



Kenya Anti-Corruption Commission v Onduso (Anti-Corruption and Economic Crimes Civil Suit 12 of 2018) [2023] KEHC 19240 (KLR) (Anti-Corruption and Economic Crimes) (23 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 12 OF 2018**

JN ONYIEGO, J

JUNE 23, 2023

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

PAUL CHAPIA ONDUSO DEFENDANT

JUDGMENT

1. Through a plaint dated August 9, 2012, the plaintiff herein sought entry of judgment against the defendant for;
 - a) The sum of Kshs 9,600,000
 - b) Costs of the suit
 - c) Interest on (a) and (b) above at court rates
2. The plaintiff's claim herein against the defendant emanates from its investigations conducted in relation to the loss of public funds amounting to Kshs 283,200,000 by the then city council of Nairobi (hereafter the council) through a fraudulent transaction to wit purchase of LR no 14759/2 for use as public cemetery.
3. That the said fraudulent transaction was orchestrated through a skewed procurement process initiated by the council vide tender No CCN/MOH/T/020/08/09 published in the daily Standard and Nation news-papers on September 18, 2008 and September 22, 2008 respectively which attracted 12 bids among them Naen Rech Ltd who were awarded the tender for sale of the said land to the council despite having not qualified for the award.



4. It is the plaintiff's averment that whereas one Henry Musyoki Kilonzi the then registered owner of the land in question entered into a sale agreement in respect of the said land with Naen Rech company Ltd as the buyer at a consideration of Kshs 110, 000,000, on December 19, 2008, the said Naen Rech also purported to sell the same land to the City Council of Nairobi on the same day at a consideration of Kshs 283,200,000 which money was paid into the joint account of a number of advocates' firms inter alia; Odero Osiero and company advocates, PC Onduso & Co Advocates and Alphonse Mutinda & Company Advocates.
5. In view of the said transaction, the plaintiff contended that the entire sale transaction was unlawfully and fraudulently executed through collusion between various public officers and other prayers the defendant included. The plaintiff particularized the acts of unlawful conduct and fraudulent actions as;
 - a) The purported sale agreement was conducted by the council with a party who was not the successful bidder in the subject tender
 - b) The purported sale Agreement was conducted by the council with a person who did not bid or participate in the tender.
 - c) None of the bids received in respect to the subject tender was responsive to the tender requirements hence the tender award was made based on a defective tender instrument disregarding protests from the council's own experts
 - d) The purported winner of the tender lacked capacity to enter into a contract
 - e) The purported sale of the land to the council was forged
 - f) The land was not valued by the council prior to the execution of the sale agreement
 - g) The council purchased the land against the professional opinion given by the senior funeral superintendent to the effect that the land was not fit for the intended use.
6. The plaintiff went further to state that out of the Kshs 283,200,000 paid by the city council of Nairobi, only a sum of Kshs 110,000,000 was paid to the registered owner and the rest paid to persons among them the defendant and other entities at no consideration hence recoverable as public property. That the sum of Kshs 9,600,000 paid to the defendant as purported legal fees was unlawful and therefore liable to refund with interest.
7. The specific fraud allegedly committed by the defendant include;
 - a) The defendant prepared the sale agreement purportedly made between Henry Musyoki Kilonzi and Naen Rech Ltd on December 19, 2008 on the same day when he purportedly witnessed the sale agreement purportedly made between Henry Kilonzi and city council over the same parcel of land
 - b) The sale agreement purportedly made between Henry Musyoki Kilonzi and the council on December 19, 2008 and purportedly witnessed by the defendant has been established to be a forgery
 - c) The defendant purported to witness the purported transfer made by the said Henry Kilonzi to the council on January 23, 2009 pursuant to a forged sale agreement.
 - d) The defendant purported to represent his client the purported vendor as his lawyer in a tender that he did not bid for nor participate in.



- e) As a signatory to an escrow account through which public funds were received from the council and then disbursed to various individuals was liable of fraud.
 - f) Receiving money for no consideration
 - g) Receiving money while aware that he was not entitled to the same.
8. In response, the defendant filed his statement of defence on September 11, 2012, basically denying the entire claim. In particular, he averred that; the defendant shall raise an objection in limine that the plaint is incurably defective for want of compliance with order 4 Rule 1(4) of the Civil Procedure Rules; as an advocate acting for Naen Rech he cannot be held liable for representing his client; the suit is incompetent as it contravenes Section 135 of the Evidence Act as read with part IX of the Advocates' Act; the suit is intended to subvert the overriding provisions of Sections 4 and 5 of the Public Procurement And Disposal Act 2005, the Public Procurement Administrative Board part VII and Director general of the public procurement oversight Authority as provided for by part VIII of the PP &DA No 3 of 2005.
9. That he did not at any one time participate in the purported fraudulent procurement process and that no court of law or statutory body established under the PP&DA has found the transaction illegal or flawed. He went further to state that the amount being claimed was legal fees paid to him as remuneration for undertaking and rendering professional legal services. He denied the allegation that he bore witness to the sale agreement between Henry Musyoka Kilonzi and the City Council of Nairobi or the transfer dated January 23, 2009 between Henry Musyoki Kilonzi and the City Council of Nairobi.
10. As a rejoinder, the plaintiff filed a reply to the defence on October 11, 2012 stating that, the plaintiff is not a corporation and that order 4 of the CPRS does not apply. That the plaintiff has the mandate to investigate and prefer necessary recovery proceedings in respect of public funds or assets.
11. During the hearing, Pw2 David Mukiri an employee of the city council of Nairobi then working as a funeral superintendent, adopted his witness statement recorded on April 29, 2009. It was his testimony that during the material time relevant to this case, he was a member of the subject tender evaluation committee charged with advising on the suitability of the land in question for use as a public cemetery. According to the land specifications, the soil profile and depth of at least 6 feet for easy of excavation was critical. That none of the plots subjected to bidding met the threshold in so far as the minimum six feet and red soil and accessibility was concern.
12. PW4 Pius Nyange Maithya a valuer with EACC also adopted his witness statement recorded on March 1, 2010. He stated that on May 7, 2009, he visited the subject land on request by the commission to value the said land which was the subject of sale to the city council. That he valued the same at Kshs 30 million (P exhibit no. 18).
13. Pw5 Anthony Mathenge chief valuer ministry of lands adopted his witness statement confirming that around August 7, 2008, he received a letter from the city council of Nairobi requesting for valuation of the said land before buying it. That the council having delayed in facilitating the process, he instructed one of his surveyors to enquire whether the council was still interested with the said valuation. That when the council went mute, the matter rested.
14. That it was until the auditor general raised the issue of a valuation report emanating from his office that he discovered of a valuation report which was used by the council to purchase the subject land. He disowned the same as a forgery as it was drawn on a wrong letter head; the author of the report



- by the name of A. Otieno did not exist nor was he known in that office; the office reference no. was wrong and no proof of fees payment.
15. Pw6 Tom Odongo the then Deputy Director physical planning city council also an evaluation committee member raised queries vide a memo. dated 11-11-2008 on the purported award of the tender to NAEN RECH citing defects in non-compliance with the tender specifications (p.exh 16). That he did not attend the meeting of November 12, 2008 when the tender was awarded against his advice.
 16. Pw7 Jacob Oduor document examiner examined the signature of the seller of the land in question in the purported sale agreement between Henry Kilonzi and the city council (Ex.A1-A12) and the known signature of the said Henry Kilonzi(exB1-B8) and found the same to be in disagreement meaning that it was highly probable that the said Kilonzi did not sign the subject sale agreement . The document examiner however found that the signature in A-13 being the transfer of the land in question was in agreement with signatures in A1-A12 being specimen signatures of Kilonzi the registered owner of the subject land.
 17. Pw8 Tabu Lwanga the investigating officer EACC did investigate the matter after receiving a confidential report regarding a fraudulent transaction over the sale of land to the city council of Nairobi. He adopted the content contained in his statement recorded on February 22, 2010. According to his testimony, the sale of the land based on the forged valuation report which inflated the value of the land at Kshs 283,200,000 instead of the Kshs 30m valued by the EACC's valuer or Kshs 110,000,000 sold by the original seller one Henry Kilonzi to NAEN RECH was fraudulent. Secondly, that the award of the tender was against expert opinion that the land was not suitable for use as public cemetery. That the disbursements of the alleged sale proceeds were made to people or entities among them the defendant who did not deserve or never provided any consideration. Lastly, the purported seller and transferor one Kilonzi did not bid for the tender.
 18. Pw1 and Pw3 bank officers merely confirmed who the signatories were to various law firms' accounts and who withdrew how much in respect of the amount of Kshs 283,200,000 which was received from the city council.
 19. On his defence, the defendant told the court that for purposes of this case, he was a legal representative to NAEN RECH the bidder who won the tender for the sale of the land in question. That he was instructed by the company director one Chege Maina to act for the company in the purchase of the subject land from one Henry Kilonzi. That in that transaction, Henry Kilonzi was being represented by one Alphonse Mutinda advocate. He stated that it was a term of the sale agreement that Kilonzi (seller) was to sell and transfer the said land to either NAEN RECH (the buyer) or its nominee in this case the Nairobi city council an agreement he termed normal in conveyancing legal practice. In his view, the role he prayed was purely legal as the transaction was overboard given that the tender award was not challenged as the land was procedurally transferred to city council who are the registered owners to date.
 20. He stated that he did not receive funds from the city council but rather it was Omotii advocates acting for the city council who disbursed the funds to various actors representing various parties in the sale transaction him included.
 21. Dw1 Maina Chege a director with Naen Rech company ltd told the court that during the material time, he instructed the defendant to represent him in a land buying transaction between him and one Henry Kilonzi who had offered to sell to him about 120 acres of land. That before paying for it, he won a tender with the city council of Nairobi which had expressed a desire to buy land for purposes of use as a public cemetery. Having tendered for the sale of the land he had expressed interest to purchase



from Henry Kilonzi, he won the contract. That he agreed with Henry to directly transfer the same land he was buying from him to city council as his nominee. That in clause 11 of the sale agreement between him and Kilonzi, it was agreed that Kilonzi was to transfer the said land to him directly or to his nominee which for purposes of this case was the city council of Nairobi.

22. In cross examination, he admitted that the land in question had not been transferred to his company by the time he was tendering to sell the same to the city council of Nairobi and that he had only paid Kilonzi (original seller) a deposit of Kshs 11 million out of the agreed purchase price of Kshs 110 million. He also denied knowledge of nor witnessing the sale agreement between Kilonzi and the city council. He however indicated that he did instruct his advocate the defendant herein to receive the money from the city council of Nairobi being the sale price of the said land. Further, he admitted that there was no sale agreement entered between Naen Rech and the city council of Nairobi. That out of the Kshs 283,200,000 paid by the city council, Naen Rech 'the seller' only received Kshs 9,950,000 instead of Kshs 173,200,000.
23. Upon close of the case, parties agreed to file submissions.

Plaintiff's submissions

24. The plaintiff filed their submissions on December 20, 2022 thus submitting that; the purported sale transaction between Kilonzi allegedly on behalf of Naen Rech selling land to the then city council at a price of Kshs 283, 200,000 was fraudulent hence the payment of Kshs 9,600,000 to the defendant as legal fees was illegal and therefore subject to recovery.
25. Counsel submitted further that; the purported seller of the land Naen Rech was not eligible to tender as it did not own land capable of being sold; No bidder met the minimum requirements for the award of the contract; the purported sale agreement between the city council and Kilonzi was not known to Naen Rech nor one Kilonzi; Naen Rech inserted falsely the name of Kilonzi as one of the directors for Naen Rech; Alphonse Mutinda acting for Kilonzi falsely wrote a letter dated 7th October indicating that Naen Rech had appointed Kilonzi as his agent to participate in the tender process; the value of the land was exaggerated at Kshs 283, 200,000 yet the actual price was 30M; Only Kshs 110, 000,000 was paid to Kilonzi the original Owner while Kshs 173, 200,000 was embezzled by undeserving persons and entities hence conspiracy to defraud the council and by extension the public off the money in question.
26. It was further contended that the defendant acted unprofessionally in the conveyancing transaction as he never remitted to the seller the sale price nor did he render accounts to his client.
27. The plaintiff summarized the issues for determination as follows; whether the tender process was irregular, unlawful and illegal; whether the defendant was involved in the said fraudulent transaction; whether the amount of Kshs 9,600,000 was legal fees; whether the defendant is liable to compensate the council for the loss of the money received and who bears costs.
28. Touching on issue no 1, It was counsel's submission that the tendering process was flawed as it was not responsive given that none of the bidders met the criteria for the tender award. To support the position that an non-responsive tender cannot form a basis for the award of a tender and subsequent payment, counsel relied on the holding in the case of Review Board; *Arid contractors and General supplies (interested party) Ex parte Meru University of science of technology [2019] eKLR* where the court held that, a bid only qualifies if it meets the requirements set out in the bid documents.
29. It was further contended that the sale agreement between the council and one Kilonzi was a forgery as Kilonzi denied signing the same and that the valuation report valuing the land at Kshs 283, 200,000



was forged hence a fraudulent transaction and therefore the money drawn out of that transaction was fraudulently obtained.

30. As to whether the defendant was engaged in the alleged fraudulent scheme, counsel contended that the defendant was appearing for the vendor in the sale agreement drawn between Naen and Kilonzi and later for Kilonzi in the sale agreement between Kilonzi and the city council. That the defendant received a total of Kshs 283,200,000 and distributed Kshs 110, 000,000 to Kilonzi and the remainder of Kshs 173, 200,000 to undeserving parties among them Mary Ngethe an employee of the City Council. That the defendant directed release of Kshs 9,600,000 to himself without authorization from his client Naen Rech.
31. Concerning whether the amount of money paid to the defendant was legal fees, learned counsel submitted that the same was not as he had no specific client whom he was representing. That Naen Rech the purported seller of the land was paid less money than its legal representative got which was against the norm in conveyancing.
32. Touching on whether the defendant should refund the amount received, counsel submitted that the money having been obtained illegally, the same was subject to recovery pursuant to Section 51 of the Ant-Corruption and Economic Crimes Act. That failure to prosecute some perpetrators of crime is not a bar to civil redress against the same perpetrators. In that regard, the court was referred to the decision in the case of *Ethics and Anti-corruption commission v Stephen Sanga Barawah t/a Mediscopes Agencies & 20 others [2018] e KLR*.
33. Although by January 23, 2023 when the matter was slated for highlighting submissions the defendant had not filed his submissions, I later received an unstamped copy privately sent to Garissa my new station via courier. Since there is no proof that such submissions were filed within time if at all, I will not make reference to the same as the other party did not have an opportunity to interrogate them nor was time enlarged to file outside time.

Analysis and determination

34. I have considered the pleadings herein together with the annexures thereof. I have also considered the testimony by various witnesses and submissions by counsel for the plaintiff. Issues that arise for determination are; whether the suit is bad in law for non-compliance with order 4 rule 1 (4) of the civil procedure rules; whether there was a valid and legal tender award by the city council of Nairobi to Naen Rech company LTD; whether the amount of Kshs 9,600,000 paid to the defendant was in respect of professional legal fees; whether the said amount is recoverable from the defendant; who bears the costs.
35. Before I proceed to consider the critical aspect of the suit, I wish to comment on the aspect regarding the incompetence of the suit for non-compliance with Order 4(1)(4) of the civil rules which requires that any suit instituted by a corporation, a verifying affidavit must be sworn by an officer of the company duly authorized. The plaintiff contended that it is not a corporation hence the rule is not applicable.
36. Under Section 11(1)(j) of the *Ethics and Anti-Corruption Act*, the commission has the mandate to institute proceedings in court for recovery or protection of public property or confiscation of proceeds of corruption. The commission is an independent body with lawyers authorized to commence proceedings on behalf of the commission. Such advocates have the natural mandate of the commission to represent it in any court proceedings. To that extent, the EACC is not a corporation in the strict sense hence Order 4(1)(4) is not applicable.
37. The suit herein is one among many other civil and criminal proceedings revolving around the infamous Nairobi public cemetery scandal where public money was spent for the purchase of land that has never



been utilized for that purpose. The genesis of the whole saga commenced with the advertisement by the then city council of Nairobi on September 18, 2008 inviting bidders to express interest for sale of land measuring about 120 acres. Among the requirements in the tender document was that the land had to have a depth of 1.8 meters red soil for easy digging graves. According to PW2 city mortuary attendant and a funeral superintendent who was one of the experts contacted to assist identify the suitability of the land offered by various bidders stated that Naen's land did not meet the criteria as it had 2.5 feet cotton soil and 2.5 feet rock.

38. PW6 Patrick Tom Odongo deputy director physical planning city council then and a member of the tender evaluation committee corroborated the evidence of PW2 to the extent that he did a memo to the chairman of the tender committee expressing his dissatisfaction to the land offered. PW2 and PW6 stated that none of the bidders met the requirements. This bid of evidence was not challenged by the defendant. To the extent that the land offered by NAEN did not meet the criteria, the tender award was not valid as it was not responsive pursuant to Section 64 of the PP & DA 2005. However, the defendant had no role to play in the processing of the tender and in so far as the soil texture was concern.
39. The other question which puts the transaction into question is the valuation report used by the tender committee to award the tender which was forged thus inflating the price of the land to Kshs 283,200,000. This fact was confirmed by PW5 the deputy commissioner of land in charge of valuation then Mr Anthony Mathenge who took the court through the forged valuation report. Indeed, there is no way land sold to Naen at Kshs 110,000,000 could be sold to city council at Kshs 283,200,000 the same day.
40. Besides, the EACC valuer Pius Maithya (PW4) did value the same land at Kshs 30m. The discrepancy in value of the same land is questionable hence the forged valuation report to support a pre-determined contract award whose motive was within the knowledge of the awarding committee which ignored expert opinion on the unsuitability of the land. With these evidence in mind and which evidence is not challenged, the tender award was invalid and irregular. Again, there is no proof that the defendant was aware of this forgery. In a nutshell, the sale of LR reference 14759/2 to the city council of Nairobi did not meet the requisite conditions specified in the tender document hence an illegal award.
41. As to whether the defendant received the money in question legally as his professional fees, it is critical to ascertain the role he played in the sale transaction. The defendant does not deny receiving the money in question out of the sale price obtained from the city council of Nairobi. He justifies receipt of the money as his legal fees. According to the sale agreement entered between Kilonzi the original registered owner on December 19, 2008 and Naen Rech, the defendant was acting as legal representative to the purchaser of the land in question one Naen Rech while Alphonse Mutinda advocate acted for Kilonzi. Clause J (iii) of the said sale agreement did provide that upon completion of the sale transaction, the vendor to transfer the land to the buyer or his nominee. Indeed, each of the two advocates signed the agreement on the space provided against their clients.
42. It is not in dispute that the land was not transferred into Naen's name. There was no evidence demonstrating that Naen ever paid the purchase price of Kshs 110 million to Kilonzi who unfortunately died before testifying in this case. However, what brings into question the whole transaction is the second sale agreement dated also December 19, 2008 allegedly between Kilonzi and city council purporting to sell the same land to city council of Nairobi at an inflated price of Kshs 283,200,000 a fact denied by Kilonzi in his witness statement admitted in evidence and confirmed by the document examiner that the signature contained in the said agreement did not agree with the known signature of Kilonzi implying that Kilonzi did not know of the tender transaction between city council and Naen.



43. In the sale agreement between Kilonzi and city council of Nairobi, Alphonse Mutinda Advocate signed as advocate representing Henry Kilonzi the seller which act the defendant in his defence said was done to a nominee (city council) instead of transferring to Naen the original purchaser who had won a contract to sell the same land to the city council. In that sale agreement, city council was represented by Omotii advocate who signed against the Town clerk to city council.
44. In obedience to clause J(iii) of the sale agreement between Kilonzi and Naen Rech, Kllonzi's signing of the second sale agreement to city council as Naen's nominee in ordinary conveyancing practice would be proper save that there is a dispute that kilonzi's signature was forged. According to the defendant, he never acted for Kilonzi and that he wouldn't have known whether Alphonse Mutinda representing Kilonzi may have forged the signature or not. To that extent, there is reasonable doubt that the defendant may not have known whether kilonzi's signature was forged hence cannot through proxy be held responsible.
45. It is trite law that acts of fraud are criminal in nature hence must be specifically pleaded and proved. See *Vijay Morjaria vs Nansingh Madhusingh Darbar and another [2000] e KLR* where the court held that acts of fraud must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts. It has been stated time and again that the standard of proof in allegations of fraud is higher than the standard laid out in ordinary civil suits. This position was clearly stated in the case of *Ndolo vs Ndolo [2008] 1 KLR* and *Kinyanjui Kamau vs George Kamau [2015] e KLR*. Similar position was held in *Demutilla Nanyama Purumu v Salim Mohamed Salim [2021] e KLR*.
46. From the set of facts and evidence outlined by the plaintiff, there was no proof that the defendant knew of the forgery of Kilonzi's signature in the sale agreement between Kilonzi and city council. As concerns receipt of Kshs 9,600,000 in the name of legal fee, the same is subject to taxation under the advocates remuneration order between him and NAEN. As to whether City council properly entered into contract as Naen's nominee for purposes of transfer, that is for city council town clerk and their lawyer to answer. In any event, it is not uncommon in conveyancing transaction for a seller of land or any property to transfer to a nominee of the buyer instead of the buyer directly. If the tender committee decided to recognize transfer of the property in their capacity as NAEN's nominee contrary to the tender document, it was up to them to be held culpable and any loss thereof recoverable from them and any other person contributing to such loss.
47. As to whether Naen received less than their entitlement and less what their advocate got, Naen should complain and seek recovery from his lawyer. In my view, the tender committee members who took part in the whole saga by awarding an illegal tender are to blame. The defendant has a right to claim his fee for rendering professional legal services notwithstanding the fact that the transaction turns out to be unlawful but acted within the law.
48. Whereas the plaintiff is concern with the Kshs 173,200,000 paid to various parties, it is difficult to prove that the defendant acting as an advocate was not entitled to his legal fees. As to other parties who did not render any services to justify any payment, it goes without say that they are culpable and must refund monies received. In my view, the defendant as an advocate was entitled to his legal fees the dispute over the actual amount notwithstanding. That is an issue for taxation.
49. Concerning refund of the amount in question, that is for the taxation court. Since he has proved that he was entitled to some legal fees, we cannot say that he was not entitled to any fees or at all. In a nut shell, without taxation, there is no clear boundary as to what he would have been paid. Further, without taxation, it is not possible to order refund. Again, even If taxation was to be done, it would only be between Naen and the defendant.



50. Whereas it is clear that the public was swindled of money through a stage managed tendering process, some actors by the name of advocates would have a leeway to escape liability. Taking into account the totality of the evidence on record, it is my finding that, the plaintiff has not proved its case on a balance of probability hence the suit is dismissed. As to costs, the defendant had expressed the desire not to pursue the same hence each party shall bear own costs.

DATED, SIGNED DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE 2023

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J. N. ONYIEGO
JUDGE

