



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

NYAMIRA HCCC 3 OF 2019

NOA INVESTMENT LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....DEFENDANT

JUDGMENT

1. By the Plaintiff dated 18th June, 2019 filed herein on 20th June, 2019 the Plaintiff claims a sum of Kshs.24,408,481/= from the Defendant being an outstanding balance for accountable documents delivered to the Defendant on various dates from the year 2013 to 2015.

2. The plaintiff avers that sometimes in the year 2013, the Defendant awarded to it a tender to deliver an assortment of receipt books for collection of revenue. He avers that more specifically in the year 2013 through a Procurement Officer by the name Obaga, the Defendant made an order for books worth Kshs.8,445,400/= which were duly delivered and that in the year 2014 another order for receipt books worth Kshs.13,305,851/= was made by Finance Minister John Omanwa and Chief Officer Finance Richard Okeyo and the same were also delivered. The Plaintiff avers that thereafter in the year 2015 one Jackline Kemunto, a Chief Officer Finance of the Defendant made an order for receipt books worth Kshs.6,500,000/= which the Plaintiff again fully delivered. The Plaintiff avers that the value of all the receipt books amounted to Kshs.28,248,981/= out of which the Plaintiff was paid Kshs.3,840,500/= but despite demand and notice of intention to sue the Defendant has refused, failed, neglected and/or ignored to pay the balance hence this suit. The plaintiff therefore prays for judgment for the outstanding balance of Kshs. 24,408,481/= together with interest and the costs of this suit.

3. By its written statement of Defence filed herein on 20th August, 2019 the Defendant vehemently denied the claim and put the plaintiff to strict proof thereof.

4. At the hearing the plaintiff called its Director Richard Kwebi Kwanga (PW1) and four other witnesses.

5. Richard Kwebi Kwanga (PW1) testified that before the creation of the County Government of Nyamira his company, the Plaintiff herein, used to supply revenue collection receipt books to Nyansiongo Town Council but after the enactment of the Constitution of Kenya 2010 the County Government of Nyamira was created and Nyansiongo Town Council ceased to exist rendering the books obsolete. He stated that sometimes in the year 2013 he received a telephone call from Stephen Obaga, the then Secretary of the Defendant's Tendering Committee who invited him and two others to send a request for quotation for the supply of accountable documents to the Defendant. He stated that he duly appeared before the Tender Committee and presented his bid alongside the other two bidders after which members of the committee visited his premises for inspection and that thereafter he was asked to present samples for evaluation by the Evaluation Committee. He stated that about a week later he received a telephone call informing him that he had emerged the winner and he had been awarded the tender and would be issued with the tender documents in due course. PW1 testified that on 28th June, 2013 he received a Local Purchase Order (LPO) for supply of receipt books worth Kshs.235,000/- which goods he duly delivered and was paid for. It transpired during the hearing however, that that was the only LPO he received from the defendant although he continued supplying goods to the Defendant. It also transpired that sporadic payments for the goods supplied were made. The court was told that the Defendant urgently required the receipt books for revenue collection hence the reason the procurement was done without LPO's. PW1 further testified that there was no written contract between the Plaintiff and the Defendant save for that one LPO dated 28th June, 2013 and that he supplied the goods upon oral requisitions and instructions of officers of the Defendant. He stated that he wrote a letter requesting for LPO's but none were forthcoming and so he continued to supply the goods on the strength of the internal requisitions and instructions that he received from the officers. PW1 contended and this was confirmed by Stephen Obaga (PW2) and Ben Aoko (PW5), both of whom were officers of the Defendant at the material time, that audits were done by the Defendant which confirmed that the Plaintiff indeed supplied the goods. Stephen Obaga (PW2) testified that the Defendant used the receipt books supplied by the Plaintiff until the end of the financial year 2015. He confirmed that he invited the plaintiff and two other bidders to send a request for quotation and that the plaintiff won the tender. PW2 also testified that he issued the Plaintiff with the LPO dated 28th June, 2013 for goods valued at Kshs. 235,000/= and stated that the same formed the contract between the Plaintiff and the Defendant. He confirmed that he did not issue the Plaintiff with any other LPO although the Plaintiff continued supplying goods to the Defendant.

6. On his part, Ben Aoko (PW5) testified that at the material time he was the interim Head of Internal Audit at the Defendant County Government and that in regard to this case, he carried out an audit and prepared a report dated 15th March, 2015 which confirmed delivery by the Plaintiff of goods worth Kshs.21,748,981/=. He however stated that the file he used to prepare the report was incomplete as some documents were missing. He stated that afterwards one B S Mecha took over the office and a second audit was carried out which yielded similar findings. PW2 urged this court to grant the Plaintiff's prayers and stated that each of the deliveries by the plaintiff constituted a contract as the same accorded the terms and conditions in the delivery notes. He also stated that at the time the deliveries were made the Defendant lacked procurement structures.

7. The other witnesses called by the Plaintiff were Japheth Ondicho (PW3), an Accountant at the Plaintiff Company and Stephen Ondieki (PW4) an employee of the Plaintiff. Both PW3 and PW4 confirmed that during the period in issue the Plaintiff supplied receipt books to the Defendant and was paid for some but not for others. Stephen Ondieki (PW4) testified that he took part in the actual deliveries to the Defendant's stores alongside PW3 and one Faith Kerubo.

8. In support of his case the Plaintiff through its witnesses PW1, PW2, PW3 and PW4 tendered several documents in evidence which this court admitted as Exhb. 1 – 12.

9. On its part, the Defendant called four witnesses who all testified that the Defendant indeed requisitioned and received goods from the Plaintiff from the year 2013 to the year 2015. Jacob Omasaki (PW1) testified that he was the Defendant's Assistant Director for Revenue at the time and that his department made a requisition for accountable documents to the procurement department and the same were supplied by the Plaintiff. He stated that the accountable documents were received by store clerks and that he himself played no role in the procurement process. He stated that his role ended once he made and forwarded his requisition to the Procurement and Finance Departments. Peres Nyakerario (PW2) testified that she is the Director, Supplies and Management. She confirmed that the Tender Committee gave the Plaintiff authority to supply accountable documents worth Kshs.2,071,500/= as per minutes of the Tender Committee meetings held on 10th October, 2013 and 16th October, 2013. She confirmed that the Plaintiff was indeed among the bidders who were prequalified to supply the goods although he received only one LPO for Kshs. 235,000/=. She explained that the Procurement Department was responsible for the procurement process and stated that the tender for Kshs.2,071,500/= was regular and the Plaintiff was paid. She stated that any procurement for goods worth more than Kshs.2,000,000/= had to proceed by way of open tender. She also testified that from the year 2016 the accountable documents were supplied by the Kenya Literature Bureau and further that whereas all those with pending bills were invited to forward the same to the Defendant, the Plaintiff did not send any request for payment. Jane Nyaboke Nyacheo (DW3) testified that she in fact received goods from the Plaintiff during the period in issue. She stated that she was in charge of the store where the goods were delivered.

SUBMISSIONS

10. Counsel for parties summed up their cases through written submissions. Learned Counsel for the Plaintiff submitted that the procurement of the goods was done under the provisions of the Public Procurement and Assets Disposal Act, 2005 (now repealed); that even though there was no formal contract between the Plaintiff and the Defendant, the Plaintiff supplied goods on the basis of basic trading terms agreed between it and the Defendant; that, the Defendant selected the plaintiff as a supplier through a prequalification procedure under Section 33 of the Public Procurement and Asset Disposal Act 2005 and that the goods would be ordered by employees of the defendant either through requisition, LPOs or phone calls depending on the urgency. Counsel submitted that the payment of invoices worth Kshs. 3,850,500/- against an LPO of Kshs. 250,000/- is enough proof that some of the goods were supplied without any written LPOs and there was therefore a **trading term** or **understanding** between the parties on the payment of the subsequent invoices. To support this submission Counsel relied on the decision in the case of **Techad Steam & Power Limited v Mather & Platter (K) Limited**.

11. It was also Counsel's submission that there existed an **implied contract** for supply of accountable documents between the Plaintiff and Defendant and that the same meets the essentials of a contract under **Section 3(1) of the Sale of Goods Act, (Cap 16 LOK)** and that, the terms of the contract are **implied by the supply and delivery of the goods and the payment of the initial invoices**. Counsel contended that the parties transacted consistently for the period between 28th June 2013 and 15th October 2015 and there was an implied term that the payment would be made promptly upon delivery. To support this submission Counsel cited the case of **Rose and Frank Co. v J R Crompton & Bros Ltd (1923)2 K B**.

12. Finally, learned Counsel for the Plaintiff submitted that **Section 127 (12) of the Public Procurement and Asset Disposal Act, 2015** provides for a single source selection which may be appropriate for tasks that represent a natural continuation of previous work carried out by a firm and that **Rule 62 of the Public Procurement and Disposal Regulations 2006** applied as the goods were required urgently and also because they were specialized goods. Counsel submitted therefore that the procedure followed by the defendant was necessary in the prevailing circumstances. Counsel also asserted that at the time, the Nyamira County Government did not have qualified personnel and that those they had were not abreast with the relevant procurement laws. He also asserted that as the procuring entity the Defendant failed to document the required processes thereby compromising both the stores and the procurement department and that it was the responsibility of the Defendant's accounting officer to justify single-sourcing selection or direct tendering prior to the procurement, an omission which the Plaintiff cannot be faulted for.

13. On their part, learned Counsel for the Defendant submitted that the procurement of the goods in issue in this case was made under verbal instructions of the Finance Minister, an unauthorized person who lacked capacity to procure goods on behalf of the Defendant in that the said person did not have capacity to issue LPOs and neither did he work in the procurement department; Secondly, that the Plaintiff's claim of Kshs. 24,248,941/- was not supported by evidence as there was no written contract between the Plaintiff and the Defendant and no LPOs were issued for goods worth the amount claimed and further that the Plaintiff was only issued with one LPO for Kshs. 235,000/- and that any deliveries over that amount, if any, were supplied in contravention of the provisions of the Public Procurement and Disposal Regulations 2006. Counsel contended that there was no emergency for the goods and even if there was, LPOs had to be issued first to determine the goods to be supplied. Counsel for the Defendant asserted that the alleged goods were supplied privately to a private person and not to the defendant and that the procurement was conducted contrary to the laws governing public procurement and it was therefore not binding on the Defendant. Counsel urged this court to find that the Plaintiff did not prove its claim to the required standard and dismiss it with costs. Counsel placed reliance on the case of **Pakatewa Investment Company Limited v Municipal Council of Malindi [2016]**

14. In further submissions filed herein on 12th November 2021, and which this court admitted as a reply to those of the Defendant, Learned Counsel for the Plaintiff pointed out that the law applicable in this case is the Public Procurement and Asset Disposal Act, No. 3 of 2005. Citing Section 27 (1), (2), (3), Section 34 (1) of that Act and Article 227(1) of the Constitution Counsel submitted that the obligation to ensure that the transactions between the Plaintiff and the Defendant complied with the law lay upon the Defendant but not the Plaintiff. Counsel submitted that the supplies were required urgently as it would have otherwise led to a huge loss of revenue for the Defendant. Counsel asserted that the Plaintiff was not limited to enter into a written contract with the Defendant as prescribed under **Section 33** of the Act and that the tenders were procedurally, competitively and lawfully awarded. Counsel also relied on **Section 88 (a)** of the Act to state that it permitted a procuring entity to use a request for quotations if the same was for goods that were readily available and there was an established market. Counsel reiterated that the accountable documents were always required urgently and had security features which meant they could only be procured from a reliable source. Counsel contended that it became imperative that officers of the Defendant seek the services of the Plaintiff to supply the same since had had dealings with him before. Counsel also contended that there was a shortage of LPOs. Counsel further cited **Section 37(2)** of the Act and stated that the Plaintiff company reduced the request for quotations made to it by the Defendant's employees into writing through several correspondences as required by the law. Counsel submitted that it was observed by the Defendant's own Director of Audit and Risk Management that the transaction revealed serious weakness on the part of the Procurement Department. Counsel stated that since there was uncontroverted evidence that the Plaintiff supplied the goods and was not paid for the same and this was not rebutted the lack of rebuttal amounted to a clear admission and hence judgment should be entered in the Plaintiff's favour. Counsel urged that the Plaintiff stands to suffer substantial loss were this court to find otherwise.

15. From the evidence adduced by both sides it is not disputed that between 2013 and 2015 the Defendant through its various departments requisitioned for accountable documents from the Plaintiff and the same were supplied by the Plaintiff. It is also not disputed that the accountable documents were in the nature of receipt books which the Defendant County required for collection of revenue at various points. It is also not in dispute that the Plaintiff supplied the receipt books up until the end of 2015 when that task was taken over by the Kenya Literature Bureau. The other facts not in dispute are that the tender for the supply of the receipt books was a direct tender although at the initial stage quotations were sought from the plaintiff and two other bidders. It is not also disputed that save for the Local Purchase Order dated 28th June 2013 for Kshs.235,000/= there was no other LPO issued. Indeed, it was PW1's evidence that the Plaintiff continued to supply the goods upon the oral requisitions and instructions from officers of the defendant. The Plaintiff's evidence was that nevertheless it supplied goods worth Kshs.28,248,981/= out of which the Defendant only paid Kshs.3,840,500/= leaving a balance of Kshs.24,408,481/= The Plaintiff's witnesses produced delivery notes and invoices which proved the deliveries and amounts and this agrees with the submission of learned Counsel for the plaintiff that this evidence was not controverted. The issues for determination therefore are:-

- a) *Whether the Procurement and Supply of goods by the Plaintiff to the Defendant gave rise to a contract between the parties.*
- b) *If so, whether the contract between the parties is enforceable and whether the Plaintiff is entitled to the reliefs sought.*
- c) *Who bears the costs of this case.*

16. **Issue No. 1** – The Defendant in this case is a public entity and as correctly submitted by Counsel for the Plaintiff the law applicable to this case is firstly, **Article 227(1) of the Constitution** which obligates state organs and public entities to **procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective** and secondly the **Public Procurement and Assets Disposal Act of 2005** which provided the framework within which policies relating to procurement were to be implemented at the time material to this case. That **Act** has since been replaced by the **Public Procurement and Assets Disposal Act of 2015** but for the purposes of this case regard shall be had to the **Act of 2005** as that was the law in force at the time.

17. It is the Plaintiff's case that he supplied the receipt books to the Defendant on the strength of a tender that was awarded to him by Stephen Obaga (PW2) in the year 2013 a fact which was confirmed by PW2. PW2 testified that he invited the Plaintiff and two other entities to send a request for quotation and that the Plaintiff emerged the winner. It is instructive that no tender documents were produced in evidence because according to the Plaintiff none were issued. It is however evident that upon **"winning the tender"** the Plaintiff only received one Local Purchase Order (LPO) to supply receipt books worth Kshs.235,000/-. That LPO was duly settled and there is no issue arising from the delivery thereon. It is my finding that whatever goods the Plaintiff supplied after this Local Purchase Order it was not part of the **"tender he had won"** as the LPO was exhausted once he supplied goods worth that amount. In my view, the tender for supply of goods won by the Plaintiff upon invitation by PW2 ended after he exhausted the LPO (Local Purchase Order) of 18th June, 2013 and any other supply after that amounted to a direct procurement. Indeed, PW1 confirmed that after that LPO the Plaintiff supplied goods upon the oral requisition and instructions of the employees of the Defendant. The requisitions and instructions were invariably made through telephone calls. Direct procurement was and is still permitted under the Public Procurement and Assets Disposal Act provided it meets the parameters set out in **Section 29 of the Act**. Section 29 of the Act of 2005 required that all procurement be done by way of open tendering. However, it allowed procurement entities to use alternative procurement such as restricted tendering or direct procurement. That alternative procedure was however to apply only where: -

- a) *The procurement entity had obtained the written approval of its tender committee; and*
- b) *the procurement entity recorded in writing the reasons for using the alternative procurement procedure."*

18. This court was shown minutes of a meeting of the County Tender Committee held on 10th October, 2013 which authorized the Plaintiff to supply assorted receipt books (**See Min 6/2/2013 of the minutes produced in evidence as EXBD 1 by Jacob Mong'are Omosaki DW1.**) It is however instructive that the said minutes authorized procurement for a sum of Kshs.2,071,500/= only. The court was also shown minutes of a meeting of the Tender Committee held on 16th October, 2013 which again authorized the Procurement Committee to procure from the Plaintiff receipt books worth Kshs.2,071,500/= only. The minutes of those two meetings mean that the Procurement Department complied with Section 29(a) of the Act as it had the written approval of the Tender Committee. However, there is no evidence that it complied with Section 29(b) as no written reasons for using the alternative procurement procedure were exhibited in this court. In

essence therefore although there were minutes authorizing the procurement, the procurement did not accord fully with the provisions of Section 29 of the Act 2005.

19. Moreover, **Section 74 of the Act** provided that direct procurement was to be used only as long as the purpose was not to avoid competition and only if:-

“a. There was only one person who could supply the goods, works or services and;

b. There was no reasonable alternative or substitute for the goods, works or services. (See Section 74 (2).)”

It was not demonstrated to this court that only the Plaintiff was capable of supplying the receipt books or even that there was no reasonable alternative for the receipt books sourced from the Plaintiff so again in so far as the procurement was a direct and single sourcing one it violated **Section 74 (2)** of the Act.

20. In regard to the assertion that the procurement was done directly due to urgency, Section 74(3) of the Act stated: -

“A procuring entity may use direct procurement if the following are satisfied: -

a) there is an urgent need for the goods, works or services being procured;

b) because of the urgency the other available methods of procurement are impractical; and

c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.”

It is my finding that all the above conditions had to be met for the procurement to be legal and that cannot be said of this case. In my considered view a mere assertion that the need for the receipt books was urgent as the Defendant would have lost revenue does not suffice. in any event **Section 75 (c) of the Act** further required that, even then, **the contract resulting from the direct procurement was to be in writing and signed by both parties**. There was no contract in writing between the Plaintiff and the Defendant County so that even if there was urgency for procurement of the goods that contract would still be in violation of the law. Further as I have stated the Procurement Committee could not have entered into any direct procurement without first giving reasons in writing for doing so to the Tender Committee. It is also worth noting that while the parties begun through a request for quotations (open tendering) they without any reasons whatsoever afterwards resorted to direct procurement hence locking out competition. In my view this was in violation of **Article 227(1) of the Constitution** and the law then applicable to procurement which both required that the procurement by public organs and entities was to be fair, competitive, transparent and equitable. The procurement herein was clearly neither of the above.

21. I am not persuaded by the argument that an oral or implied contract existed between the parties. This is because in my view the provisions of the **Sale of Goods Act** cited by Counsel for the Plaintiff to support that argument were expressly ousted by **Section 5(1) of the Public Procurement and Asset Disposal Act 2005** which stated: -

“5. Conflicts with other Acts.

(1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and Asset Disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services....”

In view of **Section 5 (1)** the argument that because the Plaintiff supplied the goods and the Defendant received them then an implied contract can be construed from the conduct of the parties cannot hold. **Section 75(c)** of the Act expressly provided and made it mandatory that the contract resulting from direct procurement be in writing and it follows therefore that there was no valid contract between the plaintiff and the defendant.

22. Counsel for the Plaintiff heaped blame on the Defendant for failing to ensure that the procurement complied with the law and urged this court to rule in favour of the plaintiff for that reason. On this it is my finding that the Plaintiff had a similar and equal responsibility to ensure that the procurement followed the law. His obligation is derived from Section 27(4) of the Act 2005 which at the time stated: -

“4. Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.”

The Plaintiff therefore had an equal responsibility to comply with and to see to it that the procurement complied with the provisions of the Act and hence the law. As the adage goes ignorance of the law is not a defence and therefore the Plaintiff's omission to ensure that there was a contract in writing before supplying the goods is not excusable. Accordingly, I find that there was no contract between the parties.

Issue No. 2.

23. I have already stated that given the provisions of **Section 5(1)** of the Public Procurement and Assets Disposal Act of 2005 the provisions of the **Sale of Goods Act** cannot be read into this case so as to find that there was an implied contract between the parties. It is my finding that the oral requisitions and instructions 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 the contract to be in writing. It is also my finding that once the plaintiff supplied

the initial batch of receipt books the need for the same ceased to become urgent and there was no further justification for the direct procurement and the procurement that continued until the end of 2015 was a violation not only of the law but of **Article 227(1) of the Constitution** which requires public organs and entities to award contracts in a manner that is fair, equitable, transparent and competitive. Any procurement that is in violation of the law and the Constitution is illegal. I find that the case of **Techarad Seam & Power Limited v Mather & Platter (K) Limited** cited by Counsel for the Plaintiff does not avail the plaintiff as the parties in that case were private entities and there was, unlike in this case, no public procurement involved.

24. My findings in this case find support in the case of **Royal Media Services V Independent Electoral & Boundaries Commission & 3 others [2019] eKLR** where the court held:-

“45.It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not to done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.

46. The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being overlooked. Non-compliance could easily be seen. For this reason this Court is unwilling to hold that RMS should be excused from the flawed process.

*47. But an argument had been made that not to allow the claim would be to hurt RMS and to allow IEBC to get away with services without paying for them. This Court is not unsympathetic to this argument yet there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *Ex lurti causa non oritur action*, that is from a dishonorable cause an action does not arise. There may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless. I reasoned as follows in Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards [2016] eKLR:-*

57. The Court reaches its decision even in the face of the submissions by the Claimant’s Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

58. If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.”

25. My findings also find support in the case of **Pakater Investment Company Limited Vs Municipal Council of Malindi [2016] eKLR** where the court stated: -

*“I do agree with the findings of the trial court that the proper procedure to procure the goods was not followed. Although it is not the work of a supplier to find out the internal workings of a public organization or a company as established in the *Turquand’s* case, at least the ordinary processes have to be followed. A supplier cannot expect to receive a phone call from an assistant supply officer to supply goods and jump into the process of supplying. One has to be pre-qualified...”*

The appellant cannot hide in the contention that it was not its duty to find out whether the process was followed. There is the basic business procedures which call for minimum due diligence....”

26. In the upshot I find that there was no valid contract between the parties herein capable of being enforced and that the plaintiff is not entitled to the reliefs sought. It would not in my considered view, be in the public interest to allow a claim that is premised on a transaction that went contrary to the Constitution and the law. The claim is accordingly dismissed.

Issue No. 3

27. Costs follow the event and in this case the Plaintiff shall bear the costs of the suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF DECEMBER, 2021.

E. N. MAINA

JUDGE