Kagiri v National Aids Control Council (Appeal E1030 of 2022)
[2024] KEHC 13923 (KLR) (Family) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13923 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E1030 OF 2022

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

PATRICK MBIYU KAGIRI ..... APPELLANT

AND

NATIONAL AIDS CONTROL COUNCIL ..... RESPONDENT

(Being an appeal from judgment and decree of Honourable Edgar Kagoni (PM) in Chief Magistrate's Court at Milimani Commercial Courts civil case number 1184 of 2015 dated 1-12-2022)

JUDGMENT

1. The appellant, who operates an auditing firm filed a suit in this court being civil case number 488 of 2012 on 4-10-2012 seeking a sum of Kshs 2,942,262.75 from the defendant being the balance and accrued interest for work done in auditing Civil Organisations in Central Province. The appellant's claim was that he bid for the said audit work at Kshs 2,752,600.00 but it was paid Kshs 1,462,700.00 which was the amount that was indicated in the Local Service Order (LSO) the respondent issued him. The suit was transferred to the subordinate court by an order of this court dated 7-11-2014 upon which it was re-numbered as CMCC number 1184 of 2015. The matter was heard at the lower court and by judgment delivered on 1-12-2022, the appellant's claim was dismissed with costs.

2. The appellant has approached this court on appeal where he has raised only one ground of appeal thus, the learned trial magistrate erred in law and in fact in finding that the appellant did not prove liability. The appeal was heard by way of written submissions. The appellant's submissions are dated 21-08-2024 while the respondent's are dated 19-09-2024.

3. This is a first appeal. It is trite that a first appeal should be conducted in a manner of a re-rehearing where the appellate court should relook at the evidence produced before the trial court, re-evaluate,

re-examine and re-analyse it afresh and come to its own independent conclusion but have in mind that it did not have the advantage of taking the evidence first hand or observing the demeanour of the witnesses and as such give due allowance for that.

4. The appellant was the only witness who testified by adopting his witness statement dated 23-08-2012. He told the court that on 25-08-2006, the respondent placed an advert in the Daily Nation and the Standard newspapers calling for expression of interest for auditing of civil organisations which were under the Kenya HIV and Aids Disaster Response Project in Kenya (KHADREP). The appellant responded to the advertisement and placed bids for auditing of the organisations in Central Province for Kshs 2,752,600/= and Kshs 1,462,700/= for South Rift region. After evaluation of the tenders, the appellant was issued with a Local Service Order (hereinafter referred to as 'LSO') dated 8-12-2006 which was for auditing of the organisations in Central Province for a sum of Kshs 1,462,700/=. According to the appellant, he alerted the respondent that he had bid for Kshs 2,752,600/= for Central Province and not Kshs 1,462,700/= but he was informed that it was an error and it would be corrected in due course and was asked to proceed with the auditing as there was urgency in it. The parties did not sign a formal contract.

5. It was the appellant's evidence that it carried out the audit in the belief that it would be paid the amount it had quoted but it was paid Kshs 1,462,700/= which was the amount in the LSO less the withholding taxes. His follow up of the correction or amendment of the LSO was in vain. The appellant claimed that he later came to discover that the respondent had carried out an internal audit which confirmed that he was entitled to be paid a balance of Kshs 1,289,900.00 as the LSO was generated by error. To support his claim, he produced documents showing that the same audit report was used to demand credit from the firm of Wachira Irungu & Associates which had been overpaid for auditing organisations in the South Rift region. The appellant's stand was that since the respondent had used the same audit report to benefit from a recovery from Wachira Irungu & Associates, it should use the same report to pay him the difference between his quotation and the LSO.

6. The appellant stated further that the audit report revealed the following;

    a. The appellant and the firm of Wachira Irungu & Associates scored 81.83 and 77.16 respectively during the technical evaluation and were approved to go to the next step of financial evaluation.

    b. In the financial evaluation, it was recommended that the appellant audits Central Province at Kshs 2,752,600/= inclusive of VAT.

    c. The results of the technical and financial evaluations were forwarded to the sub-tender committee that deliberated on the recommendation and recommended amendments that the appellant was to be awarded the South Rift region at a cost of Kshs 1,462,700/= inclusive of VAT.

    d. Unfortunately, the final documents presented to the tender committee had errors that the appellant was recommended for audit of Central Province instead of South Rift at a cost of Kshs 1,462,700/= which was quotation for the South Rift.

    e. The firm of Wachira Irungu & Associates was awarded the tender to audit South Rift at a cost of Kshs 1,462,077/- which was their quotation for Central Region instead of Kshs 1,047,261/- all inclusive.

    f. Based on the recommendations, the two firms were erroneously awarded tenders for prices they had not quoted for. The appellant through LSO number 1313 and Wachira Irungu & Associates through LSO number 1315.

7. The appellant further claims that the audit report recommended that the appellant be paid a net balance of Kshs 1,242,051.70 being the difference outstanding but its efforts to follow up payment even through Public Complaints Standing Committee did not yield any fruits. The respondent's director is said to have directed that the balance be paid and the tender committee do approve payment of the balance. Based on the above, the appellant claimed Kshs 2,942,262.75 being the aforesaid difference less taxes to be withheld plus interest of Kshs 1,700,211.05 which it claimed to be at commercial rates.

8. When he was cross-examined, the appellant said that he was informed in a meeting with the respondent and other contractors that he had been awarded the contract for Central Province. He added that his quotation was not the lowest and admitted that the amount in the LSO was paid. He added that he wrote a letter dated 18-12-2006 asking for amendment of the LSO and was assured that the issue would be sorted and so he proceeded with the work. The assurance was given verbally and it was explained that there was a mix up in the LSOs.

9. The respondent called one Nelson Musili as its sole witness. Nelson testified through adoption of witness statement dated 5th March 2020 which was recorded by one Kenney Mosoti. Musili told the court that he was the legal officer of the respondent. He confirmed that the appellant was retained by the respondent to audit civil organizations in Central Province. According to the witness statement, both technical and financial evaluation tender committees meeting held on 8-12-2006 approved the appellant to carry the audit at a cost of Kshs 1,462,700.00 inclusive of VAT and an LSO to that effect was issued. The appellant duly accepted the LSO and carried out the audit as per the terms without seeking any post award negotiations or variations. The appellant was paid fully for the services rendered as per the LSO. The witness stated that the request by the appellant for amendment of the LSO to Kshs 2,752,600/= was not possible because;

    i. The appellant would not be the lowest bidder.

    ii. As per the Exchequer and Audit (Public Procurement Regulations 2001) section 33 thereof, the notification of award constituted a contract between the parties. Further the appellant should have indicated its inability to accept the award in order for the tender committee to make further decision. The firm however went ahead and performed the audit and by their conduct accepted the award. They therefore accepted the respondent's counter offer.

10. In cross-examination, the witness confirmed that he was not working with the respondent at the time of the contract and that the audit report was accepted by the respondent. He also admitted that the firm of Wachira Irungu & Associates was requested to pay the excess money but he could not tell whether they did so. He also stated that the appellant was not paid as per his request.

11. After hearing the parties, the Honourable Magistrate dismissed the appellant's claim casting doubts on the audit report which according to him was contradictory. The appellant was aggrieved by the judgment and filed this appeal citing one grounds of appeal as indicated above.

12. It is not disputed that the appellant was awarded tender for auditing of the civil societies in Central Province for which he had bid Ksh 2,752,700/=. It is also not disputed that the respondent issued an LSO to the respondent to carry out the audit for a sum of Kshs 1,462,700.00. It is also common ground that the appellant was paid as per the LSO. The parties also agree that an audit was carried out by the respondent which recommended that the appellant be paid Kshs 1,289,900.00 which was the difference between the LSO and the appellant's quotation.

13. Having gone through the submissions filed by the parties and the record of appeal, I discern that the following questions call for answers in this appeal.

a. What was the effect of the appellant accepting the LSO?

b. Could the alleged verbal promises by the respondent to amend the LSO override the written terms of the LSO?

c. What was the effect of the audit carried out by the respondent in respect to the contract between the parties?

14. To answer the first question, one must resort to what constitutes a contract. It would be important to analyse whether the LSO formed the contract between the parties since the formal contract was never signed. The law on contract is clear that for a contract to be complete and enforceable, it must have an offer, acceptance and consideration. In addition, it must be a lawful agreement. After the said elements of contract are present, the parties get bound by the terms of same unless the contract become vitiated by factors which are applicable within the law.

15. It is agreed between the parties that appellant invited the public to express interest in provision of the specified services. This is to me was an invitation to treat which was followed by the bids presented by the appellant and others. Presentation of the bid was the offer which the respondent was not bound to accept. The respondent's sub tender committee did not accept the offer. Instead, it made amendments on the quotation which needed to be accepted for the formation of the contract to proceed to the next stage. In that regard, by drawing the LSO, the respondent was giving a counter offer because the same was not in agreement with the appellant's bid. The appellant had the right to either accept or reject it. The appellant has confirmed that it accepted the LSO and proceeded to supply the services described in the LSO. Where a party issues a counter offer, the same need to be accept.

16. I have looked at the LSO and I note that the same clearly states the description of the service procured from the appellant as 'to carry out audit for CBO/NGO in central province region'. The price stated in the LSO is Kshs 1,462,700.00. After the appellant signed for and received the LSO, it proceeded to carry out the work and provide the services. This in my opinion completed the contract between the parties. In the circumstances of this case, I hold the view that the LSO is the final document that bound the parties. Whether or not this contract could be amended is a different issue which I shall address below. In County Government of Narok vs British Pharmaceuticals Limited (2022) KEHC 10127 (KLR) Honourable Justice F. Gikonyo cited Black's Law Dictionary on the definition of a Local Purchase Order (LPO), which to me is similar to LSO except that LPO concerns goods while LSO concerns services. The Judge held that;

> " As the case rests on procurement of goods through LPO, the trial court was correct in starting to establish whether a contract was created by the LPO. See Blacks's Law Dictionary; a Local Purchase Order is;
>
> 'A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale.'"

17. Faced in almost similar scenario as in this matter Honourable Justice J.L. Onguto held in Isaac Mugweru Kiraba t/a Isamu Refr-Electricals vs Net Plan East Africa Limited (2018) eKLR that;

> 'Upon such delivery, it could only be on the basis of the prices quoted. It certainly, in my judgment could not have been in the contemplation of the parties that the plaintiff would after delivery of goods 'quote' his own prices in the invoices raised. Acceptance by the Plaintiff of local purchase orders meant also an acceptance of the prices quoted in the orders. Commercial and business sense would not dictate otherwise.

> The plaintiff relied on the local purchase order as the basis of the contract and I do not see how it may be possible that the price was varied. The price was always agreed upon and it was the price quoted in the local purchase orders, in my view.'

18. I associate myself with the above holdings and definition and I do find that the LSO in this matter which the appellant accepted and proceeded to act on formed a legal contract of provision of the services procured.

19. I have not seen in this matter anything which could be interpreted as a vitiating factor and parties have not addressed the court of any. In that regard, the contract remained lawful and binding on the parties. There was a draft contract in respect of the same transaction which was to be signed. The draft was produced before the lower court but in my opinion, it had no probative value as unsigned document or instrument cannot bind the parties. Even if we were to take the unsigned document as part of the process leading to execution of the contract, one would note that at page 16 of the document, the price is indicated as Kshs 1,462,700.00. I therefore do not hesitate to find that the contract price for the exercise was the amount shown in the LSO.

20. The appellant claims that after he received the LSO, he engaged the respondent to amend the same to show the value of the contract as per his quotation. He wrote a letter dated 18-12-2006 which sought to have the LSO amended. In addition to requesting that the LSO be amended to reflect the amount he had quoted, the letter clearly stated that the amendment would enable the appellant to proceed with the assignment which to me meant that the appellant would only proceed with the exercise after the amendment of the LSO. As things would have it, the letter was not responded to. The appellant claims that he was verbally instructed to proceed as the respondent was making the amendments. What makes this scenario interesting is that the respondent did not respond to the appellant's letter in writing. I do not accept the explanation by the appellant that an officer in a big organization and a government institution for that matter would make amendment to a contract without engaging the other people involved in the contract especially the persons responsible for procurement process. The appellant should have at least asked for a written commitment that the LSO would be amended. In Noa Investment Limited vs County Government of Nyamira (2021) eKLR, the Honourable Justice E.N. Maina while addressing similar issue held that;

> 'It is my finding that the oral requisitions made to the plaintiff by the officers of the defendant could not therefore give rise to a contract as the law applicable to public procurement expressly required that contract to be in writing.'

21. I am convinced and persuaded by the above holding which position is applicable to this case since the respondent is a public body. I would add that the contract to offer the auditing services having been reduced into writing in the form of the LSO, it would not be proper to accept any evidence which contradicts or seeks to amend the LSO. It is trite law that a written agreement cannot be amended by verbal representation. The parole, rule of evidence postulates that evidence cannot be admitted or used to add to, vary or contradict a written instrument. In Urbanus Kyalo Wambua vs Briggitta Ndila Musau (2019) eKLR it was held that;

> " The following excerpt from Chitty on Contract 29th Edition Vol. 12 is also relevant;
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> 'It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given...so as to add, subtract from, or in any manner vary or qualify the written agreement... The rule is usually known as 'parol evidence' rule.

> Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiations."

22. Before a LSO is generated, there are stages which must be followed. The tender, sub-tender and evaluation committees must be involved. Once done and issued, it cannot be cancelled or amended without following the due process and involving the same team which led to its generation. In this case, the appellant and whoever he was engaging in the respondent's office decided to do it the other way, that is, to proceed with the provision of the work then seek amendment of the LSO later. There was nothing hard for the appellant to wait for confirmation of the purported errors in the LSO before he proceeded with the audit. The explanation that the audits were urgently required and that the appellant was obligated to proceed before the amendment are not convincing. There is no evidence to that effect and I am not convinced that an urgency of services like the one in this matter could justify breaking of the laws and violation of regulations governing procurement processes. The urgency was coming from the respondent if at all and in such a case, the officers concerned should have responded and acted urgently to the appellant's letter dated 18-12-2006.

23. The appellant has pleaded estoppel against the respondent. The appellant claims that the respondent should be estopped from denying that it instructed the appellant to proceed with the service as they waited for amendment of the LSO. According to the appellant, it was made to believe that the LSO would be amended and that it will be paid Kshs 2,752,600.00. I have not seen such communication and as I have stated above, the alleged verbal communication cannot take precedence over a written document. It is not even stated what capacity the person who gave the verbal commitment was acting in. It is was not shown that he had the requisite authority to bind the respondent. And I believe that even if he had such authority, he could only do so in writing after following due process.

24. The crux of the dispute in this matter is the emergence of the audit report by the respondent. The lower court had stated that the report was contradictory. I have gone through the report which is on pages 27 to 30 of the record of appeal. This alleged report is said to have been initiated by the respondent's director after he received complaints that the tenders were erroneously awarded. The report alleges that the appellant was recommended for award of the audit of central province at a cost of Ksh 2,752,600.00. At clause 2.3 of the report, it is recorded that;

> 'The results of the Technical and Financial evaluation and recommendations were forwarded to the sub-tender committee. The sub-tender committed deliberated on the recommendations and made amendments as follows; M/s Mbiyu Kagiri & Co was now to be awarded South Rift at a cost of Kshs 1,462,700.00 all inclusive of 16% VAT and M/s Wachira Irungu was to be awarded Central at a cost of 1,466,077 and other CBO at 155,000 all amounting to Kshs 1,621,077.00 inclusive of VAT. However, the final documents presented to the Tender Committee had errors as M/s Mbiyu Kagiri & Co was recommended for audit of Central instead of South Rift at Kshs 1,462,700.00 inclusive of VAT. M/s Wachira Irungu & Associates was awarded South Rift instead of Central at a total cost of Kshs 1,621,077 inclusive of 16% VAT. These recommendations with the mistakes were consequently passed by the Tender Committee of the Board.'

25. The audit report goes on to recommend that the appellant be paid the sum it had quoted but states that the following must be done;

    i. Necessary approval must be sought from the Tender Committee.

    ii. Action must be taken on the officers who failed to forward the letter for action.

iii. Payment be made as follows; Kshs 1,462,700 inclusive of VAT be paid now, the balance of Kshs 1,289,900.00 be paid only when the necessary approvals have been made.

26. What I gather from the above audit report conclusions is that, the payment of the balance which the appellant is claiming could only be made after getting the necessary approvals meaning that there were no approvals of the amount quoted by the appellant. The report takes cognizance of the fact that the tender committee's approval was necessary. This is the same committee which had amended the LSO and approved award for audit of Central Province at Kshs 1,462,700.00. The appellant did not prove that approvals as recommended by the audit report were ever sought or given. Such approvals in my view would have involved review of the whole tendering process since at no point did the tendering process approve or recommend payment of 2,752,700.00.

27. The audit also seems to overturn decision of the sub-tender committee which reviewed audit of the Central Province to Kshs 1,462,700.00. An auditor cannot overturn a decision made by the tender committees. It can only make recommendations of what should have been done or whether procedures were followed. The audit or the investigations could not direct the tender committee or any other department on how to work. What is discernable from the sub-tender committee's decision is that it intended that the respondent spends Kshs 1,446,077.00 for audit in central province. The only mistake done here was that the Central Province business went to the appellant while the South Rift went to the Wachira Irungu & Associates. The Magistrate was therefore right in holding that the LSO when juxtaposed with the findings of the sub-tender committee, in the internal audit report, show the intention was to award Ksh 1,446,077 to Central Province and not Kshs 1,462,700.00.

28. The appellant has urged the court to consider that the respondent benefitted from the audit report by recovering the excess money paid to Irungu Wachira & Associates and cannot therefore escape the findings of the same. According to the appellant, since the respondent benefited from the findings of the report, similar benefits should go to him. This argument in my opinion has no basis. There is no proof that the said firm of Wachira Irungu & Associates paid back the alleged excess payment. Even if the said firm had refunded, the appellant cannot benefit from an act of a third party. It was not privy to contract between the respondent and the firm of Wachira Irungu & Associate.

29. Based on the above analysis, I find no merit in this appeal and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of;

Miss Orina holding brief for Mr. Mungai for the appellant, and

Miss Njeru for the respondent.