purchaser and the vendor in regard to purchase of a house in Mlolongo where the 2nd Defendant was the purchaser. He confirmed that the purchaser deposited a sum of Kshs. 4,000,000 in form of a banker’s cheque No. 11XXXX09 dated 23rd February 2009 drawn on the National Bank of Kenya and banked it in his account at Fidelity Commercial Bank and it went through.



18. In cross examination, PW2 clarified that the purchase price for the property was Ksh. 3,800,000 while Kshs.152,000 was for stamp duty, registration and disbursements. He testified that a sum of Kshs. 3,800,000 was transmitted to the vendor. He also testified that his firm completed the transaction and transmitted all the documents to the purchaser. He stated that he subsequently charged his fees but he could not remember the precise amount. He did not know if the funds paid to him through the bankers cheque were proceeds of crime.
19. Alphonse Kaio (PW3) testified that at the time relevant to the case, he was working at Mwalimu National Sacco as the Chief Accountant and was stationed in Nairobi. He confirmed that they had a member named Janet Kavula Mulwa. He testified that on 23rd February 2009 he received two cheques from her for Kshs.1,000,000 which was to be used as follows:- Kshs. 527,500 to boost her savings and Kshs. 472,500 for repayment of a loan that she had with the Sacco. He testified that the cheque was deposited into the Sacco's Co-operative Bank Account and it went through and it was utilized as instructed by Janet Mulwa.
20. On cross-examination, PW3 clarified that he never interacted with the 2nd Defendant personally as cheques were received by cashiers. He could not confirm whether her instructions were oral or written. He didn't know how the sum of Kshs.1,000,000 was obtained.
21. Dennis Yegon (PW4) testified that he is a Fraud Investigator with Fraud Examiner Certification and five years' experience working with banks and telecommunication companies that his duties involved investigating accounts suspected to be involved in fraud and collection of evidence to prove or to disprove fraud; that while he was working with the National Bank of Kenya he received instruction to extract account opening statements for Account Number 01XXXXX00 opened in January 2002 statements by Davis Odero Osiemo in the name Odero Osiemo & Co Advocates Client Account. Mr. Odero was the sole signatory. He confirmed that on 13th February 2009, Kshs. 117,000,000 was deposited into the account and that Kshs. 16,000,000 was debited from the account on the same date. He testified that on 23rd February 2009, David Odero Osiemo issued instructions to issue three banker's cheques of Kshs. 1,000,000 to Mwalimu Sacco, Kshs.1,000,000 to Billy Mbuvi Mumbo and Kshs. 4,000,000 to PJ Kakad & Co. Advocates. He stated that a fourth banker's cheque of Kshs. 2,000,000 was issued to Mwalimu Hardware.
22. In cross examination, PW3 clarified that before the deposit on 23rd February 2009, the balance in the account was Kshs. 2,119,525 and the cheque of 1,000,000 to Mwalimu Sacco came once the deposit of Kshs. 16,000,000 was made; that a banker's cheque was issued only when there were funds in the account; that he had never interacted with the 2nd Defendant and that he was a student and was not working with the bank at the time the transactions took place.
23. PW5, Patrick Tom Odongo testified that he is a Professional Physical Planner who had worked with the 1st Defendant in the City Council; that he attended the tender opening on 9th October 2008 along with other team members; that the evaluation included scoring certain parameters among them, "location within Nairobi Metropolitan Region", "an area of 36,000 kilometers square" and "feasible to secure from market" given that the private sector does not hold any land for cemetery use and a change of user would be necessary. He testified that he raised issue with analysis on soil type because cemetery use required permeability of the soil which had not been listed as a requirement in the tender. He produced minutes of the evaluation committee meeting and a memo dated 18th November 2008 which raised the issue of an award being on the verge of being done yet the evaluation process had not been completed. It was his evidence that none of the sites met the mandatory requirements so he dissociated himself from the recommendations. He produced minutes of a meeting held on 12th November 2009 and testified that the minutes did not reflect the real proceedings of the Evaluation Committee. He



- stated that it is those minutes that gave rise to the Memo dated 18th November 2008 to the effect that a tender was awarded.
24. PW5 further testified that on 19th December 2008 he wrote a Memo to the Town Clerk which addressed queries raised by the Ministry of Local Government and stated that the process as conducted would not deliver a suitable location for the cemetery land as it did not meet the criteria for accessibility, access to telephone and water services and the soil depth criteria all of which were mandatory requirements.
25. In cross examination, PW5 testified that he did not have the bid documents; that he personally scored the land although that score is not reflected in the minutes; that it was not possible to know from the minutes what the scores of the other members were; that he was asked to sign the minutes and was not aware if he was required by law to sign. He clarified that the indication on the minutes that bidder number 7 had scored the highest was not a true reflection of the resolution of the Evaluation Committee. He confirmed that Dr. Nguku (1st Defendant) did not participate in the meeting that culminated in the award. He testified that as per his knowledge, it was not possible for the Tender Committee to know if the minutes of the Evaluation Committee were a true reflection of its resolutions. He confirmed that the procurement department was responsible for the procurement process and the 1st Defendant was not in the procurement Department. He confirmed that his queries were raised after the tender had already been awarded; that bidders were required to submit their tenders based on the criteria in the bid documents and that there was need to procure land for cemetery use since the site in Langata was overused and parts of it were already being recycled. In re-examination, PW5 testified that the evaluation committee scored according to the criteria on the bid document and the minutes would be prepared by the procurement department; that the minutes were signed by the Chairperson and the secretary of the committee; that he had contact with the bid documents during the tender opening which is the only time he could make his comments; that he addressed the Memo dated 11th November 2008 to the Ministry of Local Government and that he had raised the issue during the meetings but they were not reflected in the minutes. He stated that he also addressed the Memo dated 19th December to the Town Clerk and further that they were all aware that Naen Rech should not have been awarded the tender.
26. PW6, Jacob Oduor testified that he is a forensic document examiner. He produced a Forensic Report dated 22nd February 2011 prepared by Aadipas Nyanjwa, now deceased. He explained that he did not examine the documents and that his evidence was based on the Forensic Report of Aadipas Nyanjwa on whose behalf he was producing it. He referred to Page 116, the execution page of the agreement for sale dated 3rd March 2009 and the conclusion that the questioned signature did not belong to Janet Kavula the 2nd Defendant who was named as the purchaser.
27. PW7, Simon Kiluma testified that he owns a hardware shop in Mwingi Town in the name of Mwingi Mwalimu Hardware. He stated that the Banker's Cheque for Kshs. 2,000,000 was delivered to him by one Mr. Kitonyi a loader at the Country Bus who had been sent by the 1st Defendant. That the cheque was for materials for the construction work he was doing for the 1st Defendant. He produced a bundle of invoices issued to the 1st Defendant and payment schedules for payments made to the contractor of the project, one Silvester Musyoka as well as documents signed by the said contractor. He stated that the cheque for Kshs. 2,000,000 was a deposit to begin the work but the whole construction cost was approximately Kshs. 4,000,000. He explained that the invoices were issued to Plot 102 and not the Defendants. He stated that he did not have any delivery notes for the materials supplied as the contractor would receive and confirm to the 1st Defendant directly. He also testified that he made



- some cash payments to the contractor from Kshs.2,000,000 pursuant to a verbal agreement with the 1st Defendant.
28. PW8, Antony Matenge Itui, testified that before he retired he worked at the Ministry of Lands; that by a letter Reference DLA/MNN/670/E/08 dated 7th August 2008 the City Council requested his office to do a valuation of a parcel of land LR No. 14759 Mavoko Township which it wanted to purchase. He stated that his office wrote to the Town Clerk putting the matter in abeyance but later a letter from the Director of Legal affairs revisited the issue through a letter requesting for valuation of the parcel of land. He stated that he requested one of his officers to carry out a search and to make arrangements for an inspection visit. He conceded that none of the documents he had regarding the matter were as a result of communication between him and the Defendants.
 29. PW9, Lydia Kwamboka, testified that she is the County Attorney of the County Government of Nairobi. She identified several letters between different Government departments regarding the purchase of land for the purpose of a cemetery as well as the Sale Agreement and Transfer for the land. She confirmed that her office had received a request from the Plaintiff to supply the said documents to it. She confirmed that the documents were in her custody but that she had not directly interacted with them.
 30. PW10, Richard Mogoko, testified that he is currently the acting Head Supply Chain Management at the Nairobi City Government. He referred to the “Tender Notice for Expression of Interest” for sale of cemetery land by the City Council and the minutes of the Tender Committee which he produced as evidence. He testified that in regard to this tender the user department was the Public Health Department. He confirmed that it was a requirement that the Head of the user department sat in the Tender Committee as the expert. He opined that the 1st Defendant must have sat in the Tender Committee as he was the head of the user department. He testified that the Tender Committee relied on a report from a technical committee which in this case was the Evaluation Committee. He confirmed that the Evaluation Committee recommended bidder number 7, Naen Rech Limited, which was eventually awarded the tender by the Tender Committee. He contended that the Tender Committee could not alter the contents of the Evaluation Committee’s report. He also stated that the documents were ordinarily kept in his custody. He confirmed the minutes of the Evaluation Committee as a true record. He asserted that he did not know who owns the land in issue as of now.
 31. PW11, Pius Maithya, testified that he is a Registered Valuer working with the Plaintiff Commission. He then referred to his valuation report concerning L.R. No. 14759/2 Machakos District and stated that as at 7th May 2009 the value of that land was Kshs. 30,000,000. In regard to the Defendant’s property, LR 337/3495 House Number 255 View Park Estate Mlolongo he stated that he valued it at Kshs.3,800,000. In cross examination, he testified that the land which was purchased by the City Council was 119 acres off Athi River-Namanga Road and along the Kitengela/Ongata Rongai murrum road; that he valued it at approximately Kshs. 250,000 per acre. He contended that he would need to carry out an analysis of the market in order to come up with its current value. He stated that he did not attach the analysis as it was not a requirement and that he learnt later that a different valuer had valued the land at Kshs.200,000,000. He conceded that the difference between his own valuation and that of the other said Valuer was quite large.
 32. PW12, Tabu Lwanga, is an investigator with the Plaintiff Commission. He testified that his investigations established had found that the Evaluation Committee had found that no bidder had qualified especially with regard to the depth of the land which was to be six feet but despite that it recommended Naen Rech Limited. He stated that the valuation report which informed the award was a forgery; that out of the Kshs. 283,000,000 paid for the land, only Kshs.110,000,000 was paid to



the seller while 173,000,000 was embezzled. He contended that the 1st Defendant benefited from the embezzled funds. On being cross-examined, he confirmed that the Tender Committee relied on the report by the Evaluation Committee which was forwarded to the tender Committee along with the valuation report. He confirmed that the 1st Defendant was not a member of the Evaluation Committee; that the 1st Defendant received Ksh.8,000,000 from the transaction; that Kshs. 8,000,000 was paid though Odero Osiemo Advocates who disbursed issued bankers cheques as follows:- Kshs.1,000,000 to Mwalimu Sacco, Kshs.1,000,000 to Billy Mbuvi Mumbo, Kshs.4,000,000 to PJ Kakad Advocates and Kshs.2,000,000 to Mwalimu Hardware. He stated that the cheque drawn in favour of Billy Mumbo did not appear in the statements but there was a voucher from the bank proving it was issued. He averred that he did not trace Billy Mumbo but that he had uncovered that Mumbo's father was a friend to the father of the 1st Defendant, and that Mumbo sold land Plot No. 102 in Mwingi Town, to the 1st Defendant at Kshs. 500,000. He testified that the land (plot) did not have a title deed and that there was no sale agreement. He stated that there was also a voucher from the bank evidencing the payment of Kshs. 2,000,000 to Mwalimu Hardware but the same was not in the Plaintiff's bundle of documents. There were also invoices for construction materials bought by the Defendants from Mwalimu Hardware. He also presented a statement from by the bank in respect to the Kshs. 4,000,000 paid to PJ Kakad Advocates. On cross-examination, he explained that Billy Mumbo received a cheque for Kshs.1,000,000; that he sold the plot to the 1st Defendant at Kshs.500,000 and paid Kshs.500,000 and paid KShs.500,000 to the 1st Defendant on request.

The Defendant's case

33. The Defendants filed their statement of Defense on 15th November 2010. They vehemently denied the Plaintiff's claim that the agreement dated 19th December, 2008 was illegal or that the land in question was not suitable for use as a cemetery. They also denied that the purchase price was exaggerated and contrived to defraud the City Council or that the sale was intended to defraud the public of the Ksh.283,000,000.
34. The Defendants also denied that they benefitted to the tune of Kshs. 8,000,000 from the sale of the cemetery land, or that they corruptly received money and concealed it. Further, the 1st Defendant denied that he used his position in the then City Council to unlawfully enrich himself.
35. The Defendants denied the particulars of fraud and misfeasance, or that the alleged tainted money was a reward for the award of the tender hence an illegal consideration. They vehemently denied that they are liable for restitution.
36. In the defence the Defendants also averred that this suit is a violation of their constitutional rights and is thus null, void, incompetent, bad in law and fatally defective.
37. At the hearing DW1, Daniel Mulwa Nguku (1st Defendant) testified that he worked as a Medical Officer of Health at the Council, the user department of the cemetery land; that the land was supposed to be in the Nairobi Metropolitan area and was required to have a depth of 1.8 meters, preferably one parcel but a minimum of 50 acres per parcel, free from encumbrances, and was to be accessible from all-weather roads and preferably one kilometer from a classified road. It was also to be close to utilities and to have a certificate of title, with a copy of Identity Card and KRA PIN of the registered owner.
38. He testified that David Wanjohi was his alternate in the Evaluation Committee, and that upon visiting the site the Evaluation Committee reported back to the committee. He stated that the tender was awarded to Naen Rech Limited and he confirmed that the minutes of the tender Committee held on 12th November 2008 which he had attended were the ones that were exhibited in court. He conceded that none of the bidders met the mandatory requirements of a depth of six feet. He explained that



the tender was awarded based on the total score but not on account of meeting the mandatory requirements.

39. He confirmed that the 2nd Defendant is his wife but averred that she did not participate in the tendering process. He conceded that he purchased the Mlolongo house at Kshs. 4,000,000/= and that the Advocate represented the vendor and purchaser. He also confirmed that he paid a sum of Kshs.1,000,000/= to Mwalimu Sacco and gave cleared the 2nd Defendant's loan with Mwalimu Sacco and gave instructions that the same was to be applied to pay of a loan owed by the 2nd Defendant and to boost her shares. He however disputed that he had any dealings with Billy Mumbo or that a sum of Kshs.1,000,000/= was paid to the said Mumbo on his account. He disputed that a sum of Kshs.500,000/- was refunded to him by Mumbo.
40. He conceded that he knew Simon Kiluma the proprietor of Mwalimu Hardware Shop and having purchased building materials from him. He however denied causing a cheque of Kshs. 2,000,000/= to be written in favour of Mwalimu Hardware.
41. In cross-examination he contended that the Tender Committee had no power to alter the findings of the Evaluation Committee; that bidder No. 7 was awarded the tender upon attaining the highest score; that the funds used to pay off his wife's loan and to purchase the Mlolongo house were not proceeds from the sale of the proposed cemetery land.
42. DW2, Janet Kavula Mulwa testified that the 1st Defendant purchased the Mlolongo house for her but was not sure of its value or the consideration paid for it. She did not know where the cheque came from. She confirmed that the 1st Defendant cleared an outstanding loan for her but was not sure of the amount.

The Plaintiff's submissions

43. Olga Ochola, Learned Counsel for the Plaintiff, submitted that the Tender Committee awarded the tender to a bidder who was not responsive as envisaged under Section 64(1) of the Public Procurement and Disposal Act 2005 and Regulations 47, 48, 49 and 50 of the Public Procurement Regulations, 2006. She relied on the case of Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR where the court held:

“Compliance with the requirements for a valid tender process issued in accordance with the Constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the procuring entity or the Review Board or even this Court may disregard at a whim. The materiality of irregularities is determined primarily by assessing whether the tender requirements have been substantively achieved. The starting point is Section 79 of the Act . . .”

44. Counsel submitted that out of the Kshs. 283,000,000, paid only Kshs.110,000,000 was paid to Henry Kilonzi, the registered proprietor of the land. The balance was distributed to other persons who were not parties to the sale agreement. Counsel stated that some of the officers involved had been convicted for corruption offenses in relation to the tender. She submitted that the sale agreement was a forgery and that the purchase price was paid to Alphonse Mutinda Advocate but only a fraction of it was released to the seller. She argued that this was evidenced by the fact that the agreement for sale dated 19th December 2008 between Naen Rech Ltd and Henry Kilonzi was for Kshs. 110,000,000 yet the agreement between the Council and Henry Kilonzi was for Kshs. 283,000,000. She submitted that in his statement with the Plaintiff, Henry Kilonzi confirmed that he never entered into any agreement



- with the City Council and that his signature in the alleged agreement was forged. She pointed out that the agreement for Kshs.283,000,000 was examined by a document examiner who confirmed that the signature was a forgery.
45. The Plaintiff further submitted that fraud was also disclosed by the award of the tender to a bidder who was unresponsive as it did not meet the mandatory requirements.
 46. The Plaintiff submitted that fraud was also perpetrated in the inflation of the consideration through a valuation report which was not genuine. She stated that several discrepancies in the valuation were proved by PW8 who was then a Valuer at the Ministry of Lands. She contended that the true value of the land as was disclosed by PW1 was be Kshs. 30,000,000.
 47. Counsel further submitted that the 1st Defendant, being a member of the tender committee should have raised issue with the tender. She averred that he received Kshs. 8,000,000 from the proceeds and reiterated that the tender process was irregular and the transaction fraudulent, unlawful and intended to illegally defraud the City Council. She asserted that the Defendants unjustly enriched themselves; that the monies distributed on behalf of the 1st Defendant was without consideration and was thus fraudulent and illegal; that there was evidence through PW4 that out of the sum paid for the land the account of Odero Osiemo Advocates was credited with Kshs.117,000,000 following which a sum of Kshs.16,000,000 was transferred to different persons including the sum of Kshs.8,000,000 which was paid to different persons on account of the 1st Defendant. Counsel contended that the Defendants benefitted from the illegal tender and as such this court should enter judgment against them in favour of the plaintiff.
 48. On the issue of costs, Counsel submitted that the Defendants occasioned loss to the City Council and as such they are liable to compensate the City Council to the full extent of the loss and as such they should pay the costs as well as interest at 12% per year from the date the illegal payments took place.
 49. To support her submissions Counsel relied on the following authorities in their submissions: Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology (2019) eKLR; REACC V Stephen Kamau Githinji
- * Kenya Commercial Bank Limited & Anor v Samuel Kamau Macharia & 2 Others (2008) eKLR
Fibrosa Spolka Akayina v Fairbairn Lawson Combe Barbour Ltd (1943) A.C

The Defendant's Submissions

50. Mr. Mutua, Learned Senior Counsel for the Defendants, submitted that the Plaintiff is bound by its pleadings, that as this suit is not based on unexplained assets but on fraud, conspiracy, deceit, misfeasance in office and unjust enrichment the Plaintiff is obligated to discharge its burden of proof; that the Defendants contend that as was attested by PW10, the Tender Committee, in which the 1st Defendant sat, had no power or authority to amend the decision of the Evaluation Committee and that the witness also confirmed that the 1st Defendant was not a member of the Evaluation Committee. Counsel stated that there was no evidence to prove that the 1st Defendant acted in a fraudulent manner during the tender process. Further that the particulars of fraud and illegality as pleaded were not



proved. In support of this submission Counsel relied on the case of HC ACEC Suit NO. 21 of 2016 EACC v Herman Stevens Chavera & Anor (unreported) where the court stated: -

“Concerning the legality of the tender process and subsequent award and payment of Kshs. 283,200,000 the court was invited to look at the tender document. It was incumbent upon the Plaintiff to prove the particulars of fraud on the part of the defendants.”

51. Counsel also relied on the following cases: -Gideon Mwando Ujiji v Justus Amunga Ambuka (2007) eKLR.David Morton Silverstein v Alsango Chesoni IEBC ,& Anor v Stephen Mutinda Mule & 3 Others (2014) eKLR.Raila Amolo Odinga & Anor v IEBC & 2 Others (2017) eKLR.H.C ACEC NO. 21 OF 2016 EACC v Herman Stevens Chavera & Anor (unreported)

* Kinyanjui Kamai v George Kamau (2015) eKLR.

* Demutilla Nanyama Pururmu v Salim Mohamed Salim (2021) eKLR

52. Counsel also submitted that there was no evidence to prove that the Defendants received monies out of the of the proceeds of the impugned tender; that the sum of Kshs. 8,000,000 was paid through banker’s cheques which were not reflected in the bank statements of the firm that received the purchase price for the cemetery land. Counsel asserted that the evidence of PW12 is not supported by any documents; that the Kshs. 1,000,000 paid to Billy Mumbo for alleged sale of land was not proved as no sale agreement, transfer or title documents were produced and the said Billy Mumbo was never called as a witness and that PW6 (Mwalimu Hardware) confirmed that he collected a cheque from a person known to him and the 1st Defendant but had no evidence of delivery of any of the construction materials alleged.

53. Counsel further asserted that the Plaintiff had not discharged its legal burden of proof and accordingly, no evidential burden shifted to the Defendants. Counsel urged this court to dismiss the suit with costs to the Defendants.

Issues for determination

54. The Plaintiff’s claim against the Defendants is premised on a tender for procurement by the City Council of Nairobi, the predecessor of the Nairobi City County, for land for a public cemetery. It is the Plaintiff’s case that the procurement was fraudulent in that it was awarded to a bidder who was unresponsive, that the tender was based on a forged sale agreement, that the purchase price was based on a fraudulent valuation and was exaggerated and that out of that consideration for the land only a portion thereof went to the owner of the land while the difference was distributed to persons who were not party to the agreement. That the Defendant unlawfully benefitted the sum of Ksh.8,000,000 from the fraudulent tender and are liable to compensate the plaintiff and hence this court ought to grant the orders sought in the plaint.

55. On their part the Defendants disputed that they received any money from the proceeds of the impugned tender. The 1st Defendant while conceded that he was the head of the Department of Health of the City Council which department was the user department for purposes of the tender, he also conceded that he was, by virtue of his position, a member of the Tender Committee. He however denied that he perpetrated any fraud in regard to that tender and contended that the Award of the tender was done by the Evaluation Committee; that he was not a member of the evaluation committee and that the Tender committee did not have power to amend or to reject the recommendation of the Evaluation Committee and as such he was not liable as alleged and the Plaintiff’s case should be dismissed with costs.



56. Having considered the evidence and submissions by both sides carefully the issues that arise for determination are therefore: -
- a. Whether the tender by the City Council for cemetery land was flawed and whether the Plaintiff has proved that the Defendants were involved in the fraudulent tender.
 - b. Whether the Defendants unlawfully benefitted from the fraudulent tender to the tune of Kshs. 8,000,000/= and whether this courts ought to order restitution for that amount.
 - c. Who should bear the costs of this case.

Analysis and Determination

Issue (a) - Whether the tender by the City Council for cemetery land was flawed and whether the Plaintiff has proved that the Defendants were involved in the fraudulent tender.

57. As already stated the Plaintiff alleges that the 1st Defendant who headed the Health Department which was the intended user of the proposed cemetery breached his duty to the Council by taking part in a fraudulent and illegal scheme to purchase land at an exaggerated cost and which land was not even fit for the intended purposes. The Plaintiff produced the minutes of the evaluation committee where award was made, the valuation report upon which the purchase price was determined and the two sale agreements which informed the purchase price. There was also evidence that even though a sum of Kshs. 283,000,000 was paid pursuant to that award, only a sum of Kshs.110,000,000 reached the proprietor of the land. The Plaintiff produced evidence that the tender was awarded to Naen Rech, Bidder No. 7, a fact which is admitted even by the 1st Defendant.
58. At the time in issue the law governing public procurement in Kenya was The Public Procurement and Disposal Act 2005 (now repealed) and the Public Procurement and Disposal Regulations, 2006. Section 3 (1) of the Act defined procurement as:- “procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination. Section 52(2) provided that it was mandatory for the tender documents prepared by the procuring entity to among other things set out, the specific requirements relating to whatever was being procured. The Act also provided for the setting up of committees which at the time were the Tender Committee and Procurement Committee whose members were appointed under Regulation 7 by the Accounting Officer of the Public Procurement and Disposal Regulations, 2006. The Act and Regulations also stipulated the roles and responsibilities of the persons involved in the procurement process including the Accounting Officer, the user department, the bidders and the committee established thereunder.
59. Regulation 9 provided the responsibilities of the user department, in our case the Department of Health which was headed by the 1st Defendant to be inter alia:- initiating procurement and disposal requirements and forwarding them to the procurement unit; participating in the evaluation of tenders, proposals and quotations; preparing technical specifications and submitting them to the procurement unit.
60. It is conceded that the 1st Defendant was the Head of the User Department. He was therefore bound by the Act and Regulations. He also sat in the Tender Committee by virtue of his position. The responsibilities or functions of the Tender Committee as are relevant to this case were set out in Regulation 10 (2) were inter alia;

“ 10 (2) The functions of the tender committee shall be to-



- a. review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents;
- b. approve the selection of the successful tender or proposal;
- c. award procurement contracts in accordance with thresholds prescribed in First Schedule;
- d. ensure that funds are available for the procurement under consideration;
- e. ensure that the procuring entity does not pay in excess of prevailing market prices.”

61. In essence the 1st Defendant had a special interest to ensure legitimacy of the procurement both as head of the user department and as a member of the tender committee.

62. No doubt, the impugned procurement was unlawful, fraudulent and illegal. The procurement was for cemetery land and the bidders therefore had to meet specific requirements which included the depth of the soil and accessibility. It was also a requirement for the land to be within the Nairobi Metropolitan. As head of the user department, the 1st Defendant was well aware of those mandatory requirements yet the winning bid did not meet those mandatory requirements. Therefore, under Section 64(1) of the Act the tender was not responsive. That Section stated: -

“A tender is responsive if it conforms to all the mandatory requirements in the tender documents.”

63. Only minor deviations that do not depart from the requirements set out in the tender documents or errors or oversights that could be corrected without affecting the substance of the tender would not affect the tender.

64. It is my finding that given that the tender was not responsive it would not have moved to the second stage. My so saying is derived from Section 66(1) of the Act which stated that the procuring entity was to evaluate and compare responsive tenders. It is my finding that as head of the user department he must have been aware of this failure to comply as he was, as a member of the Tender Committee, involved in the initial evaluation of the tender and should not have allowed the tender to move to the next stage. That he did so, was a breach of duty. He also had an opportunity to halt the procurement when the tender went to the tender committee. My reading of Regulation 10(2) of the Regulations, 2006 is that it was the duty of the Tender committee to ensure that the procurement had been undertaken in accordance with the law (Regulation 10(2)(a)). It was also to approve the selection of the successful tender or proposal. Section 66(2) of the Act provided that the evaluation and comparison of the tenders was to be done using the procedures and criteria set out in the tender documents but not any other criteria for this tender/procurement was the mandatory requirements which were not met yet the 1st Defendant did not raise a finger as he should have. It is my finding that he cannot hide behind the provisions of Regulation 11(1) & (2) of the Regulations, 2006. My reading of that Regulation 10(2) is that while the Committee could not modify the submission with respect to the recommendations for a contract award it could reject the submission – Regulation (1) (b) and indeed Section 36 (1) of the Act provided that a procuring entity had power to, at any time, terminate procurement proceedings without entering into a contract. The only rider to rejection of a submission of the evaluation committee was that the Tender Committee had to give reasons for the rejection.



65. This court is not therefore persuaded by the 1st Defendant's submission that he could do nothing once the evaluation committee materially made the recommendation for the award to an unresponsive bidder. It is important at this stage to reproduce the provisions of Regulation 11(1) & (2) so as to demonstrate that the 1st Defendant's hands were not tied as he alleges: -

- “ 11. In considering submissions made by the procurement unit or evaluation committees, the tender committee may-
- (1)
 - (a) approve a submission; or
 - (b) reject a submission with reasons; or
approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.
 - (2) The tender committee shall not-
 - (a) modify any submission with respect to the recommendations for a contract award or in any other respect;
 - (b) reject any submission without justifiable and objective reasons;
 - (c) where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer.”

66. It is clear from sub regulation 2(c) that the tender committee's hands were not tied at all. It could reject the recommendation of the evaluation committee. What it could not do was to modify the submission by which the recommendation was made. It had to consider the submission as it was and either admit or reject it.

67. So the 1st Defendant sitting in the tender committee as the Head of the User Department or as a member acted in utter breach of duty by permitting a procurement which was not responsive and also for not rejecting the recommendation of the evaluation committee, knowing very well that the land was not fit for the purpose of a cemetery. It is my finding that this was a breach of trust. That act of omission on his part led to the eventual defrauding of the city Council of Nairobi and to loss of public funds. It can as well be said that he abetted that fraud. That act of omission also in my view amounts to careless failure to comply with the law or applicable procedures and guidelines relating to the procurement of property and tendering of contracts' which is an offence (economic crime) under Section 45 (b) of the *Anti-Corruption and Economic Crimes Act* and under Section 51 of the *Anti-Corruption and Economic Crimes Act* he would be liable to the entity that suffered a loss as a result.

68. In addition, there was evidence that the price paid for the land was exaggerated as its real value was only Ksh.30,000,000 as proved by PW 8 (Valuer).

69. The answer to issue (a) is therefore in the positive.

Issue (b) - Whether the Defendants unlawfully benefitted from the fraudulent tender to the tune of Kshs. 8,000,000/= and whether this courts ought to order restitution for that amount.

70. The Plaintiff's claim against the Defendant's compensation to the full extent of the loss but is tied to a sum of Kshs.8,000,000 which it alleges was paid to the 1st Defendant as a reward for the role he played in the award. It is alleged that the sum of Kshs. 8,000,000 was proceeds of the procurement and that



the 1st Defendant received the sum for no consideration at all and that together with his spouse (2nd Defendant), he was unjustly enriched. The Defendants disputed that they received any money from the proceeds of the fraudulent procurement.

71. I have carefully considered the evidence and submissions by both sides on this issue and it is my finding that there is not just evidence but overwhelming evidence that the 1st Defendant received a sum of Kshs.8,000,000 out of the Kshs.283,000,000 paid as consideration in the flawed tender. This evidence is found in the testimonies of the Plaintiff's witnesses PW1, PW2, PW3, PW4 and PW12.
72. PW1, Samuel Kariuki Mungai, gave crucial evidence which demonstrated a causal link between the sum paid as consideration for the land and the Kshs. 8,000,000. He was the operations manager at the Bank of Africa at the material time. It was his testimony both orally in court and in the witness statements and he tendered proof of this by way of statements of account, that on 23rd December 2008 a sum of Kshs.281,300,000 was paid into an account No. 01XXXX07 in the name of E. N Omoti & Co. Advocates between 23rd December 2008 and 12th February 2009. E. N Omoti & Co. Advocates actively participated in the procurement as Advocates for the vendor. PW1 testified that thereafter on 12th February 2009 the sum of Kshs.281,300,000 was transferred to an account in the name of Mutinda Onduso and Odero Advocates Account No. 01XXXX06. Then on the same day a sum of Kshs.117,000,000 was transferred to an Account No. 01XXXX00 held at the National Bank of Kenya in the name of Odero Osiero and Company Advocates, client's account. There is overwhelming evidence that it is from this latter account that the bankers cheques issued to PJ Kakad & Co. Advocates (Kshs.4,000,000), Mwalimu National Sacco (Kshs.1,000,000), Mwingi Mwalimu Hardware (Kshs.2,000,000) were all drawn. I am satisfied that there was evidence on a balance of probabilities that the sum paid to PJ Kakad & Co. Advocates was utilized to purchase a house for the 2nd Defendant on the instructions of the 1st Defendant. Documents of that transaction were produced in evidence. There was also evidence on a balance of probabilities that the sum of Kshs.1,000,000 was utilized partly to set off a loan which was owed to Mwalimu Sacco by the 2nd Defendant and partly to boost her shares. The sum of Kshs.2,000,000 paid to Mwingi Mwalimu Hardware was utilized towards the supply of construction materials and payment of labour for a building which the 1st Defendant was constructing in his home town. This court found the testimonies of PW1 (Samuel Kariuki), PW2 (Pravin Charda Jamnadas Kakad), PW3 (Alphonse Kaio of Mwalimu National Sacco) and PW7 (Simon Kiluma of Mwingi Mwalimu Hardware) credible and trustworthy witnesses as really they had no reason to lie against the 1st Defendant. The evidence of PJ Kakad (PW2) and Alphonse Kaio (PW3) was in any case corroborated by the 1st Defendant and the 2nd Defendant. The only amount that was not proved was the Kshs. 1,000,000 which is alleged to have been paid to Billy Mumbo as he was not called as a witness to deny or to dispute whether he indeed received the cheque and whether he in fact sold a plot to the 1st Defendant for a consideration of Kshs.500,000 and paid the difference of Kshs.500,000 to him (1st Defendant) in cash.
73. It is however my finding that taken together, the evidence of PW1, PW2, PW3, PW4 and PW7 ties up the sum of Kshs.7,000,000 paid on behalf of the 1st Defendant by the firm of Odero Osiero & Co. Advocates to the various persons was part of the monies paid as consideration of the land the subject of the illegal tender. If it was not, then he did not adduce evidence of its source as is required of him by Section 112 of the *Evidence Act*. I am persuaded therefore that the averment by the Plaintiff that it was a reward for the part he played in the procurement was not controverted.
74. Having found that the sum of Kshs.7,000,000 was paid to the 1st Defendant as a reward and there being evidence that it was used to purchase a house, to pay off the 2nd Defendant's loan, to boost her shares and to purchase materials for their building/house, it is my finding that both Defendants corruptly



benefitted from the proceeds of crime and are hence liable to make restitution to the plaintiff and I do so order.

Issue (c) - Who should bear the costs of this case.

75. Costs follow the event and the Defendants shall bear the costs of this suit as I see no good reason to depart from that general principle.
76. In the premises, I enter judgment for the Plaintiff against the Defendant jointly and severally for: -
- a. The sum of Kshs.7,000,000/=
 - b. Interest at court rates per annum from the date they received the above sums until payment in full.
 - c. Costs of the suit.
 - d. a declaration be and is hereby issued that the Plaintiff is entitled to trace the funds to and to recover the property LR No.337/3495 registered in the name of the 2nd Defendant and to sell it in partial satisfaction of this judgment.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 8TH DAY OF FEBRUARY 2024.

.....

E N MAINA

JUDGE

