



Associates in Integrated Development (Africa) Limited v County Government of Bomet & 2 others (Civil Case 1 of 2019) [2023] KEHC 17641 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL CASE 1 OF 2019**

**RL KORIR, J
MAY 10, 2023**

BETWEEN

**ASSOCIATES IN INTEGRATED DEVELOPMENT (AFRICA)
LIMITED PLAINTIFF**

AND

**COUNTY GOVERNMENT OF BOMET 1ST DEFENDANT
THE COUNTY SECRETARY COUNTY GOVERNMENT OF
BOMET 2ND DEFENDANT
THE CHIEF OFFICER ECONOMIC PLANNING COUNTY GOVERNMENT OF
BOMET 3RD DEFENDANT**

JUDGMENT

1. This suit was instituted via a Plaint dated 17th July 2019. The Plaintiff sued the Defendants for breach of Contract that arose from Tender Number CGB/EP/001/2016/17 for provision of consultancy services to develop Bomet County Spatial Plan for the year 2017-2026.
2. The Plaintiff prayed for the following Orders: -
 - I. A Declaration that there was a legal, binding and valid Contract between the Plaintiff Company and the Defendants.
 - II. Kshs 118,505,968/= being the sums due and owing to the Plaintiff company for the specific performance of the Contract.
 - III. In the alternative, the sum of Kshs 34,459,907/= being the sums due and owing to the Plaintiff Company for the preparation and presentation of complete Inception Report.
 - IV. Damages for breach of Contract



- V. Costs and interest at court rates from the date of filing the suit.
- VI. Any further orders that this Honourable Court deems fit to grants.
3. The Defendants filed their Defence on 19th December 2019 and the Plaintiff filed its Reply to Defence on 14th February 2020.

The Plaintiff's Case.

4. The Plaintiff's case was made through the Plaint and evidence in court through witness testimonies and production of documentary evidence in the form of exhibits contained in the Plaintiff's Bundle of Documents.
5. Stephen Atallo Nyamanga (PW1) testified that he was the Principal Consultant and Director of the Plaintiff Company. That on 28th July 2016, he saw an advertisement in the Daily Nation for a request for an Expression of Interest (EOI) for the provision of consultancy services to prepare Bomet County Spatial Plan 2017-2026 Tender Number CGB/EP/001/2016/17. It was his further testimony that he called his other directors with a view to bid.
6. It was PW1's testimony that they submitted their proposal and on 15th September 2016, they were informed by the Director Supply Chain Management that their Company had been shortlisted.
7. PW1 testified that on 14th October 2016, they were informed by a letter from the 3rd Defendant that their Tender had been accepted. That they then accepted the offer through a letter dated 19th October 2016 and that he together with the 3rd Defendant signed the Contract dated 20th October 2016 and the same was witnessed by one Director of the Plaintiff Company and the Chief Officer, Office of the County Secretary Bomet County Government.
8. PW1 stated that after the Contract was signed, consultants went to the ground to carry out a reconnaissance mission which entailed traversing the entire Bomet County, collecting data and familiarizing themselves with the geographical coverage of the county. That after a week, they retreated to Nairobi to prepare the Inception Report.
9. It was PW1's testimony that the 3rd Defendant cancelled the Contract in December 2016 after receiving the Inception Report. That the County Government later on reinstated the Contract and invited them for a presentation meeting on 1st March 2017.
10. PW1 testified that they held several meetings with Bomet County officials with the aim of finalizing the Contract. That they later saw an advertisement calling for public participation for the Bomet County Spatial Plan that had been finalized in April 2018. It was PW1's further testimony that after several other meetings, it became clear that Bomet County Government wanted to breach the terms of the Contract and that they had no intention of paying the Plaintiff Company for the work done.
11. Stephen Ngari (PW2) stated that he was a director of the Plaintiff Company. That on 28th July 2016, PW1 informed him that there was an advertisement to tender for consultancy services for the preparation of Bomet County Integrated Spatial Plan 2017-2026. That they applied for the Tender and were awarded through a letter dated 14th October 2016.
12. PW2 testified that upon a Request for Proposal by the County Government of Bomet, they prepared their Proposal which was submitted in two limbs i.e. Technical and Financial Reports. That a letter accepting their Proposal was sent to them and they signed a Contract dated 20th October 2016 with the County Government of Bomet through the 3rd Defendant.



13. It was PW2's testimony that after the Contract was signed, they proceeded on a reconnaissance mission and thereafter retreated to Nairobi to prepare the Inception Report. That on 19th December 2016, the 3rd Defendant cancelled the Contract. It was PW2's testimony that the Contract was reinstated on 27th January 2017 and the County Government of Bomet invited them for a presentation meeting on 1st March 2017. It was PW2's further testimony that the presentation meeting was held at the Plaintiff's office and was attended by officials of Bomet County Government.
14. PW2 stated that he was invited to a meeting in Naivasha by the 3rd Defendant where the same Inception Report was being presented by officials from the Ministry of Lands. That the 3rd Defendant made it clear to him that the reason he wanted them at the meeting was to agree on how to handle the matter out of court. PW2 further stated that another meeting took place in Brevan Hotel on 4th October 2017 chaired by the County Attorney where it was agreed that they would work on an out of court settlement.
15. It was PW2's further testimony that the County Government of Bomet advertised for public participation for the Spatial Plan with the help of World Wildlife Foundation and the Ministry of Lands.
16. Godfrey Momanyi Ontubi (PW3) stated that he had been a consultant with the Plaintiff Company since 2012. That on 28th July 2016, PW1 informed him that there was an advertisement to tender for consultancy services for the preparation of Bomet County Integrated Spatial Plan 2017-2026 which they proceeded to apply and were awarded the Tender through a letter dated 14th October 2016.
17. PW3 testified that the Contract dated 20th October 2016 was executed by one of the directors of the Plaintiff Company and the 3rd Defendant. That the same was witnessed by PW2 and the Chief Officer County Government of Bomet. It was PW3's further testimony that after the Contract was signed, they proceeded on a recognizance mission and thereafter retreated to Nairobi to prepare the Inception Report.
18. PW3 stated that he was aware that the Inception Report had been submitted by the Plaintiff to the County Government of Bomet and that the same had been approved. That on 1st March 2017, he was invited by PW1 for the presentation of the Inception Report to the planning officials of Bomet County Government. PW3 further stated that he signed the minutes of the meeting and took photographs of the entire meeting.
19. It was PW3's testimony that the County Government of Bomet cancelled the Contract and undertook the exercise internally. That despite the breach of Contract, no payments have been made to the Plaintiff Company to date.

The Defence Case.

20. The Defence case was made through the statement of Defence dated 19th December 2019 and evidence in court through witness testimony and production of documentary evidence in the form of exhibits contained in the Defendant's bundle of documents.
21. Charles Koech (DW1) testified that he was a member of the Ad-Hoc Evaluation Committee on Tender Evaluation for the provision of consultancy services for development of Bomet County Spatial Plan 2017-2026. That there were 8 bidders who submitted their bids for Expression of Interest and they were: -
 - I. Simuplan Consultants Limited.



- II. Publix (Africa) Limited.
 - III Associates in Integrated Development (Africa) Limited.
 - IV. Geodev (K) Limited.
 - V. Geoplan Consultants Limited.
 - VI. Matrix Development Consultants.
 - VII M/S Two Emms Associates Limited.
 - VIII M/S Imap International Limited.
22. DW1 stated that they sat as the Evaluation Committee on 14th September 2016 and decided to use the mandatory requirements contained in the advertisement of 28th July 2016 to shortlist the bidders pursuant to Section 121 of the *Public Procurement and Asset Disposal Act*. That two out of the eight companies M/S Two Emms Associates Limited and M/S Imap International Limited did not qualify for shortlisting.
 23. DW1 testified that the shortlisted bidders including the Plaintiff were notified in writing and were asked to provide in separate envelopes the Technical and Financial proposals in relation to the detailed Terms of Reference. That they held a meeting on 12th October 2016 to examine the Technical proposals of the shortlisted bidders and that the Terms of Reference indicated that the minimum score for the Technical Evaluation would be 70 points. DW1 further testified that only Simuplan Consultants Limited and Geodev (K) Limited had attained the requisite points i.e. 74.6 and 93.2 points respectively.
 24. It was DW1's testimony that the non-responsive bidders were notified in writing and their financial proposals were returned unopened pursuant to Section 126 (4) of the *Public Procurement and Asset Disposal Act*. That on 26th October 2016, the Evaluation Committee met to consider the financial proposals of the two successful firms and Geodev (K) Limited was found to be the most responsive bid and was awarded the Tender.
 25. DW1 stated that the Notification of Award relied upon by the Plaintiff dated 14th October 2016 was obtained fraudulently and illegally. That on that date, they had not concluded evaluation of the proposals received from the bidders. DW1 further stated that the Contract was null and void as it was issued before the expiry of 14 days from the Notification of Award.
 26. Both parties filed written submissions at the close of the hearing. The Plaintiff's Submissions dated 23rd June 2022 and filed on 24th June, 2022 while the Defendant's submissions are dated 29th July, 2022 and filed on 4th August 2022.

The Plaintiff's Submissions.

27. The Plaintiff submitted that the minimum essentials of creating a Contract were the intention to create legal obligation and consideration. That other terms were secondary as far as the formation of a Contract was concerned. It relied on the case of *RTS Flexible Systems Limited vs Molkerei Alois Miller GmbH & Co. KG (UK Production)* (2010) UKSC14.
28. It was the Plaintiff's submission that it produced a copy of the Contract dated 20th October 2016 between it and the Procuring Entity and which was duly signed by the authorized Accounting Officer. That to rebut this, it was incumbent upon the Defendants to produce a properly executed Contract to the contrary between themselves and a different entity. It was the Plaintiff's further testimony that the



fact that the Accounting Officer cancelled then later on reinstated the Contract was evidence enough that there existed an agreement between the parties.

29. With regard to Section 135 (3) of the *Public Procurement and Asset Disposal Act*, the Plaintiff submitted that the court must adopt a purposive approach and not look at the provisions of an Act in isolation. That it was not the intention of Parliament to render a Contract unenforceable and illegal for want of compliance with the wordings of the aforementioned Section. It was the Plaintiff's submission that the provision was to allow aggrieved parties to bring action against an award emanating from an undue process.
30. The Plaintiff submitted that throughout the Notification, Award and continuance of the Contract, no aggrieved party challenged the Award and the Procuring Entity did not render the Contract void. That the Procuring Entity through itself and its agents proceeded to engage the Plaintiff in pursuit of the Agreement between them. The Plaintiff further submitted that the benefit of doubt must be exercised in favour of itself.
31. It was the Plaintiff's submission that the Tender Committee operated outside of the confines of Section 126 (3) of the *Public Procurement and Asset Disposal Act* which provided that the evaluation process was to be undertaken within a maximum of 21 days from the date of opening of the Tenders. That according to DW1's documents, Evaluation begun on 14th September 2016 and should have been completed by 4th October 2016. It was the Plaintiff's further submission that by the time it was given the Notification of Award, the Evaluation process should have been completed.
32. The Plaintiff submitted that it produced a Notification of Award which was not disputed and that DW1 had confirmed that the same had been signed by the then Accounting Officer, Remmy Mutai. That no Evaluation Report was produced by the Defence to controvert the Notification of Award given to it.
33. It was the Plaintiff's submission that the Defendants acknowledged that it had prepared the Inception Report which they accepted. That under the terms of the Contract, the amounts due to it were Kshs 34, 459, 907/=. It was the Plaintiff's further submission that there being no vitiating circumstances to render the Contract void, it was entitled to claim for the Inception Report.
34. The Plaintiff submitted that it was entitled to damages for breach of Contract for the loss suffered. That it had a legitimate expectation for the performance and completion of the Bomet Spatial plan in the sum of Kshs 118,500,000/=. The Plaintiff further submitted that in preparation of the Inception Report, it incurred administrative costs.
35. It was the Plaintiff's submission that a party who did not prove that it suffered damage in a claim for general damages for breach of Contract was entitled to nominal damages.

The Defendants' Submissions.

36. The Defendants submitted that there was no valid Contract as the Plaintiff could not have been awarded the Tender as they failed to attain the minimum threshold for such an award. It was the Defendants further submission that they were strangers to the documents alleged to have been issued by them to the Plaintiff.
37. It was the Defendants submission that their witness was unjustly compelled to identify and verify a signature that was not his. That the 3rd Defendant held a public office and anyone could have access to the model signature used by the 3rd Defendant. It was the Defendants further submission that it was unfair and unjust to ask the witness to confirm the alleged signature on letters allegedly issued by the Defendants.



38. The Defendants submitted that the burden of proving the signature that belonged to the 3rd Defendant lay with the Plaintiff. That the Plaintiff could easily have called a document examiner to verify the signature of the 3rd Defendant. They relied on the case of *Kimotho vs Kenya Commercial Bank (2003) 1 EA 108* to support this submission.
39. It was the Defendants submission that the alleged award of Tender that the Plaintiff relied on bore no mark of who and when the letter was received on behalf of the Plaintiff. That the alleged Contract was signed before the Defendants had completed the Evaluation process. It was the Defendants further submission that the Contract was signed before the expiry of 14 days from the date of the alleged award of Tender which was contrary to the provisions of Section 135 (3) of the [*Public Procurement and Asset Disposal Act*](#).
40. The Defendants submitted that the Minutes that the Plaintiff relied on were invalid as they were not signed by any of the members present in the meeting and that the said Minutes belonged to a different company and not the Plaintiff. That the Plaintiff's witnesses could not testify as to who chaired the meeting or who the Secretary was.
41. It was the Defendants' submission that the Plaintiff's documents i.e. the alleged Contract, Inception Report or Minutes of the alleged meeting were not authentic and could not be relied upon. That no original documents were presented before court. It was their further submission that the photocopied documents produced could have been doctored. That no explanation was given as to why the Plaintiff used photocopied documents and not the original ones and they relied on Sections 67 and 68 of the [*Evidence Act*](#).
42. The Defendants submitted that the Plaintiff was not entitled to any payments from the alleged Contract. That if any process was conducted to the culmination of a Contract, such a process was done in contravention of the law and without their approval. They further submitted that in such a scenario, the Contract would be unenforceable. They relied on the case of *Multi line Motors (K) Ltd vs Migori County Government (2019) eKLR*.
43. On the claim for damages, the Defendants submitted that it was trite law that there could be no award of general damages for breach of a contract. They relied on the cases of *Barclays Bank of Kenya Limited vs Mema (2021) eKLR*, *Postal Corporation of Kenya vs Gerald Kamondo Njuki t/a Geka General Supplies (2021) eKLR* and *Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd (2015) eKLR*.
44. It was the Defendants submission that a claim for special damages must be proven. They relied on the cases of *Capital Fish Kenya Limited vs The Kenya Power and Lighting Company Limited (2016) eKLR* and *David Bagine vs Martin Bundi (1987) eKLR*. It was the Defendants further submission that the Plaintiff had not provided any proof of expenses incurred in the alleged execution of works as per the Tender. That the Plaintiff had merely presented an alleged Inception Report to this court asking it to allow their claim.
45. The Defendants submitted that the development of the County Spatial Plan was executed by a different entity and that no proof had been adduced by the Plaintiff to show that the alleged Inception Report had been submitted to them or utilized by them.

Analysis And Determination

46. The parties to this suit filed a List of Agreed issues on 19th February 2021. The Agreed issues were as follows:-
 - I. Whether there was a valid and enforceable Contract between the Plaintiff and the 1st Defendant



- II. If so did the 1st, 2nd and 3rd Defendants breach the terms of the Contract
 - III Was there lawful termination of the Contract
 - IV. Did the Plaintiff perform the Contract in whole or in part
 - V. Whether the Contract was frustrated by the 1st, 2nd and 3rd Defendants
 - VI. Whether the Plaintiff entitled to the prayers sought in the Plaint
 - VII Who is liable to pay for the costs of this suit
47. After carefully considering the Pleadings and Exhibits on record, the oral testimonies of the witnesses, the Plaintiff's Written Submission dated 23rd June 2022 and the Defendants Written Submissions dated 29th July 2022, I find that the parties' list of issues can be subsumed in two main issues calling for my determination as follows: -
- i. Whether there was a valid and enforceable Contract between the Plaintiff and the Defendants
 - ii. If the answer to (i) is in the affirmative, whether the Plaintiff is entitled to any payment from the Contract and other reliefs
 - i. Whether there was a valid and enforceable Contract between the Plaintiff and the Defendants
48. Before I go into the substance of the suit, it is important to address as a preliminary issue, raised by the Defendant in their submissions. The Defendant submitted that the Plaintiff used photocopied documents in support of its case and that no explanation had been given why the original documents were not availed.
49. Section 64 of the [Evidence Act](#) provides that the contents of documents may be proved either by primary or by secondary evidence. Section 65(1) of the [Evidence Act](#) defines Primary Evidence as the document itself being produced for the inspection of the court. Section 66 of the [Evidence Act](#) states as follows: -
- “Secondary evidence includes—
- (a) certified copies given under the provisions hereinafter contained;
 - (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
 - (c) copies made from or compared with the original;
 - (d) counterparts of documents as against the parties who did not execute them;
 - (e) oral accounts of the contents of a document given by some person who has himself seen it.”
50. In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased (2016) eKLR, Mativo J. (as he then was) stated that: -
- “Section 67 of the [Evidence Act](#) provides that documents must be proved by primary evidence except in the cases hereinafter mentioned. Section 67 is the basis of what is called the best evidence rule, which provides that documents must be proved by the best evidence. The allowance of secondary evidence is a concession by the law to allow the second best. The



optimal will be the document itself or whatever would comprise the primary evidence. It is rarely the case that secondary evidence will be allowed where a party could have produced the original.

Secondary evidence, as a general rule is admissible only in the absence of primary evidence. Essentially, secondary evidence is evidence which may be given in the absence of that which the law requires to be given first, when a proper explanation of its absence is given.

The best evidence rule is a legal principle that holds an original copy of a document as superior evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, means that so long as the higher or superior evidence is within the possession of a party, or may be reached by the party, no inferior proof will be allowed. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the exceptions provided under Section 68 of the *Evidence Act*. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. The rule specifies that secondary evidence, such as a copy will not be admissible if an original document exists and can be obtained.”

51. Both parties in this case produced photocopied documents in aid of their respective cases. When PW1 (Stephen Atallo Nyamanga) produced the Plaintiff's Bundle of documents (P. Exh 1 – P. Exh 10) no objection was raised by the Defendant's counsel and similarly there was no objection from the Plaintiff's counsel when DW1 (Charles Koech) produced the Defendant's bundle of documents (D. Exh 1- D. Exh 8). Both parties were cross - examined on the contents of the documents that they relied on.

52. I find the Defendants' submission that the photocopied documents relied upon by the Plaintiff could have been doctored to be an afterthought. If they had a problem with the production of secondary evidence they could have objected to their production at the hearing stage. In the interest of justice, and seeing that this matter touches on public funds, I find the documents by both parties though being photocopies of the originals, to be admissible. I shall therefore determine the suit on merit.

53. I now proceed to examine the Contract entered into on 20th October 2016 which is at the heart of this dispute. The Black's Law Dictionary, 10th Edition at page 389-390 defines a Contract as:-

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

54. The Applicable law in this case is the *Law of Contract Act*, Cap 23, Laws of Kenya and principles that have evolved over time. The principles in contract formation and execution were espoused in the case of *G. Percy Trentham Ltd v Archital Luxfer Ltd* (1993) 1 Lloyds Rep 25, where Lord Steyn stated thus: -

“.....it is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case



of a contract alleged to have come into existence during and as a result of performance. See *Brogden –v- Metropolitan Railway* [1877] 2 AC 666; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd.* [1974] 1 Lloyd’s Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v. Novinex* [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.* [1963] 1 WLR 333.”

55. Similarly, the Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* (2010) UKSC14,(45) stated as follows:-

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.” (Emphasis mine)

56. In this case, Stephen Atallo Nyamanga (PW1) who was a director and principal consultant of the Plaintiff Company testified that they applied for Tender No. CGB/EP/001/2016/17 that was for the provision of consultancy services to prepare the Bomet County Spatial Plan 2017-2026. That they were informed by a letter dated 15th September 2016 that they had been shortlisted. He further testified that the Plaintiff Company was awarded the Tender through a Notification of Award letter dated 14th October 2016 signed by Renny Mutai, the 3rd Defendant. (Exhibit 2). That they accepted the offer through a letter dated 19th October 2016 and that he personally signed the Contract dated 20th October 2016 with the 3rd Defendant.
57. Charles Koech (DW1) who testified on behalf of all 3 the Defendants stated that the Plaintiff Company’s bid was unresponsive as their Technical Proposal did not meet the threshold of 70 points and therefore they did not qualify to proceed to the Financial Proposal stage. It was DW1’s testimony that Geodev (K) Limited had the most responsive bid and that he recommended that they be awarded the Tender. DW1 further testified that the Plaintiff’s Letter of Notification of Award dated 14th October 2016 was obtained fraudulently and that the Contract was issued before the expiry of 14 days thereby making the Contract null and void.



58. It is trite law that the burden of proof in civil cases is on a balance of probabilities. Section 107 of the Evidence Act describes the burden of proof as follows:-

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

59. In the case of *Mbuthia Macharia vs Annah Mutua Ndwiga & Another* (2017) eKLR, the Court of Appeal stated that: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

60. With respect to the elements of a valid contract, I cite the case of *Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd* (2020) eKLR, where Nyakundi J. stated as follows: -

“.....The appellant was therefore expected to proof on a balance of probabilities the following essential elements to a lease agreement with the respondent:

- (a) An offer.
- (b) An acceptance.
- (c) Any consideration.
- (d) Any intention to create legal relations.

The essential components of a contract as was observed by Harris JA in *Garvey v Richards* {2011} JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

61. PW1 produced a Contract for the Tender CGB/EB/001/2016/17 dated 20th October 2016 and the same was marked as P. Exh 3. The veracity of the Contract was challenged in cross- examination. This court is therefore required to determine if the said Contract met all the essential elements to make it valid and enforceable.

62. PW1 produced a Letter of Notification of Award of Tender CGB/EB/001/2016/17 dated 14th October 2016. The same was marked as P.Exh 2. The letter contained an offer for the Plaintiff Company to accept the award of the Tender and by accepting the award, it enabled the County Government of Bomet to finalise the Contract. The Defendants have through the testimony of DW1 stated that the letter was obtained fraudulently. In submissions before court, the Defendants went further to disown every document produced by the plaintiff arguing that the Defendants were



strangers to the said documents. They submitted that if such Documents issued emanated from their offices then they were or obtained fraudulently.

63. It is settled law that fraud must be distinctly alleged and distinctly proved, and it is not proper to leave fraud to be inferred from the facts. In *Kinyanjui Kamau vs George Kamau (2015) eKLR*, the Court of Appeal expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (Emphasis mine)

64. The Defendants have not proved the allegation of fraud as they did not lead any evidence to substantiate their claim. It is my finding that the letter dated 14th October 2016 (P. Exh. 2) formed part of the offer and it created legal obligations between the Plaintiff and the Defendants. PW1 also produced the Contract Document that was marked as P.Exh 3. The Consideration for the Contract was Kshs 118,505,968/=. PW1 stated that upon receiving the letter of Notification of Award, he accepted the offer by writing a Letter to the County Government of Bomet. He however could not produce the said letter as evidence.

65. Acceptance of the terms of a Contract takes on various forms one of them being the conduct of the parties. In *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited (2017) eKLR*, the Court of Appeal held that:-

“We respectfully adopt the position taken by *Duncan Wallace, Q.C. (supra)* that where a contractor or subcontractor commences work when all terms have been negotiated and agreed upon but no formal acceptable has been recorded, as was the case between the appellant and the respondent herein, that is sufficient evidence of acceptance of the contract terms.....”

66. In the persuasive case of *Tanathi Water Services Board v Pasha Enterprises Ltd (2020) eKLR*, *Kemei J* held that:-

“.....Acceptance of the offer means acceptance of the conditions thereto. In *Brodgen v Metropolitan Railway Company [1876-77] L.R 2 App Cas 666*, it was proposed that a contract can be accepted by the conduct of parties. This means that where the offer is accepted, and the offeror, by conduct does any act to imply the acceptance is complete, then the offeror, is bound to honour the contractual terms and will be estopped from denying that there was no valid contract between the parties.....”

67. The Contract displayed by the Plaintiff was signed on 20th October 2016 by PW1 (Stephen Nyamanga) and the 3rd Defendant (Renny Mutai). The same was witnessed by Dr. Richard Sigei (Chief Officer in the Office of the County Secretary) and PW2 (Stephen Ngari). The Plaintiff's witnesses all testified as to the signing of the Contract and PW2 in particular was a witness to the execution of the Contract.

68. The Defendants claim that the Correspondence (P.Exhibit 2) and the Contract (P.Exh.3) did not emanate from them. They claim that Renny Mutai the 3rd Defendant occupied a public office and his signature could easily be accessed by anyone. However, once the documents were presented as his, the



evidentiary burden shifted to him to show that he had nothing to do with them. Curiously, Remy Mutai, the then Chief Officer of the 3rd Defendant chose to keep away from the case and although named, did nothing to clear his name. It was not lost to this court also that prior to the hearing, the Defendants' Counsel had indicated to the court that they wished to take out 3rd Party Proceedings against the 3rd Defendant in person.

69. DW1 (Charles Koech) who was the Defendants' sole witness who testified was a member of the Ad-Hoc Evaluation Committee of the Tender in dispute. He was not involved in the execution of the Contract and could not testify to its existence. As already stated the 2 officers who occupied the offices of the 2nd and 3rd Defendants were not witnesses in the case.
70. DW1 stated that the Contract entered into on 20th October 2016 could not be relied upon since it was issued before the expiry of the 14 days which contravened Section 135(3) of the PPAD Act. The Defendants submitted that the alleged Contract was signed before the Tender Evaluation Committee had finalised its evaluation process and were at a loss how the Plaintiff begun execution of the services without the Defendants deciding who would do it.
71. The Plaintiff's witnesses testified that after the Contract was executed, they proceeded on a reconnaissance mission in Bomet County after which they retreated to prepare an Inception Report. The Report was produced and marked as P.Exh 4. PW1 also produced a letter marked as P.Exh 5 from the County Government of Bomet addressed to the Plaintiff informing them of the cancellation of the Tender due to want of budgetary provision. P.Exh 6 was a letter from the County Government of Bomet addressed to the Plaintiff informing them of the reinstatement of the Tender. The letter further invited the Plaintiff for a meeting on 1st February 2017 to negotiate on the terms of the Contract. P.Exh 10 was a letter from the County Government of Bomet that acknowledged receipt of the Inception Report and asked for a presentation meeting on 1st March 2017. It is important to note that P.Exh 5, 6 and 10 were all signed by Remy Mutai, the 3rd Defendant.
72. I am persuaded that the Documents exhibited above as emanating from the 1st Defendant did emanate from them and were signed by the 3rd Defendant. The Defendants did not rebut the Plaintiff's evidence in that regard. They did not discharge the evidential burden to disprove the Plaintiff's evidence.
73. It is my finding that the conduct of the parties, in execution of the Contract, preparation and presentation of the Inception Report and the cancellation and reinstatement of the Contract was sufficient evidence of the acceptance of the terms of the Contract. Therefore, the Defendant's could not feign ignorance of the existence of the Contract. They could not also suggest fraud and fail to take any action to prove the same or prosecute the fraudsters.
74. I therefore find it proved that there was a valid contract between the Plaintiff and the 1st Defendant.
75. It is however important to note that this was a Procurement Contract. The Procurement process in Kenya is governed by the *Public Procurement and Asset Disposal Act* No. 33 of 2015 and Regulations thereunder (hereinafter referred to as the PPAD Act). There was no dispute that the Defendant advertised the Tender and that the Plaintiff placed a bid. Since procurement is a process, for the present case, I shall begin at the Evaluation level where bids are evaluated by the Evaluation Committee. Section 126 (3) of the *Public Procurement and Asset Disposal Act* provides that:-

“The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement.”
76. The Plaintiff submitted that the PPAD Act provided for a maximum of 21 days within which an evaluation process ought to have been completed. That at the time they were issued with the



Notification of Award on 14th October 2016, the procurement process had already been completed. The Plaintiff further submitted that it was not a party to the internal procedures of the Procuring Entity and if the process was flawed as alleged by DW1 then the onus was on DW1 to prove it, which he failed to do. That the ineptitude of the Procuring Entity's procurement procedures should not be visited upon the Plaintiff.

77. The Defendants' only witness, Charles Koech (DW1) stated that he was a member of the Ad hoc Evaluation Committee. That on 14th September 2016 they met as a committee to begin the process of evaluation. He produced Minutes of the said meeting and the same were marked as D. Exh 2. He also produced Minutes of a meeting held on 26th October 2016 marked as D. Exh 6 which recommended that Geodev (K) Limited be awarded the Tender after attaining the highest score which according to him indicated the close of the evaluation process.
78. DW1 testified that after examining the technical proposals of the shortlisted bidders, only two companies attained the required points i.e. Geodev (K) Limited and Simuplan Consultants Limited and that the Plaintiff was not successful as its bid was not responsive. That it was therefore not logical to allege that the Plaintiff was awarded the tender.
79. I have closely evaluated the evidence of DW1. DW1 produced a Bundle of Documents including Minutes of a Tender Opening marked as D. Exh 1, Tender Evaluation marked as D. Exh. 2 and letters notifying the bidders of the outcome at every stage marked as D.Exh 4 and 5. DW1 sought to demonstrate through this that the Plaintiff was not successful in their bid and therefore could not have been awarded the contract. D.Exh 4 was the letter notifying Geodev (K) Limited of their successful technical evaluation and D. Exh 5 was a similar letter to Simuplan Consultants Limited. According to Section 87(3) of the PPAD Act, the correspondence was not lawful as the law required that both the successful and unsuccessful bidders be notified. Further, I observe that the period between 14th September 2016 and 26th October 2016 is over 4 weeks and it was therefore clear that the Procuring Entity went above the stipulated time of 21 days if it awarded the Contract to a different entity as submitted by the Plaintiff.
80. It is my conclusion that there was no evidence of a Contract awarded to any other party including Geodev (K) Limited and Simuplan Consultants Limited. This means that DW1's evidence did not displace the Plaintiff's evidence that they held a Contract with the Defendants.
81. As stated above, the person who signed correspondence and contract with the Plaintiff and also signed the Documents exhibited by DW2 was one Remmy Mutai, the 3rd Defendant. This revelation suggests that the 3rd Defendant's actions were not above board. I have already dismissed the claim of fraud as the Defendants led no evidence to prove the same on the higher standard of proof as required by law. The 1st Defendant however did nothing to distance itself from the actions of its officer or officers. As already observed they did not take out any 3rd Party Proceedings against them.
82. In analysing the above, it appears to me that the evaluation process and the award of the tender was flawed ab initio. Section 135 of the PPAD Act provides: -
 - (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
 - (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.



- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. (Emphasis mine)
 - (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.
 - (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.”
83. The Letter of Notification (P. Exh 2) was dated 14th October 2016 and the Contract (P. Exh 3) was signed on 20th October 2016. The Letter of Notification stated that a formal Contract would be entered between the Plaintiff and the County Government of Bomet upon the expiry of 7 days from 14th October 2016 which would be by 21st October 2016. This was contrary to Section 135 (3) of the PPAD Act. In *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others* (2018) eKLR, Aburili J held that: -
- “The legislative intent in section 135 of the Act is clear that “The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. (emphasis added).
- It therefore follows that the consequences of signing a contract before elapse of 14 days from the date of notification are grave to the extent that such a contract would be declared null and void as the procuring entity would be undermining the law if it signed a contract before elapse of 14 days.
-A contract entered into in contravention of the law is contrary to public policy especially where it is meant to frustrate a legislative purpose. It is illegal and the same cannot be allowed to stand. This is so for the contract subject of these proceedings.”
84. Section 87 of the PPAD Act provides that: -
- (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
 - (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.
 - (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.
 - (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”
85. There was no evidence by the Procuring Entity (1st Defendant) that they had informed the successful bidder of their success and equally informed the other bidders of their unresponsive bids. As earlier stated, D.Exh 4 and 5 only informed Simuplan Consultants Limited and Geodev (K) Ltd of their successful technical proposals and that they qualified to the next phase which was financial evaluation.



DW1 did not show the court an award to Geodev (K) Limited or Simuplan Consultants Limited or to any other bidder to demonstrate that indeed the Plaintiff was not awarded the Tender. In *Republic vs Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd* (2017) eKLR, Odunga J (as he then was) held: -

“.....It is therefore clear that under the current procurement legal regime, for the notification to be valid, it must be made to both the person submitting the successful tender and all other persons submitting tenders. Any contract entered into before this provision is complied with cannot be said to be valid.....”

86. In *Republic v Public Procurement Administrative Review Board & Another* (2008) eKLR, Nyamu J (as he then was) held: -

“Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law.....”

87. From the analysis above, it is clear that the whole procurement process was flawed. The Evaluation process did not meet its stipulated timeline of 21 days in accordance to Section 126 (3) of the PPAD Act. The Procuring Entity also failed to attach evidence to show that it notified the successful tenderer and the unsuccessful ones and; the Defendants, while disowning their Contract with the Plaintiff, did not show any other Contract signed with any other bidder.

88. Further, Renny Mutai (3rd Defendant) executed the Contract Document with the Plaintiff company on 20th October 2016. The same Renny Mutai sent Letters of Notification of Successful Technical Evaluation to Geodev (K) Limited and Simuplan Consultants Limited on the same day (20th October 2016). The same were produced and marked as D. Exh 4 and 5 respectively. This just buttresses the fact that the whole procurement process was flawed.

89. A Contract that emanates from a flawed process cannot be said to be valid and enforceable. In the case of *Abdulkadir Shariff Abdirahim & another vs Awo Shariff Mohammed T/A A. S. Mohammed Investments* (2014) eKLR, the Court of Appeal held that: -

“On pleadings and illegality, the predecessor of this Court, in *Mistry Amar Singh Vs Kulubya*, (1963) Ea 408, Quoted With Approval *Scott Vs Brown, Doering, McNab & CO*, (3) (1892) 2 QB, 724, in which Lindley LJ stated as follows on page 728:

“No Court ought to enforce illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

The decision of this Court in *Standard Chartered Bank Ltd Vs Intercom Services Ltd & 4 Others*, (2004) 2 KLR 183, is largely along the same lines, but does not establish a rule that illegality does not have to be pleaded. It is authority for the proposition that where the transaction upon which a claim is founded is *ex facie* illegal, a court may deal with the question of illegality whether it is raised in the defence or not.



90. Similarly, in *Heptulla vs Noormohamed* [1984] eKLR, the Court of Appeal held that: -

“Ex Turpi causa non oritur actio. This old and well known legal maxim is founded in good sense and expresses clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

91. In this case however, the facts do not show that the Plaintiff was either the author of or actively participated in breaching the law with respect to the timelines involved in the procurement process. The Plaintiff cannot also bear responsibility for the Defendants’ failure to inform both the successful and the unsuccessful bidders.

92. The Plaintiff demonstrated that it went ahead to execute the Contract and began reconnaissance work and produced an Inception Report which was duly acknowledged by the 3rd Defendant in their letter dated 24th February, 2017 marked as P. Exh 10. The plaintiff also demonstrated that there was cancellation and reinstatement of the contract. Stephen Ngari (PW2) testified that when the Defendants were unresponsive to their claim, they threatened to sue. That the Defendants sought to have the matter settled amicably out of court. All these actions have been disclaimed by the Defendants who have produced exhibits in an attempt to show that the Plaintiff did not win the tender and that a different entity won.

93. This court believes that the Plaintiff held a valid contract between itself and Defendants executed by the 2nd and 3rd Defendants as demonstrated by P. Exh 3. The Defendants therefore cannot turn around and disclaim the Contract. As stated earlier they did nothing to prove that the documents emanating from the 3rd Defendant were a forgery. Further the Defendants cannot hide behind their own failure to adhere to the timelines provided by law. The Defendants’ action amount to knowingly breaking the law then coming to court to say “we broke the law but we cannot honour our Contract, because it would be against the law to do so.” There must be consequences for the Defendant’s actions.

94. Now that I have established that the Plaintiff was an innocent party in the illegalities committed by the 1st Defendant’s Tender Committee, I hold that the Plaintiff is entitled to a remedy for the wrongs committed by the Defendants. I am persuaded by the case of *Disney Insurance Brokers Ltd vs Mombasa County Government* (2018) eKLR, where Otieno J. held that: -

“In this excerpt, I read the Court of Appeal to say that the person with illegal intent ought not to be allowed to enforce a contract thereby entered and use the illegal intent, guilty mind, to prove his right. It is the guilty party that ought not to be rewarded but the victim need not be denied the right to remedy a wrong so committed. (Emphasis mine)

95. The learned Judge in *Disney Insurance Brokers Ltd* (supra) further stated that: -

“Any costs incurred by a party arising out of the breach by the other party of any provision of this agreement shall be borne by the party in breach.”

96. All considered and doing the best I can with the facts of the matter, I do find the damages payable to the Plaintiff to be assessed at five million shillings (Kshs 5,000,000/=.) In coming to this award, I have



taken into consideration that the Plaintiff engaged in reconnaissance work which included travelling through Bomet County for site visits and project appreciation. I have also taken into account that they prepared and presented an Inception Report which was acknowledged by the Defendants.

97. The Plaintiff had prayed for damages for breach of contract. In principle, general damages are not awarded for breach of contract. In this case, I can do no more than restate what the Court of Appeal stated in the case of Kenya Tourist Development Corporation vs Sundowner Lodge Limited (2018) eKLR. The court was categorical that: -

“.....as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.....

.....What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.” (Emphasis mine)

98. In the end, this court finds that the Contract though valid as between the parties, remains unenforceable for breach of the provisions of the PPAD Act. It is also the finding of this court that the Defendants were the sole authors of the flawed procurement process. Therefore, while this court cannot grant the prayers sought by the Plaintiff, I award a remedy to the Plaintiff for the wrongful actions of the Defendants.
99. Judgement is entered for the Plaintiff against the Defendants in the sum of Five Million Shillings only (Kshs 5,000,000/=) only.
100. The Plaintiff shall also have costs plus interest at court rates from the date of the suit until payment in full.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 10TH DAY OF MAY, 2023

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered virtually in the presence of Ms. Mwenesi for the Plaintiff, Ms. Kageha for the Defendants and Siele (Court Assistant)

