



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CIVIL SUIT NO. 6 OF 2018

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT

V E R S U S

CATHERINE NKIROTE T/A VENYTE SUPPLIERS & OSCATE SALES AND SUPPLIES.....1ST DEFENDANT

JOHN KAGO MURIMA..... 2ND DEFENDANT

JANE MAKENA MAINGI T/A QSETTERS INVESTMENTS.....3RD DEFENDANT

JUDGMENT

1. Through a plaint dated 28th March 2018 and filed on 24th March 2018, the Ethics and Anti-Corruption Commission (hereinafter the Plaintiff) a body corporate established under Section 3 of the Ethics and Corruption Commission Act 211, moved to this court seeking various orders against the defendants.

2. The 1st Respondent was at all material times to this suit trading in the name of Venyte Suppliers and Joscate Sales and Supplies whereas the 3rd Respondent her sister was also trading in the name and style of Qsetters Investments. The three respondents are also related by virtue of the 1st defendant being a wife to the 2nd respondent and also a sister to the 3rd defendant.

3. Among the prayers sought in the plaint against the defendants are;

a. A declaratory order against the defendants jointly and severally that the award of tenders NYS/93/2024-2015 and NYS IRT/35/2014-2015 was irregular and the subsequent contracts were void ab initio.

b. An order of restitution of Kshs. 45,517,241.40/- to the National Youth Service being the aggregate payments received by the 3rd defendant as a result of the irregular procurement process to be remitted by the defendants jointly and severally.

c. In the alternative, an order for restitution to the National Youth Service the sum of Kshs. 33,700,000/- being the difference between the payments received and the actual value of materials supplied to be remitted by the defendants jointly and severally.

d. Costs of the suit.

e. Interest on (b) and (c) above.

4. Contemporaneously filed with the Plaint is a Notice of Motion dated 28th March 2018 and filed the same day seeking;

1. This application be certified as urgent and service thereof upon the Defendants/Respondents be dispensed with in the first instance.

2. Pending inter parties hearing and determination of this application the Defendants/Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from withdrawing funds, transferring, disposing of, wasting or in any other way dealing with the following bank accounts:

- i. Account No. 002***** held at Equity Bank in the name of the 2nd Defendant;
- ii. Account No. 094***** held at Equity Bank in the name of the Venyte Suppliers;
- iii. Account No. 118***** held at Equity Bank in the name of Qsetters Investments;
- iv. Account No. 026***** held at Equity Bank in the name of Joscate Sales and Supplies; and
- v. Account No. 011***** held at Co-operative Bank, Kimathi Branch in the name of the 1st Defendant.

3. Pending inter parties hearing and determination of this suit the Defendants/Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from withdrawing funds, transferring, disposing or in any other way dealing with funds held in the bank accounts listed in prayer (2) above.

4. Pending the hearing and determination of this application, the 1st and 2nd Defendants/Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from transferring, disposing of, wasting, or in any other way dealing with parcel of land reference number L.R. 14968/210 I.R No. 97853.

5. Pending the hearing and determination of this suit, the 1st and 2nd Defendants/Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from transferring, disposing of, wasting, or in any other way dealing with parcel of land reference number LR. 14968/210 I.R No. 97853.

6. The costs of this application be provided for.

5. In response, the 2nd respondent filed a replying affidavit sworn on 10th April 2018 thus challenging the said application terming it frivolous and an abuse of the court process.

6. Having heard the said application inter partes, the court granted the prayers sought vide its Ruling dated 3rd May 2018. The matter was then scheduled for hearing of the main suit.

Plaintiff's Case

7. The Plaintiff's case is hinged on allegations of embezzlement of government funds through illegal and irregular contracts allegedly awarded to the defendants for the supply of various goods and services to the NYS at inflated prices when compared to the prevailing market prices then.

8. That upon receipt of information regarding the said contracts, the plaintiff embarked on investigations which revealed that;

i. that the National Youth Service under the Ministry of Devolution and Planning in the financial year 2014-2015 invited bids for the supply of bed making materials for refabricating double decker beds for use at the National Youth Service College.

ii. that under Tender No. NYS/93/2014-2015, three entities were invited namely M/s Q-Setters Investments, M/s Joscate Sales and Supplies and Elandic Logistics.

iii. Under Tender No. NYS/RT/35/2014-2015, ten entities were invited to bid among them Q- Setters Investments.

iv. That on 6th February 2015, the 3rd defendant under Min. No. 13/24/2014-2015 was awarded tender Ref. No. NYS/93/2014-2015 for supply of 1,000 cutting discs 14" at a unit cost of Kshs. 1,800 and 1,000 grinding discs 9" at cost of 1,950/-.

v. That the 3rd defendant was then issued with an LPO and payment voucher on 25th June 2015. Following delivery of the items, she was on 3rd December 2015 paid cheque of Kshs. 3,750,000/- less tax leaving a net amount of Kshs. 3,556,034.50.

vi. On 16th June 2015, the 3rd defendant again vide Tender No. MS/RT/35/2014-2015 won an award to supply 15000 round tubes 1 and 1/2" at unit price of Kshs. 24,400 and 5,000 cutting discs 9" at a price of Kshs. 1,650.

vii. That she was issued with an LPO and payment voucher following delivery of the items worth Kshs. 44,250,000/- and subsequently paid a net payment of Kshs. 41,961,206.90 on 14th December 2013.

9. It was contended that the procurement process was tainted with fraudulent practices by the 1st defendant who was in direct control of the three entities that were invited to tender including the introduction of Eribet Fair Deal Supplies owned by one Betty Maingi Kagendo a sister to the 1st and 3rd defendants.

10. It was further stated that, despite not being the proprietor of the contract winning entities, the 1st defendant signed contract documents on behalf of the winning entities with the sole intention of stage managing the prices.

11. That despite the fact that the subject tenders were awarded to the 3rd defendant, the 1st defendant, a none proprietor of the tender winning entity signed the respective contractual documents in contravention of Section 31(1b) Public Procurement and Disposal Act, 2005. It was further contended that, a comparison between the unit costs of the procured items by the said entities and the quoted prices revealed fraudulent scheme to defraud the NYS by overpricing of the items contrary to Section 31(3) of the Public Procurement and Disposal Act 2005 resulting in substantial loss.

12. According to the plaintiff, after obtaining prices of the supplied items from M/S Central Auto and Hardware Limited and further after ascertaining the prevailing market rates of the said items from the Ministry of Transport, Infrastructure Housing and Urban Development (Public Works) it revealed that;

1. Round tube 1½”, cutting disc 9”, cutting disc 14”, grinding disc 9”, Auto and central hardware prices was going at kshs610, kshs155, nil, and kshs245 respectively while at public works prices they were going at kshs 840, kshs180, kshs 500 and kshs300 respectively.

13. That using the unit prices obtained from the Ministry of Public Works, they arrived at the conclusion that NYS was overcharged in the two subject tenders a total sum of Kshs. 33,700,000 as follows;

i. Round tube 1 and 1/2” at a purchase price of kshs2,400 against public works price of kshs840 for a quantity of 15000. The price difference was Kshs1,500 giving a total difference of Kshs 23,400,000 as money fraudulently acquired and therefore the money required to be refunded.

ii. Cutting discs 9” at a purchase price of Kshs 1,650 against public works prices of kshs 180 for a quantity of 5,000 supplied. The price difference was kshs 1,470 giving rise to a total sum difference of Kshs 7,350,000 as money fraudulently acquired hence needed to be refunded to the state.

iii. 1000 cutting discs 14” supplied at a price order of kshs 1,800 each instead of the public works rate of kshs 500 leaving a price difference of Kshs 1,300 giving rise to a total price difference of Kshs1,300,000 being money fraudulently acquired hence demanded for refund to the state

iv. 1000 grinding discs 9” supplied at a price order of kshs1,950 instead of public works’ price of kshs 300 leaving a price difference of Kshs 1,650 giving rise to a total difference of Kshs 1,650,000 being money fraudulently acquired hence demanded for refund.

14. It was the plaintiff’s allegation that the defendants manipulated the procurement process to their advantage through corrupt practices amongst themselves designed to establish tender prices at artificial non-competitive levels and to deprive the procuring entity of the benefits of free and open competition.

15. That the defendants colluded to illegally and fraudulently acquire Kshs. 45,517,241.00 from NYS by quoting a price higher than would otherwise have been the case contrary to Section 42 of the Public Procurement and Disposal Act 2005 in advancement of their fraudulent scheme particularized as hereunder

a. Stage managing competition by determining tender prices thus denying NYS benefits of free and open competition.

b. Collusion amongst the bidders to make the proposed price higher than would otherwise have been the case.

16. That as a result of the fraudulent payments made to the 2nd defendants by NYS, the 3rd defendant caused several cash transfers from one bank to another and used part of the money to purchase L.R. 14968/200 I.R. No. 93853 through the firm of Kimondo and Ng’ang’a Advocates.

17. In the plaintiffs’ view, the defendants have unjustly jointly and severally awarded themselves to the tune of Kshs. 45,513,241.00 by manipulating competition and grossly overpricing the bed making materials at the detriment of NYS.

Defendants’ Case

18. In response to the claim herein, the defendants filed a joint defence dated 23rd April 2018 through the firm of Musyoki Mogaka and Co. Advocates. The defendants denied the claim stating that the tender awards were procedurally, competitively and lawfully done. That companies which won the tenders were procedurally invited by NYS who voluntarily and without coercion accepted the prices as suggested, placed the bids and consequently received the claims without condition.

19. They further stated that notwithstanding the fact that Q-Setters is purely owned and registered under the names of the 3rd defendant, the 1st defendant has been exercising controlled level of authority over the operations and dealings of the said company.

20. They contended that, the allegations of overpricing are scandalous for the plaintiff failed to take into account the facts that the items were purchased, loaded, transported, offloaded and taxed among other accrued costs hence the need for profit.

21. They further contended that, the Kenyan market is a free market economy that works on a willing buyer and willing seller. That having bid and their bids accepted, the court cannot be invited to bargain on behalf of a party that has already enjoyed the fruits of contractual terms.

22. According to the defendants, the prevailing market rates as quoted by the Ministry of Public Works are simply estimates which acts as a guide to NYS officials and moreover, any fault if any it should not be apportioned to them as business men and women engaging in official business.

23. In answer to the allegation of collusion, the defendants denied the claim of stage managing the bid prices nor distorting the price competition. It was their contention that each individual bidder competitively quoted and the NYS was under no obligation to accept the bids.

24. Lastly, they stated that, having lawfully bid, won the contracts and eventually paid, they were free to spend their money the way they wanted including transferring the same to any other person or even buying property.

Hearing

25. During the hearing, the plaintiff called Smith Shah (PW1) the proprietor of Central Auto and Hardware Company LTD who confirmed that between the year 2014-2015, they supplied general pipes and tubes to Joycates Sales and Supplies in the name of Q-Setters Investments and Catherine Nkirote. He confirmed supplying the items listed in paragraph 10 of the Plaint to Q-Setters at the prices indicated against each item. That he used their truck to deliver the items for free; i.e round tubes, cutting and grinding discs at NYS premises Thika road.

26. PW2 Catherine Wanderi Ngare a Certified Public Accountant working with NYS carried out investigations. Her work was to establish payments made to the defendants by NYS for supply of various goods and how the defendants actually disbursed the money and eventual Purchase of some property in this case L.R. 14908/210. She adopted her witness statement dated 18th September 2018.

27. That her findings revealed that Q-Setters were used by Catherine Nkirote Mwangi (1st defendant) to increase her chances of winning the bid hence a beneficiary through companies not registered in her name.

28. That further investigations revealed that Nkirote had used elandic Company registered in the name of Anthony Kisame to win a tender for the supply of discs at a price of kshs. 775,000/- without Kisame's knowledge. That Anthony Kisame denied having bid for the contract, supplying the goods nor receiving any money paid in respect of that contract.

29. She further stated that in tender No. NYS/RS/35/2014-2015 in which Q-Setters won the contract for supply of goods, the prices were overpriced at 44.4 million

30. On cross examination by Mr. Wambui, Ms. Catherine stated that the tenders in question were restricted tenders which required a procuring entity to invite tenders from specific tenderers. That after receiving the bids, the tender committee was supposed to open the bids and then recommend to the Ministerial Tender Committee to award. According to her the process was followed.

31. As to whether a person who is not the registered owner of a company could sign for the owner, she affirmed that it was allowed but with authority from the owner.

32. On further cross examination, she answered that, it is the procuring entity who determines the price and any act of over-pricing, the procuring officers concerned should pay the government the lost amount. She specifically stated that the officers who should pay the government are the evaluation Committee officials, Ministerial Tender Committee and the P.S of the relevant Ministry.

33. Asked why she did not enjoin them in the suit, she answered that they had not been surcharged. She equally blamed the evaluation Committee and Ministerial Tender Committee for overpricing. She further stated that the procuring entity ought to have carried out a survey and prepared a price list but which was not the case in the instant case. PW3 Anthony Kisame adopted his witness statement dated 27th June 2018 and filed on 6th March 2018. He confirmed that he was the registered proprietor of a company known as Elandic.

34. He stated that at some point he requested Catherine Nkirote to assist him secure a contract for supply of goods. That Catherine accepted, took his business registration certificate, identity card and other necessary documents. He however denied submitting tender bids for the award of any contract in his name. He further denied knowledge of any payment made using his name and for his benefit.

35. On cross examination, he admitted that Catherine Nkirote was his former girlfriend whom he had given his documents to secure a contract He further admitted to have submitted his prequalification application forms and gave them to Nkirote (1st defendant) to process on his behalf.

36. On their defence, DW1 Catherine Nkirote, confirmed that she was the business owner of Joscate Sales and Supplies and that she used to work for Q-Setters Company a business entity owned by her sister Jane (3rd defendant) as the Director. She adopted her witness statement dated 23rd October 2018 in which she admitted tendering for supply of the goods in question. She denied influencing the award nor stage managing the tender leave alone the prices.

37. She stated that after failing to win tender No. NYS/93/2014-2015, she later discovered her sister Jane (3rd defendant) had won the same through her company known as Q-Setters. That based on trust, the 3rd defendant entrusted her the duty of supplying the goods tendered on her behalf as an agent a duty she faithfully executed by spending her money in buying the goods. On that ground, she justified the reason why she was paid through Q-Setters accounts and later money transferred to her.

38. According to her, the goods supplied were to earn profit thus justifying the logic why they were in business. Regarding the availability of Elandic company documents in her house, she admitted that she used to stay together with kisame the proprietor of Elandic during courtship. That when they separated, she inadvertently moved with some of his documents.

39. DW2 John Kago Maina (2ND Defendant) a husband to Catherine(DW1) confirmed that his sister in law Jane (3rd defendant) won a contract through her company known Q-Setters and when she found it difficult to supply the goods, she (Jane) agreed with them to supply on her behalf and then to enjoy the fruits of the contract. That when payment was made to Q-Setters as the supplier, the same was later transferred to his account being the husband to Catherine as the actual supplier of the goods.

40. DW3 Jane Makena Maingi a sister to Nkirote (1st defendant) and the Director of Q-Setters Investment, confirmed that she won the tenders from NYS through her company Q-Setters investments. That since she was busy in her duties at Kiganjo Police College, she allowed her sister Nkirote to supply the goods using her name and that after payment was made through her company, she transferred the money to the accounts of her sister and that of her husband (DW2) at 15 million and 25 million respectively.

Plaintiff's Submissions

41. The plaintiff filed their submissions on 11th September 2019. Ms Kibogy appearing for the plaintiff reiterated the particulars of the plaint, various witnesses' testimonies and the annexures thereof. Learned Counsel identified two issues for determination as follows;

a. Whether the procurement process of tenders NYS/93/2014-2015 and NYS/35/2014-2015 were tainted with fraudulent practices; and

b. Whether the materials were supplied at an unreasonably inflated price.

42. According to M/s Kibogy, the 1st defendant used several entities to disguise as different bidders to bid in the tenders in question thus resulting to stage managing competition. She submitted that DW1, DW2 and DW3 colluded to influence the over pricing contrary to Section 42(1) of the Public Procurement and Disposal Act 2005.

43. It was counsel's submission that a contract which is tainted with fraudulent practices is null and void ab initio. To support this position, the court was referred to the decision in the case of Blueseas Shopping Mall Limited vs City Council of Nairobi and 3 others Civil Appeal No. 129 of 2013 (2015)eKLR where the court held that;

“The issue of the appellant's failure to challenge the contract that ensued from the tender by the 1st respondent to the 2nd respondent must be viewed in the context of the invalidity of the decision to award the tender in contravention of the Public Procurement and Disposal Act, 2005. The learned Judge correctly held that the 1st respondent acted in complete disregard to the provisions of the PPD Act. The effect of the 1st respondent's failure to comply with the said (statute) was to render not only the decision in the award of the tender but also the process of tender null and void (see St. John Shipping Corporation V. Joseph Rank) (supra). In the premises, the contract that ensued therefrom could not receive the seal of legitimacy as it arose from a process and an award that lacked legality”.

44. Regarding whether the materials were supplied at an unreasonably inflated price, counsel submitted that there was no lawful explanation given why the goods were supplied at exorbitant prices than they were bought at the hardware of Pw1 at the prevailing market price.

45. That the supply of goods at exorbitant prices was in gross violation of Section 30(3) of the Public Procurement and Disposal Act 2005, which provides that, standard goods, services and works with known market prices shall be procured at the prevailing real market prices.

Defendants' Submissions

46. Through the firm of Musyoki, Mogaka and Company Advocates the defendants filed their submissions on 1st October 2019. Mr. Wambui appearing for the defendants submitted on three issues namely;

a. Whether the procurement process of tender No. NYS/93/2014-2015 and tender No. NYS/RT/35/2014-2015 were tainted with fraudulent practices.

b. Whether the materials were supplied at unreasonably inflated prices and who should by law suffer the consequences if at all and;

c. Whether the reliefs sought by the plaintiff are tenable in law.

47. Mr. Wambui submitted that neither the defendants nor the procuring entity violated the law. Counsel further submitted that there was no proof of fraud committed and that none was specifically pleaded hence the same should not be inferred. To support this proposition, counsel relied on the decision in the case of Kuria Kiarie and 2 Others vs. Sammy Magera (2018) Eklr where the court held that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts. Counsel further submitted that he who alleges fraud bears the burden to prove the same. In support of this proposition reliance was placed on the decision in the case of Kinyanjui Kamau vs. George Kamau (2015)eKLR.

48. Mr. Wambui urged the court to find that a mere relationship between the defendants does not amount to proof of conspiracy to defraud the NYS. In distinguishing the case of Blueseas Shopping Mall Limited vs. City Council of Nairobi and 3 Others Civil Appeal No. 129/2013 (supra) quoted by the plaintiff, Mr. Wambui opined that the suit in this case was against the procuring entity and not the successful bidder.

49. Regarding the supply of materials at unreasonably inflated price and as to who should bear the consequences, Mr. Wambui submitted that

as a business entity, the defendants were interested in making profit. That the defendants tendered procedurally, quoted their prices and won the tenders at the quoted prices. In Mr. Wambui's view, the procuring entity was not obliged to accept the quotation if it was exorbitant. That Section 30(4) of the said Act lays full responsibility in the shoulders of the procuring entity to ensure that goods are supplied at the prevailing market prices.

50. Concerning the reliefs sought, Mr. Wambui submitted that orders are not issued in vain. Learned Counsel urged that a declaratory order declaring the contract void *ab initio* cannot issue as the law at Section 41(2) & (3) and 66 of the Public Procurement and Disposal Act recognises avoidable contract and not a void Contract as claimed. That the law in Public Procurement does not make a contract void but voidable with the consequence being that: ***"If a person acquires rights under a voidable contract or other transaction without notice and for value they cannot afterwards be put in a worse position by its being set aside."***

To bolster this argument, counsel relied on the decision in the case of **Maynard Mackenzie Dang'ana vs. Commissioner of Police and Another (2011) Constitutional Petition No. 44/211.**

51. It was further submitted that under the law of contract only a party privy to the contract can avoid a contract that is voidable and that that law is only applicable before performance of the contract. That it is only the NYS who can rescind the contract and even so, it cannot do so after enjoying the fruits of the contract hence the prayer for restitution cannot apply.

Analysis and Determination

52. I have considered the application herein, pleadings and materials placed before court, testimony by witnesses and submissions by both counsel. Issues that arise for determination are;

- a. whether the procurement process in respect of Tender Nos. NYS/93/2014-2015 and NYS/RTI 35/2014-2015 were validly awarded**
- b. whether the cost at which the goods were supplied was illegal or unreasonable**
- c. If the answer to (b) above is true, whether this court can declare the contracts void ab initio**
- d. whether the reliefs sought can issue**
- e. who should bear costs**

53. There is no dispute that during the procurement period 2014-015, NYS invited bids for supply of various materials for refabricating double decker beds. It is also not in dispute that the tenders were floated with tender No. NYS/93/2014-2015 won by Q-Setters after attracting 3 invited quotations among them; Q-Setters Investments owned and managed by the 3rd defendant, Joscate Sales and Supplies owned and managed by the 1st defendant a sister to the 3rd defendant, Elandic logistics owned and managed by PW3 one Anthony Kisame a former boyfriend to the 1st defendant.

54. In the said contract, Q-setters was to supply 1000 cutting discs 14'' at Kshs 1800/= each and 1000 grinding discs 9'' at kshs 1,950/=. It is also not in contest that the 2nd contract NYS/RT/35 /2014-15) attracted ten bids and out of which Q-setters won the contract to supply 15000 round tubes of 11/2'' at a price of Kshs 2400 per unit and 5000 cutting disks 9'' at kshs 1,650/= each

55. From the pleadings and indeed the evidence of the witnesses, the nature of the tendering method used was restricted tendering pursuant to Sections 29(1) and (3) and 73 of the Public Procurement and Disposal Act 2005. Section 73(1) of the Act states that;

(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

(2) A procuring entity may use restricted tendering if the following conditions are satisfied—

- (a) competition for contract, because of the complex or specialized nature of the goods, works or services is limited to prequalified contractors;**
- (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and**
- (c) there are only a few known suppliers of the goods, works or services as may be prescribed in the regulations.**

56. Nobody disputed the fact that restricted tendering method was the most suitable method for procuring the goods in question which were actually supplied as per the contract. There is no dispute that the goods contracted were duly supplied and payment made to the suppliers. NYS did not complain of non-delivery nor breach of contract. The suppliers did not complain either of breach of any conditions in terms of the contract.

57. However, the plaintiff's complaint is that the supplying entities that won the contracts are not the beneficiaries of the fruits of the contract (payment). To the plaintiff, Q. Setters won the contracts yet the money paid to them was later transferred to DW1 ((1st defendant) and her husband one Murima (DW2) (2nd defendant). According to the 1st defendant, she tendered for the contract NYS/93/2014-15 through Joscate

supplies but failed to win. However, her sister Jane the Director Q. Setters won the contract.

58. That due to financial inability of her sister Jane (DW3) and her busy schedule at her place of work, they agreed as sisters for the 1st defendant to purchase and supply the goods at her own cost and upon receipt of payment by Q-Setters, the proprietor (Jane) would transfer the money to the 1st defendant to recover the expenditure incurred when buying the goods supplied. This fact was corroborated by Jane (DW3).

59. Was there anything illegal or fraudulent in the private arrangement between sisters to assist each other financially in supplying goods on behalf of the winning sister's company? Although section 31(1) of the Public Procurement Act provides that for a person to qualify to be awarded a tender he must have resources among others, there is nothing wrong in lacking sufficient resources after the award of the contract hence result to borrowing. In my view, this was a private arrangement to which NYS had no business to interfere with. As long as goods were supplied by the entity that won the contract, it was none of the procuring entity's business to follow on the source of the money used to buy goods which were eventually supplied to them as per the contract.

60. Financial arrangements between the 1st defendant and her sister the 3rd defendant was purely a private venture. Equally, it was not the business of the NYS to follow on how money paid to the supplier was eventually spent. Withdrawals by the 3rd defendant and subsequent transfer to the 1st defendant and her husband (2nd defendant) (DW3) is not illegal in law. Since the money paid to Q-Setters was legitimately acquired after supply of goods in a legally awarded contract, nobody should question how the money was spent and who obtained how much and for what purpose.

61. Regarding a contract allegedly won by Elandic which was registered in the name of Anthony Kisame a former boyfriend of the 1st defendant, the same is not the subject of the contracts won by Q-setters which is the subject of the suit herein. There is no relief sought in respect of any contract won by Elandic logistics. I will therefore not delve into the legality of that contract.

Whether the cost at which the goods were supplied was illegal or unreasonable and if so, whether the court can nullify the contract.

62. According to the plaintiff, the price quoted by the bidders was grossly exorbitant and unreasonable compared to the prevailing market price. PW1 one Smith the proprietor of the hardware from where the 1st defendant bought goods for delivery to NYS confirmed that he sold the goods at the market price. He identified an invoice (see page 381 of the plaintiff's bundle of documents) showing that a round tube of 1 1/2 (1.5 mm) was going at kshs 602 against the quoted price of 2,400. Cutting disc of 9X18 at kshs146.55 against the quoted price of Kshs 1,650/-.

63. There is no dispute the prices at which the contracted goods were supplied were way beyond the prevailing market price as assessed by the ministry Public Works Department after the contract had been awarded, supplies made and payment honoured.

64. There is no dispute either that the price was way above the normal market price. According to the plaintiff, there was fraud, collusion and stage managing of the price. Procurement of goods is an elaborate process starting from invitation to tender, evaluation, award by the tender committee, acceptance, issuing of LPO, supply and then payment. All these processes have conditions attached.

65. Procurement contract is governed by Statute in this case the Public Procurement and Disposal Act 2005. The burden to prove fraud or manipulation of the prices quoted or stage managing the tender process purely lies with the plaintiff. For the plaintiff to plead fraud, it must specifically prove that the defendants through deceit or dishonest means did actually manipulate the exercise(prices) and unduly benefitted from the over exorbitant prices quoted. The burden of proof in cases of fraud is higher than the ordinary cases which are pegged on a balance of probability. In the case of **Emfil Ltd vs. Registrar of Titles Mombasa and 2 others (2014)eKLR** the court had this to say:-

“allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

Similar position was held in the case of **Rosemary Wanjiku Muriithi vs. George Maina Ndinwa (2014)eKLR** where the Court of Appeal held that proof of fraud involves questions of fact.

66. Did the defendants have the capacity to influence the award of contract at exorbitant prices? It obvious that the defendants were not employees of the procuring entity neither were they members of the evaluation committee nor the tender committee. The procurement law enjoins the procurement entity, evaluation committee and the tender committee to exercise due diligence to ensure value for money in every action they take in procuring goods or services.

67. Due diligence includes carrying out market survey regularly to be able to ascertain the reasonable price at which to award contract. A market survey is normally done before the invitation to tender, opening of bids or award of the tender itself. It serves no purpose if it is done after the contract has been awarded and payment made like it happened in this case. The Public Works report on the prevailing market price made in this case after investigations had commenced is not of any value as it does not address the market price before or at the time of the award of the contract.

68. Regulation 8(3)(7) of the Public Procurement and Disposal Act 2006 makes it a mandatory requirement for a procurement entity to carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. By dint of this provision, NYS was deemed to have carried out market survey before awarding the contract. The plaintiff did not submit to this court any list of the prevailing market price at the material time.

69. Like any other ordinary contract, the defendants were duty bound to quote the price that best served their profit interest in business. If they quoted a price the procuring entity felt was unreasonable, it was under no obligation to accept the offer, proceed to award the contract at the price offered and then pay. The defendants were not under obligation to quote the lowest. The procurement entity voluntarily accepted the price quoted. There is no proof of collusion, coercion, undue influence over the evaluation committee, tender committee or even the P.S.

70. It is no wonder that PW2 the investigating officer stated on cross examination that;

“It is the procurement entity which determines the price.”

She went further to state;

“The officers concerned are supposed to pay the government. It is the procurement officers to pay the overpriced items.”

On further cross examination she answered as follows;

“The public officers in this case are the Ministerial Tender Committee, the Evaluation Tender Committee and the P.S.”

71. Asked why she could not enjoin them in the suit, she responded that they had not been surcharged.

72. From these kind of evidence, it is clear that the defendants had no role to play in fixing the price to be awarded the contract. There was nothing irregular in quoting a higher price than anybody else. If there were 10 bidders in a contract, how come none quoted below the defendants' price. There is nothing unlawful in quoting a higher price at the risk of disqualification.

73. However, the Public Procurement and Disposal Act has a remedy under Section 30(3) and (4). Sub-Section 3 provides;

“Standard goods, services and works with known market prices shall be procured at the prevailing real market price.”

Sub-Section 4;

“Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations, be required to pay the procuring entity for the loss resulting from their actions.”

73. The law does recognise the culprits of inflated prices. It is surprising that the people culpable or responsible of the exorbitant prices which is obvious on the face of it have been spared. They should have been enjoined in this suit as the defendants or actually sued independently if not surcharged. The defendants cannot be sacrificed at the altar of convenience or interest of the procurement officers and those involved in the relevant committees. There cannot be a justification for the application of the estimated prices by the ministry of public works after the contract award and payment made.

75. The blame should be placed squarely where it lies. If there was collusion with the defendants, the same is too remote hence not proved by evidence.

76. Regulation 10(2) (e) of the Public Procurement and Disposal Act Regulations places the burden of determining prices on the tender committee by stating that;

“the tender committee shall ensure that the procuring entity does not pay in excess of the prevailing market prices.”

In the case of **Isaac Mugweru Kiraba t/a Isamu Refri- Electricals v Net Plan East Africa Limited [2018] Eklr** the court had this to say regarding the obligation of a procuring entity in a contract;

“In my view, and in the absence of any evidence of rejection of the goods either at the time of delivery or even within a reasonable period after delivery, property in the supplied and delivered goods passed to the Defendant once the goods were accepted and the delivery notes stamped and signed. The Defendant then had to pay for the delivered goods at the agreed prices being the local purchase order prices.”

77. In nutshell, it is my finding that there is no proof of any fraud or stage managing of the prices or even influencing by the defendants in respect of contracts No. NYS /93/2014-15 nor NYS/RT/2014-2015. In other words, the plaintiff has not proved to the required degree that the said contracts were illegally awarded. It is further my holding that courts cannot be invited to rewrite contracts voluntarily entered between two consenting parties with full capacity to enter into a binding contract.

Whether the reliefs sought can issue.

78. Having held that the impugned contracts were validly entered, the prayer to declare the contract void *ab initio* cannot apply as there was no illegality committed. A void Contract is one that is not enforceable in law. A void Contract would only apply in this case if both parties were either mistaken of the nature of the contract, the contract was prohibited by law or that it was entered without consideration. In the

circumstances of this case, the contract was procedurally and lawfully entered hence enforceable in law. An illegality cannot be inferred from making super profit by one of the parties in a contract.

79. Regarding restitution of the amount paid over and above the public works' estimates, the plaintiff did not take into account the fact that the defendants were supposed to make profit. It is not tenable that the defendants were supposed to buy goods on behalf of NYS at the exact market price, deliver and then on top of it all pay tax from the purchase price without making profit. I do not find it reasonable that the defendants should be blamed for earning super profit. The concerned government officers who played part in the procurement process with their eyes closed to the detriment of government interest should be held accountable.

80. Accordingly, it is my finding that the plaintiff has not proved its case on a balance of probability against the defendants hence the suit is hereby dismissed. The preservation and injunctive orders issued on the 3rd May 2018 are hereby lifted and set aside.

81. As regards costs, I have noted that this is a public interest litigation matter where a legal contract was awarded but the government suffered a great deal of loss out of its officer's mistakes. I will order each party to bear own costs.

DATED, DELIVERED and SIGNED at NAIROBI THIS 8th DAY OF APRIL 2020.

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J. N. ONYIEGO

JUDGE