



Ethics and Anti-Corruption Commission v Chavera & another (Anti-Corruption and Economic Crimes Case 21 of 2016) [2023] KEHC 22271 (KLR) (Anti-Corruption and Economic Crimes) (12 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22271 (KLR)

CIVIL CASE NO. 404 OF 2012

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE 21 OF 2016**

**JN ONYIEGO, J
SEPTEMBER 12, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

HERMAN STEVENS CHAVERA 1ST DEFENDANT

BONIFACE OKEROSI MISERA 2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated 9th April 2012, the plaintiff sought judgment against the defendants jointly and severally for; recovery of a sum of kshs 8,600,000; costs of the suit and interest thereon at court rates.
2. At all material times to this suit, the 1st and 2nd defendants were employed as chief finance officer and head of procurement respectively in the office of the deputy prime minister and ministry of local government then the parent ministry of city council Nairobi.
3. It is the plaintiff's case that having investigated a case of fraudulent procurement of LR No.14759/2 by the then city council of Nairobi for the establishment of a public cemetery at a price of kshs 283,200,000, it arrived at the conclusion that certain public officers among them the defendants took part in and benefitted from the fraud.
4. According to the plaintiff, the said land was registered and owned by one Henry Kilonzi who had entered into a sale agreement on 19th December 2008 for the sale of the same to NAEN RECH company ltd at a price of kshs 110,000,000. That according to its investigations, Nairobi city council had on the same date that is 19th December 2008, entered into an unlawful sale agreement wherein it



- purportedly purchased the same parcel of land from the said Henry Musyoki Kilonzi at a price of kshs 283,200,000 which sum was paid to the joint account of the law firms of Odero Osiemo, PC Onduso and Alphonse Musyoka and Co.Advocates.
5. The plaintiff listed aspects of illegalities committed in the whole procurement process and financial transaction thereof as follows; city council entered into a sale agreement with a party who was not a bidder nor a successful bidder for the sale of the land in question vide tender number CCN/MOH/T/020/08/09 and that the land in question was not suitable for establishment of a public cemetery.
 6. Particulars of fraud were enumerated as hereunder;
 - a. None of the bids received in respect of the said tender was responsive
 - b. City Council's tender committee proceeded to approve and award the tender based on a defective tender document and contrary to expert opinion from within on physical planning and land use.
 - c. The purported winning bidder lacked capacity to enter into a contract for procurement of the land in question.
 - d. The land was not valued by the city council prior to execution of the purported sale agreement
 - e. The council's tender committee was hoodwinked to relying on a false valuation report purported to have been from the deputy commissioner of lands.
 - f. The land was not fit for purposes of public cemetery.
 - g. The purported sale of land was concluded by the city council with one Henry Musyoki Kilonzi a person who did not participate in the tender.
 - h. The purported sale agreement between the city council and the said Henry Kilonzi was forged.
 7. Particulars of fraud committed by the 1st defendant were listed as follows;
 - a. Receiving money as a reward for securing funds for the council to purchase the land in the ordinary course of discharging his duties as a public servant.
 - b. Recklessly authorizing the payment of funds amounting to kshs 283,000,000 as purchase price of land in the absence of any valuation report.
 - c. Conniving with other officers to pay the exaggerated purchase price while fully aware that the said amount would end up in other persons pockets including himself.
 - d. Releasing funds to a person who did not bid for the sale of the land.
 - e. Wilful or wreckless failure to inquire as a reasonable person to satisfy himself that he was not acting in furtherance of committing a fraud.
 8. The 1st defendant was further accused of committing illegalities *interalia*;
 - a. Corruptly receiving a benefit contrary to section 39 of the [Ant-corruption and economic crimes Act](#)
 - b. Receiving as a reward payment for securing funds for city council of Nairobi to purchase the land.
 - c. Knowingly having interest in the said land.



- d. Unlawfully acquiring private interest in the aforesaid sale agreement involving a public entity.
 - e. Abuse of office to confer a benefit on himself and others contrary to section 46 of the *[Anti-corruption and economic crimes Act](#)*.
 - f. Dealing with suspect property c/s s47 of the *[ACECA](#)*
 - g. Concealing or disguising the nature, source, disposition or movement of proceeds of corruption.
9. On his part, the 2nd defendant was accused of committing illegalities listed as hereunder;
- a. Unlawfully acquiring public property c/s 45 *[ACECA](#)*
 - b. Knowingly having private interest in the said sale agreement
 - c. Receiving secretly proceeds of corruption.
10. It was alleged that the defendants jointly received a sum of Kshs 10,000,000 through a bank account of a private citizen one Onyiego Gichana held at Barclays bank. That the plaintiff has so far recovered kshs 1,300,000 from the defendants and kshs 100,000 paid to the said Onyiego leaving a balance of Kshs 8.6m. That the defendants jointly and unjustly enriched themselves to the tune of Kshs 8,600,000 which money should be recovered from them as restitution to the city council.
11. In response, the 1st defendant filed his statement of defence on 1st October 2012 denying involvement in any fraudulent activity in relation to and or sale transaction involving tender No. CCN/MOH/T/020/-08/-09 for the purchase of public land for establishment of a public cemetery.
12. That the tender process was advertised, processed and awarded to the successful bidder by the then city council of Nairobi hence he was not privy to any fraud committed by the tendering committee as he was deployed at the central government which had undertaken to finance the project of the city council which was tasked with the responsibility of buying land for a public cemetery. He stated that he was not an expert to have known that the seller of the land was not responsive and that the valuation report relied on was forged. That the tender award and the sale transaction were never nullified hence had no reason to suspect that there was any illegal transaction. That his role was to disburse funds upon receipt of the request by the city council of Nairobi and authorization by his seniors.
13. He denied the allegation that he was a beneficiary of any funds from the city council of Nairobi whether jointly with the 2nd defendant nor individually.
14. The second defendant equally filed a statement of defence and counter claim on 14th September 2012 denying allegations of fraud and commission of illegalities in the manner stated in the plaint. He went further to state that he was a stranger to the stated sale agreement and tender transactions with regard to the land in question. He denied receipt of any money from the city council or involvement in any corruption related activities in so far the sale agreement, tender award and subsequent payment of kshs 283,200,000 was concerned.
15. On a no prejudice basis, he alleged that the plaintiff recovered Kshs 1,300,000 on 6th May 2010 from him thus assuring him that that was the full and final claim against him. He went further to allege that during his arrest under duress he was threatened with prosecution thus ending his career. That he was to be locked in immediately and be denied access to counsel. He also denied giving Kshs 100,000 to one Onyiego Gichana nor receiving any money through the said Gichana.



16. On his counterclaim, he sought refund of kshs 1,300,00 extracted from him during arrest and Kshs 6m being legal fee incurred in defending criminal proceedings against him.
17. In its reply to the 1st defendant's defence filed on 22nd October 2012, the plaintiff filed a reply denying the allegation that it had instigated criminal proceedings against the 1st defendant as that was the role of the DPP. Equally, on 8th October 2012, it filed a reply to the 2nd respondent's defence and defence to his counter-claim denying claims of malicious prosecution.
18. During the hearing, one Gibson Njamura Kanyi (PW1) the then director city council of Nairobi during the material time, adopted the content of his witness statement dated 25th May 2009. It was his testimony that around the year 2008-2009, he placed an advert in the daily nation and standard newspapers for expression of interest from the public for sale of land to the city council of Nairobi for establishment of a public cemetery. He stated that among the bidders who submitted their bids to sell the required land was NAEN RECH CO. who were bidder No.7 and who was eventually awarded the tender to supply the land in this case LR No.14759 Mavoko Township.
19. He told the court that he had advised one Alex Mzee secretary to the tender evaluation committee to ensure that there was an evaluation report to the land in question. He further told the court that he was surprised to learn that one of the technical evaluation committee tender members one Tom Odongo had raised concern to the tender committee on the defectiveness of the tender document and the unsuitability of the land in question.
20. PW2 John Koyier Barre also adopted his witness statement dated 7th May 2009. He told the court that during the material time, he worked as a planner in the city council of Nairobi. It was his testimony that around October 2008, one Tom Odongo then the deputy director planning requested him to represent him by accompanying a technical evaluation committee which was to visit various sites on land located in Kingela, Isinya, Magadi and Kangundo to ascertain their suitability for public cemetery use as per the specifications of the tender documents. That from their site visit, none of the proposed land qualified or met the criteria set out in the tender document among them; the land was supposed to have had murram soil up to 6feet for ease of digging graves.
21. That after briefing Tom Odongo of the findings and subsequently M/s Mary Ngethe who was the chair technical evaluation committee and director legal affairs, their views were ignored thus necessitating their protestation through an internal Memo dated 11th Nov.2008 (pex7) addressed to the tender committee chair and later another one addressed to the town clerk.
22. PW3 David Mukiri senior funeral superintendent Nairobi city council then reiterated his witness statement filed on 31st July 2019. He stated that sometime in October 2008, he was instructed by his boss the MOH then to accompany a team that was then scheduled to visit various sites with a view to ascertaining the suitability of various proposed parcels of land for purposes of establishing a public cemetery. His role was to confirm that the proposed land had red soil for quick decomposition of bodies and at least 6ft deep rock free for ease of digging graves. That the technical evaluation team prepared a technical evaluation report and presented the same to the tender committee as per the minutes of 12th November 2008 observing that none of the proposed plots met the criteria set out. He gave his findings to his boss but later discovered that Naen Rech Co. had been awarded the tender yet it had scored zero on soil profile and dept.
23. PW4, Patrick Tom Odongo the deputy physical planner adopted his witness statement dated 6th May 2009. He told the court that around October 2008, he was instructed by the town clerk to carry out a tender evaluation in respect to bids submitted for the purchase of land by the city council for establishment of a public cemetery. That he was part of the evaluation committee membership where



- upon there were 12 bidders among them NAEN RECH Co. According to him, his department had not been involved from the word go in preparation of the tender document which he found to be defective as critical elements were given less weight inter alia; soil profile, location of the land, service availability, social and environmental compatibility.
24. That none of the 12 bidders met the criteria and that his sentiments to the technical evaluation committee was ignored. He was shocked to learn that NAEN RECH had been recommended during a tender committee meeting he did not attend. He was therefore forced to do a memo dated 11th November 2008 to the chairman technical evaluation committee and later another one dated 19th December 2008 to the town clerk protesting over the award. He corroborated the evidence of PW2.
 25. Pw5 Anthony Mathenge Itui a valuer adopted his witness statement recorded on 24th April 2009. He confirmed that the valuation report relied on to value the land intended to be purchased by the city council was a forgery and did not emanate from his department. He stated that; the author of the forged report one A. Atieno was not a member of staff in his department and; the letter head used to prepare the report was not in use in that department. According to him, a request was made by the clerk to city council for valuation of the subject land but no action was made as some information sought was never supplied hence the matter according to him rested there.
 26. PW6 Taabu Lwanga the investigating officer adopted his witness statement dated 8th August 2008. He stated that in the course of investigating acts of fraud in the tendering process involving the acquisition and payment for land meant to serve as a public cemetery, he recorded statements from the defendants (exh 15a and b). He further produced a national bank payment voucher for a sum of Kshs 10,000,000 payable by the firm of Osiemo advocates to Peterson Gichana on the 25th February 2009(see pexh no 16). He also produced a copy of the forged valuation report valuing the subject land at Kshs 325,150,000(Pexh 19).
 27. It was further his finding that the signature of Henry Kilonzi Musyoki the purported transferor of the land in question was forged. To support that assertion, he produced a document examiner's report (pexh 22). He went further to produce court criminal proceedings and judgment in criminal case no 44 of 2019(exh 26) wherein the second defendant was found guilty of corruptly receiving the said amount.
 28. On his defence, the 1st defendant adopted the content of his statement of defence and witness statement dated 19th May 2017. He denied playing any role in the procurement process of the land in question. Regarding payment, he stated that he made payment on instructions from his bosses. He denied having knowledge of one Gichana nor receiving any money from him as alleged. He entirely dismissed the claim against him.
 29. It is worth noting that the 2nd defendant did not take part in the hearing of these proceedings despite having filed a statement of defence.
 30. Upon close of the defence case, parties agreed to file written submissions. The plaintiff filed its submissions on 13th December 2022. Despite being given time to file their submissions, the defendants did not.

Plaintiff's Submissions

31. The plaintiff submitted on six issues namely;
 - a. Whether the commission acted within its mandate
 - b. Whether the tender process was irregular, and the subsequent financial transaction fraudulent, unlawful and illegal



- c. Whether the defendants unjustly enriched themselves with public money to the tune of Kshs 8.6 million at the expense of city council.
 - d. Whether the defendants had knowledge that the money received was fraudulently obtained and therefore concealed or disguised the source.
 - e. Whether the defendant's involvement in corrupt activities occasioned loss of kshs 8.6 to the city council of Nairobi and therefore recoverable.
 - f. Who bears the costs.
32. Regarding issue number one, counsel submitted that the tender process and the subsequent payment of the purchase price to the purported winner was illegal and irregular as the purported winner of the tender did not bid nor was he responsive. Counsel contended that procurement procedures must be complied with for there to be a valid tender process. To support that position, the court was referred to the holding in the case of *Republic v Public Procurement Administrative Review Board, Arid contractors and General supplies(interested party) Exparte Meru University of science & technology*(2019)eKLR where it was held that legislative or constitutional legal requirements in procurement process is not a mere internal prescript that a procurement entity can ignore.
 33. Counsel further submitted that since none of the bidders met the conditions set out in the tender document and more particularly the soil profile and the six feet depth, it was illegal and irregular for the tender committee to have awarded the tender and then proceeded to pay based on an illegal contract purportedly signed by Henry Kilonzi who was not abider to the tender.
 34. On the aspect of illegalities and fraud committed, counsel reiterated the particulars contained in the plaint.
 35. As to the deposit of Kshs 10,000,000 by Odero Osiemo advocates to the account of one Gichana who allegedly received and distributed the same to the defendants, counsel contended that the same was a product of corruption and fraud. That the sum of kshs 8,600,000 paid to the defendants was for no consideration. That one Gichana had admitted that he had received the money on behalf of the second defendant.
 36. That the statements of Gichana filed in court and the testimony of Gichana against the 2nd defendant in criminal case no 44 of 2019 and its subsequent appeal found that the money obtained by Gichana was at the instruction of the defendants. Counsel further submitted that the defendants were at liberty to enjoin the said Gichana if grieved by his admission that he had received the amount in question on their behalf. In that regard, the court was referred to the case of *DIG-TEC Images Limited v Kenya Railways staff retirement and benefits scheme and 4 others* (2015) eKLR where the court held that the purpose of enjoining a party in the proceedings is to assist the court arrive at a just decision.
 37. As to whether the money in question should be recovered from the defendants, the learned counsel held that money obtained by the defendants amounted to unjust enrichment hence recoverable. In support of that position, counsel relied on the decision in the case of *EACC v Stephen Githinji Kamau* ACEC 20 Of 2016 where the court held that it would be unfair and against public policy for a person who unjustly enriches himself to retain proceeds obtained unjustly.
 38. As to whether the defendants received and had knowledge that the money they received was fraudulently obtained, counsel submitted that the judgments in criminal proceedings in case no 44 of 2019 and Cr. appeal no 5 of 2018 upheld the position that one Gichana Peterson had received the money in question on behalf of the defendants.



39. Concerning recovery of the money alleged to have been obtained fraudulently from the defendants, counsel submitted that Section 51 or 52 of the ACECA is clear on the subject that money improperly obtained is liable to recovery. To support that position, the court was referred to the holding in the case of Ethics and Ant-corruption commission v Stephen Sanga Barawab t/a Mediscope Agencies & 20 others (2018) eKLR where the court held that failure to prosecute perpetrators of criminal proceedings is not a bar to the commission to institute civil proceedings by the commission.
40. In conclusion, counsel urged the court to enter judgment in favour of the plaintiff against the defendants with costs.

Analysis and Determination

41. I have considered the claim herein, response thereof and counter claim by the 2nd defendant. I have also considered the oral evidence by the plaintiff and 1st defendant together with the exhibits thereof. I have further considered the plaintiff's submissions. Issues that arise for determination are;
- a. Whether the commission acted within its mandate properly in instituting this suit.
 - b. Whether the tender process and subsequent award and payment of the impugned tender was legal and regularly executed
 - c. Whether the defendants unjustly, fraudulently and or corruptly received Kshs 8.6m being money fraudulently obtained from Nairobi city council.
 - d. Whether the money referred in c above is recoverable
 - e. Who bears the costs of the suit.
42. The crux of the suit herein is the irregular award of tender no. CCN/MOH/T/020/-08/-09 by the then city council of Nairobi to NAEN RECH Co. Ltd for the purchase of LR parcel no.14759/2 situated within Athi river Mavoko municipality giving rise to payment of Kshs 283,200,000 as the purchase price. As a consequence, the plaintiff was engaged in investigations to unearth the fraud committed in the process of the said tender and the subsequent illegal payment of the purchase price. Consequently, several people including some of the city council officials were prosecuted both in criminal and civil proceedings. Among the alleged beneficiaries of the fraud were the defendants who allegedly received Kshs 10m jointly being a portion of the Kshs 283,200,000 obtained fraudulently from the city council.
43. At paragraph 36 of the statement of defence, the 1st defendant stated that the plaintiff had instituted this suit as a fishing expedition to gather evidence against the defendants and other persons despite having pending criminal proceedings against them. It is the 1st defendant's contention that the plaintiff should not have filed these proceedings before the criminal proceedings were finalized.
44. Under section 53(3) of ACECA, the plaintiff is empowered to institute civil proceedings for recovery of any money lost by any public body through corrupt dealings. Further, under Section 193A of the criminal procedure, criminal and civil proceedings can be instituted concurrently in respect of the same. For avoidance of doubt, Section 193A provides as follows;

“Concurrent criminal and civil proceedings-

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”.



45. In view of the above provisions, I have no doubt that the plaintiff had the power to institute these proceedings the pendency of criminal proceedings over the same subject matter notwithstanding. See *Ethics and Anti-corruption Commission v Stephen Sanga* (*supra*).
46. 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. See *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR.
47. The law on proof fraud was further buttressed in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”(Emphasis ours)
48. As regards the standard of proof, the Court of appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows:-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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 ours)
49. In the instant case, the plaintiff cited several grounds of fraud ranging from forgery, corrupt receipt of public funds, illegal award of the tender and embezzlement of public funds through collusion and manipulation of the procurement process.
50. Among the conditions set out in the subject tender document was that the soil profile was to be red soil for ease of decomposition of bodies and rock free soil of a depth of up to six feet. According to PW1, PW2 city council planer, PW3 senior funeral superintendent and pw4 the deputy physical planner city council then and who was a member of the technical evaluation committee, they advised the technical evaluation tender committee of the unsuitability of the offered plots but their advice was ignored.
51. Besides, the subject land was inflated at a price of kshs 325,000,000 using a forged valuation report. This was confirmed by PW5 who stated that the purported valuer who purportedly prepared the report by the name of Atieno was not a member of staff in his department and that the reference and letter head used was not in use in that department.
52. It was also stated that the purported seller of the land one Henry Kilonzi who transferred the subject land to the city council was not a bidder to the tender. Besides, NAEN RECH who emerged the successful bidder was not responsive and that they had no land capable of selling. A perusal of the sale agreement of the said land to the city council, shows that Henry Kilonzi had sold to NAEN RECH the land in question on 19th December 2008 kshs 110,000,000 million which date he also sold the same land at kshs 283.200,000, to the city council. How could the land appreciate from kshs 110,000,000



too Kshs 283,200,000 in a day? If Henry was paid kshs 110,000,000, who were the beneficiaries of kshs 173,200,000?

53. From the above revelation, it is obvious that the tender process and award was tainted with illegalities and fraud. As a consequence, the money paid out of a fraud process was irregular and unlawful hence recoverable. Were the defendants involved in any way in the process of the procurement process and eventual award? The answer is no. The people concerned were city council officials and not the defendants. Their role was limited to implementing what had already been approved by the procuring entity and sanctioned by their seniors among them the PS local government. They had no legal capacity to challenge a tender that had been passed by the relevant procurement entity.
54. Did the defendants receive the sum of Kshs 8.6m? The plaintiff relied on the evidence of the investing officer PW6 who investigated the case. According to pw6, a sum- of 10m was traced from the law firm of Odero Osiemo payable through the account of one Peterson Gichana who in criminal case no.44 of 2019 admitted having been requested by the second defendant a relative to receive the said amount on his behalf. According to the paper trail, the money paid by Odero Osiemo was part of the money received from city council of Nairobi in the fraudulent tender transaction where his law firm was representing city council.
55. According to Osiemo, he was allegedly instructed by Chege Maina one of the directors of NAEN RECH the alleged successful bidder to pay the said amount. Since the second defendant was a senior procurement officer in the ministry of local government through which final payment was processed to the purported seller, it is obvious that he had his cut from the amount of money paid by city council. Why would the 2nd defendant hide and receive genuine money through a relative. I do not have any doubt just like my colleagues who heard the a foresaid Cr. case and appeal. Obviously, the 2nd defendant had knowledge that the money he was receiving secretly was not clean money hence obtained the same corruptly. It was a benefit out of money obtained through a flawed system of procurement.
56. The plaintiff's case was not challenged by the 2nd defendant. Its evidence was not challenged or at all hence I have no reason not to believe the merits of the plaintiff's case. In nutshell, the evidence of the plaintiff against the 2nd defendant is unchallenged hence the finding that there is overwhelming evidence from the testimony of pw6 and that of the criminal proceedings in Cr. case no 44 of 2019 and criminal appeal no.5 of 2018 where both courts upheld the evidence of Gichana and convicted the second defendant.
57. As regards the 1st defendant, the plaintiff did not tender any concrete evidence to connect him with the money received by the 2nd defendant. I do not find any evidence to prove that the 1st defendant received any money from Gichana or anybody else. The plaintiff basically relied on the proceedings in criminal case No. 44 of 2019 where the evidence of Gichana was used to convict the 2nd defendant.
58. However, the 1st defendant was not an accused in Criminal case No. 44 of 2019 hence had no opportunity to test the veracity of Gichana's testimony against him. Besides, mere reliance of a witness statement recorded before the EACC investigating officer without calling the maker to testify and be subjected to cross examination is not sufficient on its own to find the 1st defendant liable of corruptly receiving the alleged amount. In the circumstances, I do not find any meritorious evidence against him. The plaintiff's case did not bring it out on how the 1st defendant received the alleged amount and from who. To that extent, the claim against the 1st defendant has no merit hence dismissed.
59. Is the plaintiff entitled to recover the sum of 8.6M less kshs 1,300,000 from the 2nd defendant? The 2nd defendant having received the money corruptly, the same is subject to recovery under Section 53 of the ACEACA.



60. Regarding costs, the same is within the discretion of the court notwithstanding the general rule that costs shall follow the event. Accordingly, the plaintiff is entitled to costs against the second defendant. As regards the 1st defendant, he was exonerated on a benefit of doubt. Further, considering the amount of money lost by the public through the subject tender, I will not further punish the public with payment of costs.
61. In nutshell, it is my finding that the plaintiff has proved its case on a balance of probability against the 2nd defendant and judgment therefore entered for recovery of kshs 8.6m. Kshs 1,300,000 already recovered shall remain in the plaintiff's custody as money recovered in advance. I award interest at court rate calculated from the date of filing the suit together with costs. The counter claim filed herein is dismissed as it lacks merit.
62. The suit against the 1st defendant is dismissed with no order as to costs

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF
SEPTEMBER 2023**

J.N. ONYIEGO

JUDGE

