REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 153 OF 2017

1. ALPHAS NGONDA – CHAIRMAN

2. SAMUEL CHAKA – SECRETARY

3. SAUMU MUSADI – TREASURER

4. KAFUNDINI PRIMARY SCHOOL

MANAGEMENT COMMITTEE.....APPELLANT

VERSUS

JOSEPH KITONGA KITHUKU t.a

MUKI HARDWARE & GENERAL WORKS.....RESPONDENT

J U D G M E N T

1. Before the trial court, the respondent sued the Appellant for the recovery of the sum of Kshs.412,980/= being the balance of sum due and owing to the respondent by the appellant on account of goods sold and delivered by the said respondent to the Appellant. It was pleaded that the Appellant did issue a local purchase order in the sum of Kshs.1,923,620 out of which the respondent was paid Kshs.1,510,640 leaving the balance sued for.

2. When served, the Appellant filed a defence in which it was asserted that the suit was bad for being in contravention of Order 2 Civil Procedure Act purchase of any goods the respondent was denied even issuance of local purchase order was denied.

3. It was then pleaded without prejudice that any moneys due to the respondent was paid in full and that any further claims were a scheme by the respondent to extort money by unlawfully inflating and exaggerating the prices of goods supplied and by falsifying delivery of the material purported to have been delivered.

4. Particulars of fraud and fabrication were given to include use of school letter records without knowledge of management; raising invoices from goods not delivered; inflating the prices of goods supplied, failing to deliver the goods as agreed and failing to tender for supply as required by the law.

5. The existence of an enforceable contract between the parties was denied together with the allegations that conditional credit was given and strict proof was invited.

6. With the plaint, the respondent filed a list of documents which included a quotation on the school together with delivery notes. For the defendant a list of documents was filed which included quotations including revised quotation coping the sum at Kshs.1,510,640/= cheques paid to the respondent and an audit report of the school dated 18/5/2015.

7. When parties tendered evidence, the respondents side relied on own evidence while the Appellants side called three witnesses, the headmaster, the auditor authorized by the ministry and the head of school infrastructure Kwale County.

Evidence by the respondent

8. In his evidence the respondent told the trial court that he knew the appellant as having given him an order for the supply of construction

materials. He there prepared a quotation and gave the same to the appellants. He also said that the school needed some money for own use and made a request in writing. He said that he supplied goods worth Kshs.1,923,620/= for which he was paid Kshs.1,510,640/= leaving a balance of Kshs.412,980/= outstanding. He did produce the quotation, delivery and a letter requesting for some cash. He said all the delivery notes were recalled and acknowledged by the Appellant. He said that no reason was advanced for failure to pay the balance and therefore he prayed for judgment on the sum together with costs.

9. On cross-examination he confirmed knowledge that the appellant's school was public but did not know if any tenders were floated and advertised and that his quotation did not have his name as the supplier. He then admitted payment of Kshs.1,510,640/= and that he had quoted from flowered chipboards but supplied plain ones. He also confirmed that the invoices had alterations and that some items were omitted by mistake. He added that he gave Kshs.150,000/= in cash to the school.

10. The evidence by DW 1, the headmaster was to the effect that they contracted the respondent to supply building materials and the materials supplied from 30th April 202 and that an invoice of Kshs.2,171, was brought to school before all the materials were supplied. He said that the prices were exaggerated in that iron sheets was quoted for Kshs.710,000/= when the price was Kshs.380,000 just like only 130 bags of cement was delivered but the respondent charged for 180 bags. He further pointed out other under delivered items to include, earth rods, electric settings and timber which under delivered by 1000 feet.

11. Upon complaint, the respondent sought to adjust the sum but only did so in part. Then he said, he paid to the respondent the sum of Kshs.1,510,610 being the sum justly due to him according to the estimates dated 25/6/2012.

12. He then said that after the issue came to court he invited an auditor to audit the accounts with the respondent who confirmed, that the respondent had no legitimate claim against the school.

13. In cross examination, he said that the prices were to cover a sum between Kshs.1,500,000/= and Kshs.1,700,000/= and that some of the goods invoiced for were never delivered or were exaggerated in prizing.

14. DW 2, the schools auditor gave evidence to the effect that when he audited the books he discovered several anomalies including the fact that the prices were charged after the award. He pointed out under delivery and hiked prices.

15. On cross examination, he said that he relied on an invoice to arrival at his report. He however denied having seen the invoices and delivery notes in school while insisting that there were recordings on foolscaps what he used.

16. For the 3rd witness, was the head of department of infrastructure, Kwale County. He said he was invited to the school for purpose of valuing the roof of a class on which there was a dispute with the supplier. He said that his evaluation showed that 82 Iron Sheets were used worth some Kshs.385,400/= unlike the quotation by the respondent of Kshs.639,200/=. In cross examination, he reiterated that 82 sheets were used and that being an engineer he was an auditor of materials.

17. Having taken the evidence and record submissions by parties the court delivered its reserved judgment on the 4/7/2017. In that judgment the court identified four issues for determination and determined all in favour of the respondent and therefore entered judgment for him in the sum of Kshs.412,980/= plus interests at court rates and costs.

18. It is that decision which has provoked this appeal in which the appellants have raised eight (8) grounds of appeal. Those grounds even if so proliferated really add up to no more than two:-

a) That the decision was against the weight of evidence.

b) That the finding that the tender process leading to the award was procedural.

Analysis And Determination

19. The first ground essentially asks the court to review the record at trial and to determine whether the finding by the trial court was in consonance with the evidence led or not. Having read the evidence led by the four witnesses, I must say that not so much was achieved by calling DW2 and 3. I say so because their evidence stirred more dust that shed light on the dispute at hand. Of the two, I find the evidence of DW2 is very difficult to follow and believe. Difficult to believe because while the court has been shown invoices and delivery notes, that auditor denied having seen any deliveries or invoices and opted to rely upon notes made on foolscaps by the headmaster. Owing to credibility levels of the two witnesses, I will decide this appeal based on the evidence of PW1 and that by DW1.

20. When cross examined, PW1 admitted that there was under delivery and overstatement of some items said to have been delivered. Of note is the under delivery of cement by 50bags and timber by 1000. There was also the dispute as to the length and quantity of the iron sheets to be delivered. These questions when asked of the respondents were never satisfactorily answered and therefore up to the close of the respondent's case, how the calculation of the sum claimed had been arrived at was not clear at all.

21. Against that incoherent evidence was the evidence by DW1 which was to the effect that there was under delivery of iron sheets by 270 metres but the invoice was for 680 metres in the sum of Kshs 710,000 and therefore an overcharge of Kshs 230,000. Then there was the invoice for 50 extra bags of cement not received and an under delivery of 100 feet of 2x2 feet timber and that a complaint was lodged and an agreement reached on adjustments. Faced with such evidence, no attempt was made by the respondent in cross examination to discredit the evidence. It then remained open by that evidence that there was both under delivery accompanied with overcharge and therefore there was no basis for the court to find and enter judgment for the respondent without addressing the contradictions. I do find that at the close of the respondents case there was doubt as to the authenticity of the quantity and value of the materials delivered and when evidence was led by the

appellants, it became clear that the public body had not received the value for the money it was being asked to pay. I therefore find that the respondent failed to prove his case on a balance of probabilities and therefore the judgment he obtained from the trial court was erroneous and is hereby set aside.

22. That determination should suffice to conclude this judgment but there was a matter I consider of grave public concern which was pleaded but the trial court seems to have closed over without much regard. It concerns the tender process leading to the contract between the parties. In his own words, the respondent denied knowledge of any tender process. His own words were:-

> **"Kifuduni Primary School is a government primary school. I got orders to supply the materials. I don't know if there were tenders. I tendered myself but I don't know if there was any advertisement."**

23. The law on public procurement is that procurement by public entities must be done pursuant to a system that is, fair, equitable, transparent, competitive and cost effective. These are prescription of the Constitution at article 227 pursuant to which parliament has enacted, the Public Procurement And Asset Disposal Act. The Act has elaborate procedures on how to procure and transparency by advertisement cannot be gainsaid. When the respondent said to court that he did not know if there had been an advertisement, the question that should have popped up in the courts mind ought to have been the legality of the contract sued upon. The court indeed captured the need for that determination at page 217 of the record of appeal but somehow viewed that to be beyond its duty. In that regard the court said:-

> **" I am not capable to regularizing the a flowed process of procurement and supply of items at this point…the defendant failed to adhere to correct procedures and they cannot come out claiming oppression at this point. I am unable to fathom how the supply agreement came to be, and why the defence would even ask for cash advances.**

24. Once the court found the process to have been flowed and *contrary to correct procedures* the propriety and the legality of the process and the ensuing contract ought to have concerned the court. The court ought to have been concerned to establish if there had been procurement by an obvious public entity. And the courts duty having been made easier by the respondent's evidence, it was a case for the court to find that a contract contrary to the law is unenforceable on account of public policy. A contract that is contra statute is incapable of enforcement in the same way public policy demands that nobody should gain from own wrong doing or illegal acts. The court is empowered to deal with such question so long as it comes to its attention even if the parties chose to keep it away. In ***Standard Chartered Bank ltd vs intercom services Ltd [2004] eKLR*** the court of appeal explained the application of the principle ***ex turpi causa non aritur actio*** in Kenya in the following words:-

> **"… if illegality is on the face of the contract upon which a claim is based, then the Court will deal with that question of illegality irrespective of whether it is raised in the statement of defence or not but if illegality is to be discovered from some evidence that the defendant has knowledge of, then illegality should be pleaded so that the plaintiff is pre-warned on the issue and it is only then that the Court can act on it".**

25. The respondent had expressly pleaded the fact of impropriety in the amended defense at paragraphs 5c and 6b and the responded did join issues with such pleadings in its Reply to defence filed thereafter. It was therefore a clear issue for determination which the court was bound to determine and was never determined. That failure qualifies as a failure to consider a relevant matter by the trial court and therefore an invitation by the appellate court to interfere with the decision thereby arrived. I do find that the evidence led showed that Public procurement and asset disposal act was not followed in awarding the tender upon which the suit was grounded and that on that account it was not open to the court to enforce such an agreement by entry of judgment. This present the second compelling ground that the appeal be allowed and the judgment of the lower court set aside.

26. My conclusion is that the appeal is wholly merited and it is allowed in that the judgment of the lower court dated 04.07.2017 is wholly set aside and in its place substituted with a judgment dismissing the suit with costs. The costs of the appeal are awarded to the appellant.

Dated, **signed** and **delivered** at **Mombasa** this **7th** day of **February 2020**.

P J O OTIENO

JUDGE