



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CIVIL APPEAL NO. 27 OF 2019**

**COUNTY GOVERNMENT OF LAIKIPIA.....APPELLANT**

**-VERSUS-**

**JOHN MACHARIA MURAGURI T/A**

**CLERVERLINE AUCTIONEERS..... RESPONDENT**

**JUDGEMENT**

1. By a plaint dated 21/03/2016 the Respondent/Respondent sought reliefs;

- a) A declaration that the termination of the tender amounted to a breach of contract on the part of Appellant/Appellant.*
- b) Special damages Kshs.4,812,000/-.*
- c) Interest.*
- d) Any other relief.*

2. The Appellant/Applicant filed defence and denied Respondent/Respondent's claim and thus the suit was heard and the Respondent/Respondent was awarded:

- **Kshs.2,840,000/-**
- **Costs and Interest**

3. This precipitated the instant appeal which sets out 8 grounds:

- i. That the learned trial Magistrate erred in law and facts in his finding that there was a contract between the parties in total disregard of the terms and conditions stipulated in the prequalification document.*
- ii. That the learned trial Magistrate erred in law by departing from the well settled principle that courts interprets contracts but do not re-write contracts for parties.*
- iii. That the learned trial Magistrate erred in law and facts in his analysis of evidence viz-a-viz the pleadings on record.*
- iv. That the learned trial Magistrate erred in law by ignoring the import and meaning of the provisions of Section 109 of the Public Finance Management Act and Article 207 of the Constitution of Kenya.*
- v. That the learned trial Magistrate erred in law by awarding general damages for breach of contract.*
- vi. That the learned trial Magistrate erred in law by disregarding the principle of mitigation of damages/loss.*
- vii. That the trial Magistrate assessment of damages was erroneously based on gross income rather than rental income.*
- viii. That the learned trial Magistrate departed from pleadings and evidence in his decision.*

**EVIDENCE TENDERED:**

4. The Respondent testified and called one witness. The defence called their sole witness.
5. Respondent –testified that, he was an Auctioneer by trade and that he was engaged via letter of 10/09/2012 signed County Clerk to be collecting revenues on cow and goats sold in Appellant’s market at Rumuruti at a rate of Kshs.200/- per cow and Kshs.60/- per goat per market day.
6. The letter stated above was for a pre-qualification purpose.
7. He continued earning on the above engagement from 2012 to 2015 when an Appellant’s employee verbally told him to stop collecting revenue in the its yard.
8. Thus the Respondent being aggrieved and therefore instituted the suit claiming loss of Kshs.55,000/- per market date for 2 days per week and for 6 months.
9. He also claimed special damages pleaded totaling to Kshs.360,000/-
10. In cross – examination he said the engagement was for period from 2012 to 2014. That there was no local service order (LSO) issued nor did Appellant after it took over from abolished local authority issue letter of continuation of engagement.
11. He confirmed he got commission directly from buyers and sellers of cows and goats. He said he tendered for provision of auctioneers services but instead he was engaged for revenue collection.
12. He agreed he did not have audit report, books of account or even tax returns. Also stated that his expenses were Kshs.25,000/- per market day.
13. On re-examination he said the money he collected was his. He avers that letter of engagement was LSO and a contract.
14. PW2 Walter Latifa Ngare was PW1’s employee. He said he was present when auction started at Rumuruti and used to be on Thursdays later on Mondays twice a week.
15. Sellers brought cows and or goats for selling and buying and each got generated Kshs.60/- as seller paid Kshs.30/- and buyer Kshs.30/-.
16. The sharing of revenue of Appellant and Respondent was on 50:50 bases. On 31/12/2015 the engagement was verbally terminated by the Appellant agent.
17. On cross-examination he said: “The farmers brought to sale cattle, goats and sheep. Thus collected revenue for Appellant. Prices were set by buyer and seller. Respondent would not buy or sell. Initially markets were on Thursdays. Communication to conduct auctions on Mondays was made on 12/05/2015.
18. The revenue collected was shared on 50:50 basis between Respondent and Appellant no receipts were ever issued by Appellant on payments. He would take money to the office and pay an officer.”
19. Defence Evidence was via DW1 Nelson Odhiambo Ochieng of Appellant’s Revenue Department. He testified that Respondent was pre-qualified for auctioneer’s services but there was no contract no LSO was issued.
20. On cross-examination he stated that; Appellant took over assets and liabilities of local authorities. There was no contract with Appellant. Appellant found that engagement of Respondent was illegal thus terminated the same. Respondent had done for 2 to 3 years.
21. The contract with terms ought to have been made. He wrote a letter to the Appellant’s Secretary on issue of validity of engagement on 2015. The engaged was thereafter terminated by him verbally.
22. Parties were directed to canvass appeal via submissions which they filed and exchanged.

**APPELLANT SUBMISSION’S:**

23. It is submitted that, the category of services which the Respondent was prequalified for amongst others was to provide auctioneers and disposal services. Further the Respondent was to participate in the request for proposals whenever a need for those services arose.
24. The evidence tendered by the Respondent in this case did not disclose that there was any request for proposal process and to that extent letter dated **8<sup>th</sup> September, 2014** could not be a contract between the parties.
25. Without a request for proposals process, the letter could not be deemed to be a contract creating specific obligations between the parties and to that extent the trial Magistrate erred on page **7 paragraph 2** of the judgment by holding that there existed a contract between Appellant and Respondent.

26. Under **Section 92(c) of the Public Procurement and Asset Disposal Act** one of the methods of procurement is through request for proposal and that is what **P-Exhibit 9** envisaged. After going through the pre-qualification procedure the Respondent had to be invited through a request for proposals as envisaged under **Section 95(3) of the Public Procurement and Disposal Act**.

27. The Respondent's activities would only have been lawful if he had met the requisite criteria for procurement of his services through direct procurement pursuant to **Section 103 and 104 of Public Procurement and Asset Disposal Act** which was not the case herein.

28. The services which the Respondent purported to offer did not fall within the description of auctioneering services.

29. In the amended plaint at **page 339 – 343** of the record the Respondent, starting with paragraph 3 explicitly alluded to a contract of provision of auctioneering services, the Respondent's evidence ought to have accorded to that position because it is a well settled principle under the law that parties are bound by their pleadings. **See Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR (page 3) where the court observed:**

30. A perusal of the evidence of the Respondent in court (**PW1**) **pages 423, 424 and 425** of the record and evidence of Respondent's witness (**PW2**) **pages 428 – 430** of the record makes it clear that the Respondent was not providing auctioneering services. **PW2** in his evidence at **page 430** of the record **lines 12 and 13** stated as follows:

***“We were only to assist the collection of revenue. There was not auction.”***

31. The court in its judgment departed from the pleadings and evidence on record and held that the services by the Respondent could be described as agency as can be discerned from second last paragraph of page 2 of the judgment in supplementary record of appeal whereby the court stated:

***“The services by the Respondent can be described as that of agency.”***

32. The finding by court that what existed between Respondent and Appellant was an agency relationship and not an auctioneering contract is neither based on the pleadings nor to the Respondent's evidence and to that extent it was submitted that the trial court sought to re-write a contract for the parties. Appellant cited case of **National Bank of Kenya Ltd v Pipeplastics Samkolit (K) Ltd (2001) eKLR & Another (pg 4)** where the court observed:

***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”***

33. The Respondent in his evidence described how he would collect money from the livestock traders during market days. Though he stated that he would remit 50% of the collections to the Appellant, no documentary evidence to that effect was adduced. It is not in dispute that Respondent would retain the whole or part of revenue collected from traders. We do say whole because the Respondent failed to produce receipts of any revenue remitted to the Appellant. Under provisions of **Section 109 of the Public Finance Management Act** it is an illegality for the Respondent to retain money from the source. Under **Article 207(1) of the Constitution of Kenya 2010** all monies collected on behalf of a County Government must be remitted to the respective County Revenue Fund. Such money can only be withdrawn from the County Revenue Fund as a charge against the revenue fund if provided for by an Act of parliament or through a County Assembly appropriation legislation as provided for under **Article 207(2) of the Constitution of Kenya 2010**.

34. Further under **Article 207(3) of the Constitution** any monies collected on behalf of the County Government cannot be withdrawn/spent without approval by controller of budget. In the circumstances the Respondent's activity to collect revenue on behalf of the Appellant, County Government of Laikipia and to pay himself from such revenue was an illegality **ab ignition**.

35. That no contract whether written or implied can validate or sanctify an activity which offends the law. The contract between the Respondent and Appellant whether implied or explicit if any was tainted by illegality and is therefore not enforceable.

36. It would fall within the category of what is referred to as an illegal contract under the law and which offends public policy. Appellant relied on **Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & Another [2016] eKLR (page 9)**

37. The learned trial Magistrate awarded general damages of Kshs.200,000/- which was erroneous as held in **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** where court observed that:

***“Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the Respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages. ....”***

38. In his evidence in chief (**PW1**) stated that he used to earn a sum of Kshs.55,000/- per market day. However the Respondent failed to produce audited accounts.

39. he also stated that from his income he would incur a daily expenditure of Kshs.6,500/- on security and fuel and Kshs.25,000/- on employees expenses on each market day. Adding the two (2) category of expenses the total daily expenditure would amount to Kshs.31,000/- which amount should have been set off from the alleged gross daily income of Kshs.55,000/- to make a net income of Kshs.23,000/- per market day.

40. The trial Magistrate therefore erred in his assessment of damages by basing the Respondent's income on a gross sum of Kshs.55,000/- instead of a net sum of Kshs.23,500/- which the Respondent conceded that he incurred in the course of his activities in the livestock markets.
41. The Respondent did not also tender any documentary evidence in form of audited accounts, audit report or even a simple schedule to prove how he arrived at a figure of Kshs.55,000/- per market day.
42. This claim falls under the realm of special damages and the principle of parties throwing figures to court is one which is alien to litigation in an adversarial set up as was observed in ***Jeffrey Ndungi Sila v Kenya Copyright Board & 2 Others [2018] eKLR***
43. The Respondent's claim of lost income relates to the unexpired period of six (6) months. The trial court awarded the Respondent a sum of Kshs.55,000/- per market day at the rate of two (2) market days per week translating to a sum of Kshs.2,640,000/-
44. The Respondent did not demonstrate to what extent he mitigated the loss as would have been expected of a reasonable man. The assessment of Kshs.55,000/- per market day for the remainder of six (6) months term was therefore excessive and erroneous. Appellant relies on ***Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR (page 6 and 7)***

#### **RESPONDENT'S SUBMISSIONS:**

45. The respondent submits that the appellant admits that there was engagement between the Respondent and Appellant's predecessor Rumuruti Town Council and confirms having adopted the same when it assumed the management of services as a County Government.
46. It is instructive to note that the Appellant, upon taking over the functions and operations of the Rumuruti Town Council, continued with the engagement with the Respondent and benefited from it for a lengthy period without raising any legal issues.
47. Further it is contended that, the argument that the Respondent was only pre-qualified and listed as a contractor for provision of auctioneering services among other Applicants and that the Respondent would be required to participate in request for proposals process among other pre-qualified participants when need arises from user departments does not hold any water considering the fact that the Respondent did not and could not have engaged itself in the tasks assigned without the active involvement and participation of the Appellant through its concerned agents.
48. On ***Section 2(C) of the Public Procurement and Asset Disposal Act it is submitted that***, same places the Appellant in a position to invite pre-qualified entities through a request for proposals. However, in the instant case, the Appellant has failed to state or confirm whether or not it invited the pre-qualified entities including the Respondent through any such request for proposal. It is obvious therefore that the Appellant is using or attempting to use a matter of technicality on its part in its ill-fated attempt to invalidate the work done by the Respondent from which the Appellant admittedly benefited for a period beyond 5 years.
49. Clearly, the Appellant was under a statutory duty to follow the cited procurement laws to ensure strict adherence thereof failing which it cannot be heard to place blame on the Respondent for any failure or omission on its part.
50. It is submitted that, it would not matter the nature or the dynamics of the work done as long as the service advertised, applied for or tendered, awarded and performed was understood by the parties to be a contract of provision of auctioneering services. Having understood the same to be provision of auctioneering services and not having altered the description of the services in its advertisement in any manner whatsoever, the Appellant is factually and legally precluded from alleging in this appeal that the Respondent did not offer auctioneering services.
51. It is the Respondent's further submissions that the contract ought only to be understood from the context of what was advertised and what the Respondent applied for and was pre-qualified to offer. An attempt by the Appellant to view it from its own nature and working would be a kin to rewriting the contract in a manner not understood by the parties.
52. There was no contract between the Appellant and the Respondent on the issue of money already deposited in the County Revenue Fund. As such, there is no such contract entered into between the parties which can be described as illegal, null and void ab initio as the Appellant submits.
53. The trial court's reasons for awarding general damages are valid to the extent that the Appellant purports to run away from a valid contract from which it benefited for a period of 5 years. The Respondent availed all the necessary and relevant documentary evidence to prove the earnings to a balance of probability.
54. It is submitted that the finding of the trial court is accurate and reasonable and thus Court urged to uphold the same in entirety.

#### **ISSUES, ANALYSIS AND DETERMINATION**

55. ***After going through the pleadings, proceedings and submissions, I find the issues are; whether the respondent proved his case of breach of contract on balance of probabilities? If above in affirmative, was damages awarded proved on balance of probabilities? What is the order as to costs?***
56. The Respondent tendered for prequalification to offer auctioneers and disposal services under Tender No. LCG/B31/2014 – 2015/16 as can be discerned from letter dated 8th September, 2014 produced as Respondent's Exhibit 9 (P-Exhibit 9) and contained on page 193 of the record of appeal. By a letter dated 8th September 2014 the appellant notified the Respondent that his tender to offer auctioneers and disposal services was successful. Thus it is clear that:

57. The Respondent was pre-qualified and listed as a contractor for provisions of auctioneers and disposal services amongst other Applicants.

58. The Respondent would be required to participate in the request for proposals process among others who had been prequalified.

59. The category of services which the Respondent was prequalified for amongst others was to provide auctioneers and disposal services. Further the Respondent was to participate in the request for proposals whenever a need for those services arose.

60. There is no where in evidence tendered by the Respondent discloses that there was any request for proposal process and to that extent letter dated 8th September, 2014 could not be a contract between the parties. Without a request for proposals process, the letter could not be deemed to be a contract creating specific obligations between the parties and to that extent holding that there was contract on that basis is erroneous.

61. In page 4 of that judgment paragraph 2 trial court relied on the P-Exhibit 9 and observed that the letter was a contract that the Respondent lied upon to prove his claim.

62. Under Section 92(c) of the Public Procurement and Asset Disposal Act one of the methods of procurement is through request for proposal and that is what P-Exhibit 9 envisaged.

63. After going through the pre-qualification procedure the Respondent had to be invited through a request for proposals as envisaged under Section 95(3) of the Public Procurement and Disposal Act.

64. The Respondent' would only have been in lawful contract if he had met the requisite criteria for procurement of his services through direct procurement pursuant to Section 103 and 104 of Public Procurement and Asset Disposal Act which was not the case herein.

65. The services which the Respondent purported to offer did not fall within the description of auctioneering services.

66. The Respondent's side the witnesses were himself (PW1) and PW2 who gave sworn evidence. The Appellant's sole witness was **Nelson Ochungo** also gave sworn evidence. From the evidence of PW1 and PW2 following facts emerged and are not in dispute:

*a) It was admitted by both PW1 and PW2 that what Respondent was doing was not auctioneering services but revenue collection. In fact, PW1 stated that he did not use any auctioneers hammer.*

*b) Respondent would collect revenue from the livestock vendors and buyers on a 50:50 bases.*

*c) Respondent did not produce any official receipt from the Appellant as evidence of any revenue remitted to the Appellant.*

*d) Respondent would retain a 50% commission at the source of revenue.*

*e) From revenue received PW1 would allegedly incur expenses and on cross-examination the expenses worked out to about Kshs.25,000/- per market day.*

*f) What PW1 referred to as a contract between him and Appellant was Exhibit 9 a pre-qualification letter dated 8<sup>th</sup> September, 2014.*

67. It is the Respondent's contention in pleadings evidence that there existed a contract between him and Appellant. Paragraphs 3, 6, 7, 9, 10, 12 and 13 of the amended plaint envisage existence of a contract. The Respondent did not produce any written contract between him and Appellant. The wording of that document would indeed demonstrate that it would not have amounted to a contract. Paragraph 2 of that letter reads:

***“On accepting his offer, you will be required to participate in the ‘request for proposal’ process among others who have been pre-qualified as per when need arises from the user departments within Laikipia County Government.”***

68. The Respondent was merely shortlisted amongst others to offer auctioneering services. The Respondent may mistakenly have construed this to mean that he was awarded a contract to provide services.

69. The argument by Respondent that there existed an implied contract would not hold because that position was not pleaded by the Respondent in his amended plaint. It is trite law that the court in a civil suit cannot entertain an issue which is not pleaded and this position was well addressed in the reported decision of ***Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR*** where court held;

***“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong, which tends to be at variance with the pleadings must be disregarded”***

70. It is this court's view that, there was no contract between Respondent and Appellant as pleaded in the plaint, thus the Respondent cannot be said to have proved his case on breach of contract on evaluation of evidence and pleadings.

71. A perusal of the witness statement and by reading of evidence of PW1 and PW2 would clearly elucidate the nature of the activity which Respondent was carrying out in Rumuruti Livestock Market. It was explicitly conceded in cross – examination by both PW1 and PW2 that they were collecting revenue from the traders.

72. It is worth noting that the Respondent was not pre-qualified to carry out debt/revenue collection services and therefore his activities were ultra vires what the pre-qualification envisaged.

73. That is a departure between the Respondent’s case as pleaded and what emerged from the evidence. The Respondent therefore pleaded one case but by his evidence he is out to prove a different case altogether.

74. It is not in dispute that Respondent would retain the whole or part of revenue collected from traders. We do say whole because the Respondent failed to produce receipts of any revenue remitted to the Appellant. Under **provisions of Section 109 of the Public Finance Management Act** it is an illegality for the Respondent to retain money from the source.

75. Under **Article 207(1) of the Constitution of Kenya 2010** all monies collected on behalf of a County Government must be remitted to the respective County Revenue Fund. Such money can only be withdrawn from the County Revenue Fund as a charge against the revenue fund if provided for by an Act of parliament or through a County Assembly appropriation legislation as provided for under **Article 207 (2) of the Constitution of Kenya 2010**.

76. Further under **Article 207(3) of Constitution** any monies collected on behalf of the County Government cannot be withdrawn/spent without approval by controller of budget. In the circumstances the Respondent’s activity to collect revenue on behalf of the Appellant, County Government of Laikipia and to pay himself from such revenue was an illegality ab initio.

77. It would fall within the category of what is referred to as an illegal contract under the law and which offends public policy. See **Root Capital Incorporated v Tekengu Farmers’ Co-Operative Society Ltd & Another [2016] eKLR. the court observed:**

***“The principle has been followed in the High Court case (Githinji, J) in Mohamed v Attorney General [1990] KLR 146 and Nyeri Civil Appeal No. 40 of 2001, Nyeri County Council v Monicah M. Mwangi (Kasango, J) where it has been held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.***

***It is this clear that a contract that is illegal is not enforceable and it is a nullity or void ab ignition.”***

78. On the above findings alone, the succeeds, however will briefly allude to the issues of damages.

79. It is trite law that in a claim of the instant nature where the Respondent seeks an award of damages, the court should in its judgment make an assessment of damages that it could have awarded the Respondent has the Respondent succeeded in his case.

80. In the amended plaint, the Respondent seeks for a sum of Kshs.55,000/- per market day for 76 market days.

81. This claim entails what the Respondent in his estimation anticipated to earn. Claim is therefore anticipatory, speculative and futuristic.

82. During cross-examination PW1 admitted that the sum of Kshs.55,000/- per market day was a gross amount and all his expenses would be defrayed from the gross income. PW1 on cross – examination gave a breakdown of expenses totaling to about Kshs.25,000/- which would therefore have reduced the gross income by that amount and thereby translate to Kshs.30,000/-.

83. The Respondent did not also tender any documentary evidence in form of audited accounts, audit report or even a simple schedule to prove how he arrived at a figure of Kshs.55,000/- per market day.

84. The element of initial period of having single day(Thursdays) per week market day and later two Days (Mondays and Thursdays) market days per week were not demonstrated as how translated to the claimed amount in terms of number of goats and cows sold and bought.

85. This claim falls under the realm of special damages and the practice of parties throwing figures to court which is alien to litigation in an adversarial set up as was observed **Jeffrey Ndongi Sila v Kenya Copyright Board & 2 Others [2018] eKLR.**

86. In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721** where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

***“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”***

87. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See **Total (Kenya) Limited**

Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd.)

88. Thus the court finds that the appeal has merit and is hereby allowed with orders;

*i. Appeal is allowed and as appellant also participated in invalid contract, it deserves no costs thus parties bear their own costs in trial court and in the appeal.*

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4TH DAY OF NOVEMBER, 2021.

.....

CHARLES KARIUKI

JUDGE