



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC CIVIL SUIT NO. 36 OF 2018

ETHICS AND ANT-CORRUPTION COMMISSION.....PLAINTIFF

VERUS

GURACHA ABDI.....1ST DEFENDANT

HUSSEIN ALNOOR IBRAHIM.....2ND DEFENDANT

MOLU HUKA ARBALE.....3RD DEFENDANT

COUNTY GOVERNMENT OF MARSABIT.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Plaintiff herein a body corporate established under Section 3 of the Ethics and Anti-Corruption Commission Act (EACCA) has filed this suit for recovery of public property (funds) belonging to the County Government of Marsabit (hereinafter referred to as the Interested Party) against the 1st, 2nd and 3rd defendants who were at all material times to this suit working for the Interested Party as County Executive Committee Member (CECM) in charge of Finance and Planning, Chief Finance Officer and Chief Officer Roads, Public Works and Transport respectively.

2. This suit was originally instituted at Meru High Court as **Civil Suit No. 5/17**. It was later transferred to Marsabit High Court and then finally Milimani High Court Anti-Corruption and Economic Crimes Division which is bestowed with jurisdiction to hear and determine corruption related matters. Upon transfer, the file was given **ACEC Civil Case No. 36/18** as its new number.

3. Through a Plaint dated 22nd February 2017 and filed on 27th February, 2017 the plaintiff is seeking for judgment against the defendants jointly and severally as hereunder;

a) A determination that the opening and operation of Account No. 1010262897906 held and operated at Marsabit Branch of Equity Bank Kenya Ltd by the defendants herein was fraudulent, illegal and /or unlawful.

b) A determination that the interested party herein has suffered loss amounting to Kshs. 21,978,764/- or such other amount as the honourable court may determine on account of the defendants' fraudulent, irregular, illegal and or unlawful dealings that led to the opening and operation of account No. 1010262897906 held and operated at Marsabit Branch of Equity Bank Kenya Ltd by the defendants.

c) A declaration that the defendants herein are jointly and severally liable for the loss occasioned to the interested party owing to their fraudulent, illegal and or unlawful dealings which led to the opening and operation of account No. 1010262897906 held and operated at Marsabit Branch of Equity Bank Kenya Ltd.

d) An order compelling the 1st, 2nd, 3rd and 4th defendants to compensate the interested party for the loss occasioned to it, amounting to kshs. 21,978,764/- or such other amounts as the honourable court may determine.

e) An injunction to permanently restrain the defendants and or any other officers, servants, employees and or agents of the interested party from accessing, withdrawing, transferring and or in any other manner dealing with the money held in Account No. 1010262897906 held and operated at Marsabit Branch of Equity Bank Kenya Ltd otherwise for the purpose of transferring it to the Marsabit County Revenue Fund established in accordance with Article 207.

f) Costs of this suit.

g) Interest on (d) above from the date of filing this suit to the date of satisfaction of such decree as may be in respect thereof.

h) Any other or further relief that the court may deem fit to grant.

4. Prior to the inception of this suit, the plaintiff obtained a preservation order dated 29th December 2016 in respect of the same money vide **Misc. Civil Application No. 55/16** Meru High Court.

5. Contemporaneously filed with the plaint is a Notice of Motion dated 22nd February 2017 seeking a temporary injunction against the defendants restraining them or any other officers, servants, employees and or in any other manner dealing with the money held in Account No. 1010262897906 held and operated at Marsabit Branch of Equity Bank Kenya Ltd pending the hearing and determination of this application and if granted pending the hearing and determination of the suit.

6. Consequently, the court certified the application urgent and granted a temporary injunction pending inter partes hearing on 9th March 2017. Subsequently, the 1st, 2nd and 3rd defendants entered a joint Memorandum of Appearance on 8th March, 2017 through the firm of Kaumbi and Co. Advocates. On 9th March, 2017 Mr. Godana Yatani who described himself as the interested party's County Attorney filed an appearance on behalf of the interested party.

7. When the matter came up for inter partes hearing of the application dated 22nd February 2017, the defendants and interested party through their respective counsel sought for adjournment to enable them file their responses to the application. The matter was then fixed for inter partes hearing on 6th April 2017.

8. On the date scheduled for interpartes hearing, there was no response filed by the defendants nor the interested party. Mr. Kithinji appearing for the 1st-3rd defendants sought for more time to file response. The court proceeded to give several directions geared towards expediting the hearing of the main suit among them; parties to file witness statements and documentary evidence properly paginated and bound; defendants to file their response within 30 days and, interim orders extended. The matter was then fixed for mention on 11th May 2017 to confirm compliance.

9. On 20th April 2017, the 4th defendant filed a Notice of Preliminary Objection claiming that the suit was fatally defective, incompetent, vexatious, scandalous, frivolous and an abuse of the due process thus disclosing no reasonable cause of action as it does not comply with Order 51 rule 13(2) of the Civil Procedure rules. Meanwhile, on 3rd May 2017, the 1st-3rd defendants filed defence. At the same time, the plaintiff filed notice to withdraw the suit against the 4th defendant.

10. When the matter came up for mention on 11th May, 2017, there was no appearance for the 1st - 3rd defendants. The suit against the 4th defendant was withdrawn and more time granted to the 1st-3rd defendants to comply with directions given on 6th April, 2017. Interim orders were once again extended until 14th June, 2017. On 14th June, 2017 parties confirmed compliance with court orders. On the same day, the plaintiff filed a reply to the 1st-3rd defendants' defence. Parties having expressed their readiness to proceed with the suit, the court considered and fixed the same for hearing on 25th September, 2017. For some reason which is not clear from the court record, the matter did not proceed.

11. However, on 8th January, 2018, this file was transferred to Marsabit High Court which had a newly established High Court. The matter was placed before Justice Chitembwe on 5th April ,2018 when the plaintiff's counsel indicated to the court of discussions that were going on with a view to reaching a settlement (consent) on lifting the account freezing orders made on 27th February, 2017. The matter was then fixed for mention on 8th May ,2018.

12. On 8th May ,2018 the court adopted a consent order dated 8th May, 2018 which effectively lifted the order freezing the frozen accounts and the interested party was allowed to continue utilising the money on the affected accounts for purposes of running its activities in supervising county government projects. The consent in question read as below;

a) That the plaintiff in consideration of the undertaking by the interested party to use the money held in Equity Bank Marsabit Branch Account No. 1010262897906 which was frozen by an order of the honourable court dated 27th February, 2017 in accordance with the principles espoused in Article 201 of the Constitution of Kenya 2010 and the Public Finance Management Act No. 18 of 2012, has agreed to have the account unfrozen in order to allow the interested party access the money held in the account for purposes of supervising the County Government projects.

b) That the interested party undertakes to prepare and present requisite accounts and financial statements to the appropriate bodies; publish and publicize the use of the funds as provided for under Section 116(7) and (11) of the Public Finance Management Act No. 18 of 2012.

c) That the decision to unfreeze the account shall not in any way compromise the plaintiff's right to pursue, against the 1st,

2nd and 3rd defendants, the issues before court concerning the lawfulness of the account and or the impugned dealings in respect thereof.

13. Having adopted the said consent, the court fixed the matter for 26th June, 2018 for further directions. On that day, Mr. Kyeli for the plaintiff told the court that circumstances had changed following the release of the money hence sought for more time to amend the plaint which the court allowed. On 10th July, 2018 the plaintiff filed an amended plaint dated 6th July 2018 in which the amount sought to be recovered was indicated as Kshs. 15,604,900/- instead of Kshs. 21,978,764/- indicated in the original plaint.

14. On 21st November, 2018 Mr. Kyeli for the plaintiff sought transfer of the file to Milimani High Court Anti-Corruption and Economic Crimes Division pursuant to the chief Justice's directions vide Gazette Notice No. 10267 of 9th December 2016. By consent, the matter was transferred to Milimani High Court Nairobi for hearing and determination.

Plaintiff's Case

15. The Plaintiff's claim is hinged on the allegation that sometime in mid-2016, the plaintiff received a complaint from members of the public that senior officers working with the interested party had opened an account dubbed 'Marsabit County Project Supervision account' in which all contractors contracted to undertake projects by the interested party were required to deposit a certain percentage of money for supervision of projects being undertaken by the interested party.

16. That the plaintiff's investigations revealed that the County Executive Committee Member (CECM) for roads, transport and public works had presented to the County Executive Committee (CEC) a concept note aimed at raising money for supervision of all projects being undertaken by the interested party. Subsequently, the concept note was approved by the CEC in a meeting held on 8th August 2014.

17. That following the approval of the said concept note, the 1st defendant authorised opening of accounts to operationalize the concept and subsequently appointed the 2nd, 3rd, 4th defendants and an officer one Sora Jillo Danso as joint signatories to the account to wit; Account No. 1010262897906 held at Equity Bank Marsabit Branch. However, the said Sora Hillo Danso having failed to sign bank opening forms, did not become a signatory.

18. Consequently, the account received cumulative deposits amounting to Kshs. 21,978,764/- or thereabout from various contractors out of which a total sum of Kshs. 15,604,908 was withdrawn for project supervision activities.

19. Upon interrogation, the defendants supplied six sets of supporting documents to support expenditure of Kshs. 6,649,600/- but failed to prove how a balance of Kshs. 8,955,310 was spent.

20. It is the plaintiff's contention that the concept note herein and the subsequent account opening to operationalise the said concept was a fraudulent scheme calculated at irregularly, illegally and unlawfully accessing funds from the interested party in that;

a) It allowed officers of the County Government to access funds drawn from the interested party through contracts contracted to undertake projects for the County Government by inflating project cost at the expense of the interested party;

b) It was meant to make unsuspecting members of the public think that the money held in the account was coming from contractors hence the persons charged in its management did not require to meet the standard set in Section 116 of the Public Finance Management act and other provisions of the law requiring transparency and accountability in use and management of resources drawn therefrom.

c) It allows public officers be paid for services and work they were employed to undertake.

21. The plaintiff further contended that the 1st to 3rd defendants being officers of the interested party charged with implementation of the scheme herein used their respective offices to facilitate access and use of Kshs. 15,604,900 from the interested party disguised as money from contractors thus occasioning loss and prejudice to the interested party.

22. On a without prejudice basis, it was averred that the defendants breached their statutory duty of care and or acted negligently while managing the funds herein and the money withdrawn therefrom.

23. The plaintiff went further to give particulars of breach of duty as hereunder;

a) Failure to seek approval of the County Assembly before approving establishment of the fund.

b) Failure to prepare accounts in respect of the fund and submit them to the County Assembly and the office of the Auditor General contrary to Section 116(7) of PFMA.

c) Failure to publicize and publish use of the money withdrawn from the fund account contrary to Section 116(7) of PFMA.

d) Failure to develop policies to guide withdrawal and use of the money withdrawn from that account contrary to Section 120(1) of the PFMA.

e) Failure to adhere to the law in procuring goods and services using the funds withdrawn from the account contrary to

Section 121 of the PFMA.

f) Failure to ensure that money withdrawn from the account was used in a way that is lawful, essential, efficient, economical and transparent contrary to Section 153 as read with Section 162(2)(b) of the PFMA.

g) Failure to make adequate management to ensure proper use of money withdrawn from the account herein as required by Section 153 as read with Section 162(2)(c) of the PFMA.

h) Failure to use their best efforts to prevent any damage being done to the financial interests of the interested party as required by Section 153 as read with Section 182(2)(e) of the PFMA.

Defendants' Case

24. Through their joint defence dated 3rd April 2017 and filed on the same day, the defendants basically denied the claim. They however admitted the existence of account No. 1010262897906 held at Equity Bank Marsabit branch, operated by the County Government of Marsabit under the name of Marsabit County Project Supervision Account with 2nd and 3rd defendants as signatories. They therefore justified the opening of the said account claiming that it was intended to ensure prudent management of expenses arising from the county projects' supervisors, consultants, acceptance and certification committees and related supervision expenses. That the said expenses are catered for by the Project Supervision Account which is a cost in the bill of quantities. They therefore contended that the account is not a fund contemplated under Section 116 of the PFMA.

25. They further averred that Section 119(1) of the Public Finance Management Act No. 18/2012 allows the County Treasurer to open, operate and close bank accounts for the County Government and its entities. That their action was in compliance with the International Federation of Consulting Engineers red and yellow books which allows 5% of the project cost be rendered for project supervision which cost is catered for in the bill of quantities as formulated by guidelines of "best practices"

26. They further averred that, supervision of civil engineering construction works such as roads, water, sewerage facilities, dams, bridges and tunnels require supervision team to shift from their places of aboard which necessitates provision of allowances. They vehemently denied involvement in any fraudulent or corrupt activities nor were they used as conduits for siphoning money out of the County Government account.

27. Further, they denied allegations of breach of public duty thereby stating that; contracts provide for standard percentage of project cost applied for supervision and policies for supervision are provided in the contract; that Section 203 of the Public Finance Management Act does not apply in this case and that, the claim herein is activated with malice, misconceived and an act of ignorance of standard conditions provided for under Engineering, Procurement and Construction Contracts.

Hearing

28. During the hearing, the plaintiff called a total of three (3) witnesses and closed its case. PW1 David Naibei, an investigator with EACC who was tasked to investigate the complaint against the defendants reiterated the contents in the plaint. He adopted the contents of his witness statement dated 15th July, 2018. He claimed that the opening of the Project Supervision Account was irregular and the sum of money deposited therein was irregularly withdrawn and spent.

29. According to PW1, the impugned fund (account) was irregularly opened for purposes of payment of allowances to supervisory staff and officers involved in site meetings, hiring transport when transport was unavailable from the department, purchase of airtime for supervisory staff, training, consultancy services, purchase of stationery, printing and other services.

30. He claimed that a total of Kshs. 23,000,000/- was deposited by project contractors in the said account out of which 15 million was withdrawn and documents to support expenditure of Kshs.6,649,600 supplied. It was further stated that some of the money withdrawn was used for other purposes other than the intended purpose and that no documents were kept to support the alleged expenditure.

31. He further stated that, although the fund was for all intents and purposes established for purposes of Section 116 of the Public Finance Management Act, the procedure to open it was not properly followed in that;

a) there was no approval of the County Assembly contrary to Section 116(1) of PFMA;

b) no accounts from the said funds were prepared and submitted to the County Assembly and Auditor General contrary to Section 116(7) of PFMA;

c) use of the money was not published and publicised contrary to Section 116(11) of the PFMA. Procurement of goods was done in violation of section 12 of the PFMA and generally there was no transparency in accounting for the money.

32. According to him, the nine sets of documents supplied to them did not give a proper account on how the money was spent. For instance, there were no work tickets and normal surrender of imprests was not done hence about 8 million was not accounted for. It was his evidence that the accounting documents in support of the claim dated 27th February 2017 and supplementary list of documents filed on 14th June 2017 accounted for Kshs. 6,649,600/- only. That documents in support of the balance of Kshs. 8,955,300 was not supplied. The supporting documents were broken down into requests for payments as reflected in the supplementary list of documents filed on 14th June 2017 with dates and amounts indicated as 21st March 2016 Kshs. 767,600, 5th November 2015 Kshs. 816,800, 21st March 2016 Kshs. 480,600, 20th

August 2015 Kshs. 836,000, 9th June 2016 Kshs. 697,600, 14th January 2017 Kshs. 767,000/-, 6th August 2015 Kshs. 842,200, 18th February 2016 Kshs. 595,400, 16th December 2015 Kshs. 746,000 making a total of Kshs. 6,649,600 leaving a sum of Kshs. 8,955,300 unaccounted for.

33. On cross examination, he confirmed that he was shown the bill of quantities which made provisions for project supervision costs. He also stated that the problem he had with the fund is the treatment of the same as a source of income. On further cross-examination by Mr. Kaumbi, the witness stated that the impugned account was unfrozen to enable the County Government to continue operating its project supervision activities. He further confirmed that supervision fees is sourced from the contract sum and it is the contractor who pays out such expenses.

34. PW2 John Kimani Kabugua an accounts clerk working with Marsabit County Government basically relied on his witness statement recorded on 16th July, 2018 as his testimony. He confirmed that sometime 2014 the County Government Marsabit opened a Project Supervision Account which is the subject of these proceedings.

35. That for purposes of payment, the Chief Officer by the name of Huka Molu withdrew money from the said account and then passed the same over to him to pay officers who had gone on official duties in this case; supervision of ongoing county projects, payment for airtime, purchase of stationery and their daily subsistence.

36. He stated that before payment, he could receive a schedule of officers to be paid from the Chief Officer who would then sign against their names with their ID numbers indicated.

37. The officer made reference to various amounts received from the Chief Officer Finance for payment to various officers. Among the amounts received was; Kshs. 836,000 on 21st August, 2015 out of which he paid officers entitled among them, Simon Ejere Kshs. 21,000 for supervision of projects in North Hor. On 5th October, 2015 he paid Kshs. 500/- to a casual worker Ekwan Ekir to unblock a drainage in Marsabit town. He also paid one Boru Mamo a Private Engineer Kshs. 35,000/- for supervising construction of a perimeter wall at the stadium. He further paid Kaburu Eustance a Private Engineer Kshs. 35,000/- in September 2015 for supervising construction of governor's residence.

38. He further acknowledged receiving Kshs. 7,500 and Kshs. 500/- as lunch allowance for supervising work during lunch hour. He went further to state that, on 10th November, 2015 he received Kshs. 876,500/- from Molu Huka out of which he paid various supervisors as per the schedule of payment given by the Chief Officer. Among the people paid were; Hassan Guyo Kshs. 18,900 on 13th November, 2015 who took a motor vehicle to Nairobi for repair, Boru Mamo and Eustace Kaburu both providing supervision work as private Engineers.

39. He also acknowledged receipt of Kshs. 842,200/- from Molu Huka a Chief Officer on 8th August, 2015 to pay various officers as per the attached schedule. On 22nd January, 2016 he again received Kshs. 767,600 from Molu Huka which he paid several officers as per the schedule provided. Among the payments made out of this amount were; Kshs. 128,000/- to Masters Company for hire of their motor vehicle for 8 days and a further sum of Kshs., 112,000/- for hire of motor vehicle for 7 days.

40. He also told the court that on 8th April, 2016 he received Kshs. 480,600/- from Molu Huka which he paid various officers. Subsequently, he received Kshs. 746,000/- and Kshs. 595,400 from the same officer which he again used to pay various officers engaged in supervision exercise. On cross-examination by Mr. Kaumbi, he praised the method of collecting money from contractors in advance for purposes of supervision of projects. He further stated that the amount of money in question was 2% of the total contractual sums which contractors paid in advance to meet supervision costs.

41. PW3 Ben Nyakwana a retired officer then working at Marsabit County as Government Stores Officer (Procurement Officer) also adopted the contents of his witness statement filed on 14th June, 2017.

42. On his part, he told the court that on 13th June, 2016, he received Kshs. 697,600/- from Chief Officer Molu Huka which he disbursed as per the schedule provided. Among the payments made were; Kshs. 10,500/- for various supervision items, Kshs. 5,220 for sodas, three lunches for one officer on 13th May, 2016 for attending a seminar, Kshs. 1000/- paid on 26th May, 2016 to another officer and 84 casuals. In total he received Kshs. 1,116,720 in two instalments which he disbursed as per the instructions of the Chief Officer.

43. On cross-examination by Mr. Godana, the officer stated that the money in question was paid by contractors in advance to the respective contractors' accounts.

Defendants' Case

44. DW1 Hussein Ali Molu (2nd defendant) Chief Officer Finance Marsabit County at the material time acknowledged that during his tenure, Marsabit County Government opened a Project Supervision Account. Its main objective was to ensure prudent finance expenditure and control. That the account was approved by the County Executive Committee and the governor.

45. He further stated that the money was provided in the respective projects' bills of quantities. That the money was used in consultation with the user department. He confirmed that he and the 3rd defendant (Chief Officer) were the joint signatories to the account.

46. It was his testimony that every expenditure was accounted for save for remote areas where receipts could not be given for purposes of accountability. He stated that the money was part of the contract sum and that the County Government did not have anything to do with the money as it was not income from its account.

47. On cross examination by Mr. Godana, he stated that the account was not illegal as they got authority from the County Assembly. He further stated that supervision fees is normally contained in the contract document (BQ) which money is paid to the contractor and then the contractor refunds supervision funds. He also stated that the contractor was bound to give the full contractual sum in advance even before the contract commenced. That money to officers involved in supervision is paid in advance in form of an imprest voucher which is surrendered upon expenditure.

48. DW2 Guracho Abdi (1st defendant) County Executive Committee Member Finance Marsabit County corroborated the testimony of DW1 (2nd defendant). He relied on the contents in his witness statement dated 16th May, 2017 as his testimony. He stated that the impugned supervision account is an account contemplated under Section 119(1) of the Public Finance Management Act 2012 hence the approval of the County Assembly was not necessary.

49. That the money in question was raised from all projects in the County which runs simultaneously. Consequently, an audit for each project is done separately thus covering costs set out in the bill of quantities among them project supervision expenses. He produced bills of quantities (Ex. 6) as proof of the source for provision of supervision expenses. He further stated that the top Executive organ of the County Government had approved the opening of the account and the same was not a source of county government revenue. In a nutshell, he acknowledged that they spent 15 million for project supervision and gave 9 sets of documents which were requested for by the plaintiff in support of the expenditure.

50. The defence closed their case after calling the 1st and 2nd defendants. The 3rd defendant did not testify. The interested party opted not to call any witness. Upon close of the case, parties agreed to file submissions.

Plaintiff's submissions

51. Mr. Kyeli appearing for the plaintiff filed his submissions on 25th October 2019. Counsel reiterated and adopted the contents contained in various witness' statements and testimonies. He submitted on seven issues broken down as follows;

- a) whether the opening and operation of the account herein was a fraudulent scheme calculated at irregularly, illegally and unlawfully accessing funds from the County Government of Marsabit (interested party).**
- b) whether the principles of accountability and transparency espoused in the Constitution of Kenya 2010 and PFMA are applicable to the account herein.**
- c) Subject to the outcome of (b) above, whether the operation of the account herein by the defendants met the principles of accountability and transparency empowered in the Constitution of Kenya 2010 and PMFA.**
- d) whether the interested party suffered any loss on account of opening and operation of the account herein.**
- e) If the answer to (d) above is in the affirmative what loss.**
- f) If the interested party suffered loss on account of operation of the account herein, who was responsible for the loss.**
- g) whether the plaintiff has made up a case for being granted the order sought or any of them.**

52. According to Mr. Kyeli, the Project Supervision Account was illegally and irregularly opened to perpetuate misuse and misapplication of the money thereto. It was counsel's submission that the fund had an identifiable source which then calls for Section 116 of the PMFA into play. That if the account was opened under Section 119 (1) of PMFA, it was subject to the application of Sections 120(1), 121, 153, 162(2) (c) of the PMFA which requires accountability and transparency.

53. That out of the total amount of over 15million admittedly spent by the defendants, a total of Kshs. 9,950,224 was not accounted for. He further submitted that the defendants were not able to support the total expenditure of all the monies spent.

54. As to whether the interested party suffered loss, counsel submitted that the same was admitted that Kshs. 9,950,224 was not accounted for hence the loss suffered. As to who is responsible for the loss, counsel laid the blame squarely on the defendants. In conclusion, counsel called for recovery of Kshs. 9,950,224 from the defendants jointly and severally.

Defendants' Submissions

55. On his part, Mr. Kaumbi for the defendants filed his submissions on 20th November 2018. Learned counsel submitted on three issues broken down as follows;

- a) legality of the opening of the said account**
- b) mandate of the plaintiff to Audit the Marsabit County Project Supervision account.**
- c) prudent management of public funds**

56. Concerning issue number one, counsel submitted that the account was legally authorised by the County Executive Committee which is

the top county decision making organ and that the same was opened pursuant to Section 119(1) of PMFA.

57. As to whether the plaintiff have authority to Audit the impugned account, Mr. Kaumbi submitted that Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act No. 22/11 does not envisage proceedings for recovery of such money save for recovery, freezing and confiscation of public property. That any audit on how the supervision sum is spent is an issue which squarely lies with the Auditor General pursuant to Section 226(2) of the Constitution.

58. Counsel submitted that the County Government has not complained of any loss of funds or commission of any illegality by the defendants. He contended that the plaintiff was self-contradicting by demanding for Kshs. 15,604,900 yet PW1 admitted that the defendants have accounted for Kshs. 6,649,600 leaving a balance of Kshs. 9,604,900 hence the money being sought for recovery.

59. As to prudent Management of the Public Funds; Mr. Kaumbi contended that the contract document does provide for project supervision item. He opined that Marsabit County is a vast and arid area which requires prudent fund management for quick and efficient finance control an issue which the plaintiff also praised as a noble idea.

60. Basically, Mr. Kaumbi contended that the plaintiff had not discharged its burden as provided under Section 107 of the Evidence Act hence not entitled to any of the reliefs sought.

Analysis and Determination

61. I have considered the pleadings herein, evidence and submissions by both counsel albeit without any authority being cited by either counsel. Issues for determination are;

- a) whether the impugned Project Supervision Account was regularly and legally opened;**
- b) whether the County Government of Marsabit lost any money and if so, who is responsible for the loss and therefore liable;**
- c) who is entitled to costs.**

Whether the impugned Project Supervision Account was regularly and legally opened

62. According to the amended plaint, the plaintiff is seeking a declaration that the opening and operation of Account No. 1010262897906 Equity Bank Marsabit Branch was illegal and unlawful and sought recovery of a sum of Kshs. 15,604,900 withdrawn from the said account.

63. The suit herein is anchored on the plaintiff's allegation that, the opening of a Project Supervision account by the defendants to which the 2nd and 3rd defendants are signatories is irregular and without any legal basis thus contravening Section 116(1) of the PFMA which governs opening of accounts. On the other hand, the defendants averred that Section 116 of the PMFA is not applicable.

64. There is no dispute that the defendants did open the impugned account. There is no dispute also that the said account was sanctioned by the County Executive Committee. It is also admitted by both parties that the amount deposited in this account was money sourced from several contractors who had won various County Government contracts but had to deposit upfront the full amount provided in the respective contracts' bills of quantities. It is also admitted by both parties that a sum of over 15 million was withdrawn and spent on project supervision activities upon authorisation by the defendants.

65. Was the account opened legally? The plaintiff has claimed that Section 116 was breached by the defendants. For avoidance of doubt, I wish to reproduce Section 116 of the Public Finance and Management Act as hereunder;

(1) A County Executive Committee member for finance may establish other public funds with the approval of the County Executive Committee and the county assembly.

(2) For every county public fund established, the County Executive Committee member for finance shall designate a person responsible for administering that fund.

1.

(3) The administrator of a county public fund shall ensure that the earnings of, or accruals to a county public fund are retained in the fund, unless the County Executive Committee member for finance directs otherwise.

(4) The administrator of a county public fund shall ensure that money held in the fund, including any earnings or accruals referred to in subsection (3) is spent only for the purposes for which the fund is established.

2.

(5) The County Executive Committee member for finance may wind up a county public fund with the approval of the county assembly.

(6) On the winding up of a county public fund—

(a) the administrator of the fund shall pay any amount remaining in the fund into the County Exchequer Account; and

(b) the County Executive Committee member for finance shall, with the approval of the county assembly, pay any deficit in the fund from the County Exchequer Account.

3.

(7) The administrator of a county public fund shall—

(a) prepare accounts for the fund for each financial year;

(b) not later than three months after the end of each financial year, submit financial statements relating to those accounts to the Auditor-General; and

(c) present the financial statements to the county assembly.

(8) The administrator of a county public fund shall ensure that the accounts for the fund and the annual financial statements relating to those accounts comply with the accounting standards prescribed and published by the Accounting Standards Board from time to time.

4.

(9) Regulations may provide for the establishment, management, operation or winding-up of county public funds under this section.

(10) This section does not apply to the County Revenue Fund established under [section 109](#) of this Act.

66. Under Article 227 of the Constitution, each County has an established revenue fund into which money raised by or received on behalf of the County Government is paid. This provision is operationalised vide Section 109 of the PFMA.

67. Section 116 therefore provides for creation or opening of any other independent public fund other than a County Revenue Fund with the approval of the County Executive Committee and County Assembly. A fund created under Section 116 contemplates money paid into the county government account or received on behalf of the County Government. Is the money subject of these proceedings treated as income earned or paid into the county government account for purposes of expenditure? Is it a source of income available for independent administration, management and application by the County Government?

68. In the instant case, the source of the money which was and is being deposited into the account in question is money paid by various contractors who would have competitively won contracts advertised or floated by the County Government. This money which is not denied

by the defendant is paid in full and in advance by contractors depending on the percentage of money provided for in the contract document for supervision. It is therefore money contained and catered for in the contract sum being the value of the tender awarded.

69. The plaintiff did not dispute the fact that money was sourced from contractors' pockets. With that clear in mind, the money paid by the contractors in this case and subsequently deposited in the supervision account was the supervision amount set out in the contract but spent in advance. The question then will be, is depositing the supervision amount before the commencement of the contract part of the conditions for winning a contract? The defendants did not disclose this fact.

70. However, I do not think that would be a precondition to winning a contract if the requisite conditions are met. In any event, when bidding for a contract, a contractor is supposed to prove ability to finance the contract if awarded and that fact in most cases is supported by a bank guarantee otherwise known as a bid bond to serve as security (see Section 61 of the Public Procurement and Asset Disposal Act 2015).

71. To allow an extra condition of requiring a winning contractor to pay upfront project supervision fees even before work commences for supervision to apply is irregular and an act calculated at unlawfully denying deserving contractors who would have won the contract fairly to be subjected to unnecessary conditions. In any event, supervision fees should be paid by the contractor after receiving payment from the contracting entity or where the contractor is able, use his private source of income and thereafter be reimbursed after payment upon satisfactory proof of expenditure through the payment certificate.

72. PW1 was in agreement that contracts have a provision for supervision fees. He however went further to state that project supervision expenses should be spent properly following the normal accounting process. I will hasten to say that, money provided for in the bill of quantities (contract) as money for project supervision is money payable to a contractor as one of the items in the contract (Bill of Quantities) and he is the one to release the same for payment subject to approval by the Project manager and Supervision Committee.

73. Ideally, that money does not belong to the government to be treated as County Revenue or independent public Fund or income to be administered by the County Government officials in accordance with either section 116 or 119 of PFMA. If at the end of the project the supervision amount is not expended in full, the balance should be retained by or returned to the County Government as the contracting entity for onward transmission or return to the county exchequer or treasury being money originally sourced out of the County Revenue Fund created under Article 207 of the Constitution and Section 109 of the PFMA.

74. What would happen in case of breach of contract by either party and the contractor would have been forced albeit irregularly to deposit money in full for supervision of a project which has not even commenced? Would the county government still insist on managing that money on behalf of the contractor? In my view, the answer is no because, that money does not belong to the government unless and until the contractor makes a claim under the item for project supervision as provided for in the bill of quantities.

75. Therefore, the County Executive Committee had no authority to create a fund out of money already budgeted for in a contract to which there is an independent procedure for expenditure and accountability. The money once contracted is deemed as duly committed hence cannot be converted to be an independent fund administered by the County Government officials to the exclusion of the contractor who is entitled to claim part or the whole of the amount subject to proof of expenditure.

76. It therefore follows that; the Project Supervision sum cannot be converted into a government fund as though it was an independent source of income which will then call for an independent audit other than the one to be conducted in respect of the relevant contract out of which that money is obtained.

77. To that extent, Section 116 of the PFMA does not apply as the money involved is specifically catered for in an already existing contract. It was therefore illegal and irregular for the County Executive Committee and by extension the defendants in purporting to open a fund out of money already budgeted and provided for in a contract. Section 116 was not intended to create a fund like the one created by the defendants. Although the intention and vision was described as noble by both parties, the same is not supported by any law. To allow an illegality to thrive on the basis of convenience or expediency is to open a Pandora's box for anarchy and misuse of authority or office thus opening an avenue for double expenditure and misuse.

78. The argument by the defendants that the impugned account was opened pursuant Section 119 is a misinterpretation of that provision. One cannot open an account for funds already committed. To allow that will usurp the role of a contractor in a contract as he or she will have no say or control over the contract and the sum of money awarded.

79. Equally, I do not agree with the plaintiff's argument and submission by Mr. Kyeli that the fund was subject to Audit. The money in question is not independent money whose expenditure needs to be subjected to separate publication and independent submission of statement of accounts and Audit to the Auditor General. Project supervision money like all other items in the contract are subject to both Internal Audit and External (Auditor General) within the relevant contract where the same is provided for.

80. It is no wonder that during the pendency of these proceedings, the plaintiff entered into a consent to unfreeze the frozen account so as to allow the County Government continue spending money already deposited for project supervision. With this consent, it is an admission by the plaintiff albeit on a no prejudice basis that, the money was from a percentage provided for in the bill of quantities and that the expenditure should continue. It sounds illogical if not ironical that an account being challenged as illegally opened should continue operating pending determination of the suit.

81. Having held that the account was improperly opened and that there is no law supporting that process, the County Government through its Finance Department (County Executive Member) should forthwith cease the operation of that account and any monies paid by the contractors and whose contracts have not commenced or if partly spent, the unspent monies be refunded to the respective contractors and the normal procedure of reimbursement of expenses in the course of the contract performance to apply just like other departments both at the County and National Government operates. Marsabit county cannot be an exception to operate an illegal account on the basis of a concept note which has no basis in law.

82. It is trite that an illegality cannot continue at the altar of expediency or convenience. Since I have found the act of opening the account irregular and illegal, its continued existence and operation is void abinitio. See the case of **Benjamin Leonard Mcfoy v United African Company Limited(UK)(1962)AC152** where Lord Denning opined as follows

“if an act is void, then it is in law a nullity...”

Whether the County Government of Marsabit lost any money and if so who is responsible for the loss

83. According to the plaintiff, a sum of Kshs. 15,604,900 was withdrawn and therefore unaccounted for. However, PW1 stated that after receiving nine sets of supporting documents of expenditure, only Kshs. 8,955,300 was not accounted for. This is contrary to Mr. Kyeli's submission that only a sum of Kshs. 9,950,214 was not accounted for. Although it is not clear how much the plaintiff wants to recover, they have not submitted clear evidence as to how much was lost and by whom.

84. As stated above, the money in question was deposited to the said account by contractors. To that extent, it is not the County Government's money. It is the contractors' money held irregularly by the County Government for the purported use in project supervision. This amount once spent is eventually recovered by the contractor through the contractual sum as provided in the bill of quantities. Any improper accounting and or claim by the contractor will be subjected to both the internal and external audit (Auditor General) for recovery from the outstanding contractual sum or through surcharging or charging the government official involved in case of fraud.

85. For the plaintiff to demand accountability at this stage without proof whether the contract in respect of which the money was deposited is complete, payment made and subsequently subjected to the necessary Audit is to jump the gun.

86. I do agree with Mr. Kaumbi that PW1, PW2 and PW3 are not accountants nor Auditors to be able to audit the entire contract before determining whether the requisite supervision sum was properly utilised or not. To ask this court to deal with one item of the contract is to usurp the role of the Auditors in auditing the entire project/s and to some extent asking the court to conduct an Audit on the disputed expenditure.

87. If there is any money not properly spent, it is not the county government's money but contractors' money. If the county government money is not properly spent as per the contract document, it shall be questioned within the procurement procedures and practices set in the contract document.

88. It is true that the County Government has not claimed loss of any money. However, the County Government after completion of the project or in the course of performance of the contract and possibly after conducting an audit, the plaintiff can lodge investigations and institute recovery proceedings pursuant to Section 11(1)(j) of the EACCA and Article 227 of the Constitution.

89. The allegation that the money lost belonged to the government is not proven and that the plaintiff prematurely filed this suit before the full circle of the relevant contracts could be finalised.

90. It is trite law that he who alleges a fact and wishes to rely on it bears the burden of proof (section 107 of the Evidence Act). See also **Ethics and Anti-Corruption Commission v Stanley Mombo Amuti (2015)Eklr** where the court held that;

“The Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so orders”

91. Having held that there was no provision that the money allegedly not accounted for belonged to the government, it will be erroneous to order recovery while fully aware that any project supervision money will properly and legally be subjected to Audit by the relevant authorities under the contract in reference.

92. To that extent, the money being claimed is not recoverable in the manner suggested by the plaintiff. This is even supported by the plaintiff's consent in allowing further expenditure out of the said account which had been frozen. Accordingly, that prayer cannot stand and we cannot hold the defendants liable on account of unsubstantiated claim which was initiated before it was ripe. In any event, the opening of the account was done in good faith although unlawful. To hold the defendants liable in the circumstances will amount to victimizing them before proper investigation and Audit is carried out.

Costs

93. Regarding costs, this is a matter of discretion. In the circumstances of this case the plaintiff partially succeeds and fails hence each shall bear own costs. Accordingly, it is hereby declared and ordered that;

(1) The opening of Marsabit County Government Account No. 1010262897906 equity bank Marsabit Branch was illegally and improperly opened and the same shall be closed forthwith by the relevant officers and signatories to the account

(2) That any deposited money by contractors in respect of contracts yet to commence should be refunded to the respective contractors in full

(3) That in the event of deposited money for supervision of projects which is partly spent, the unspent money should be refunded to the respective contractors and the normal process of reimbursement of expenses or payment as per the contract document be observed in accordance with the relevant and obtaining procedure or provisions of the law

(4) That from the date of delivery of this Judgment, no further withdrawal for purposes of project supervision should be made from the impugned account

(5) That each party shall bear own costs

DATED, SIGNED and DELIVERED by EMAIL at NAIROBI THIS 11TH DAY OF MAY, 2020.

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J. N. ONYIEGO

JUDGE