



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO.19 OF 2017

GREEN HIGHLAND SERVICES LTD

BIZMARK GROUP AFRICA LIMITED

GREYSTONE CONSTRUCTION COMPANY LIMITED

LEND CONTRACTORS LIMITED

GANYIMU LIMITED

SWIVTA CONSTRUCTION SERVICES LIMITED

GEOCASE AGENCIES LIMITED

FAST WORLD SOLUTIONS LIMITED

JAVANNAH ENTERPRISES LIMITED

CHROMAWAVE ENTERPRISES LIMITED

NYERI STAR TRANSPORTERS LIMITED.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF NYERI.....DEFENDANT

JUDGMENT

The plaintiffs herein;

1. Green Highland Services Limited
2. Bizmark Group Africa Limited
3. Greystone Construction Company Ltd
4. Lend Contractors Ltd
5. Ganyimu Ltd
6. Swivta Construction Services Ltd
7. Bewa Wholesalers Ltd

8. Geocast Agencies Ltd
9. Fast world Solutions Ltd
10. Javannah Enterprises Ltd
11. Chromawave Enterprises Ltd
12. Nyeri Star Transporters Ltd

Brought a suit against the County Government of Nyeri the defendant herein vide plaint filed on 23rd October 2017 seeking orders: -

Judgment be entered against the defendant for: -

- a) Kshs. 53,607,369/-
- b) Costs of the suit
- c) Interest on (a) and (b) at court rates from the date the debt arose.

The plaint was filed by the firm of S. Ndirangu & Co. Advocates. The basis for the claim is set out at paragraph 9 and 10 of the plaint where each of the plaintiffs' claims to have been contracted by the defendant to carry out works that included the haulage and transport of gravel and murram from the defendant's quarry at Mweiga to various roads within different wards of Nyeri County which had been earmarked for gravelling, dumping and in some case spreading of the same. The plaintiffs set out each the place where the works were undertaken, and the value of the same in terms of the amount owed.

ITEM	CONTRACTOR	WORKS UNDERTAKEN	AMOUNT OWED
A.	Green Highland Services Ltd	Mugathi-Rugutu Road (Mathira), Meeting point to County Assembly Road (Nyeri Town), Wakulima Dairy Road (Mukurweini), ACK Church Road (Mukurweini), Gachucha Road-Ring Road (Nyeri Town)	1,885,710/-
B.	Bizmark Group Africa Limited	Wamunyoro Road (Mathira). Gwa Kamaki Rose –Waruingi (Mathira),Barrier-Iruri Road (Mathira)	1,393,00/-
C.	Greystone Construction Limited	Gakawa, Magutu,Githakwa, Kimathi, Gaki/Aguthi and Iriaini Wards	12,185,550/-
D.	Lend Contractors Limited	Ihururu, Tetu Sub-County	663,549/-
E.	Ganyimu Limited	Njogu-ini, Kina-ini Road,Ihururu-Kiamathambo Road	3,126,000/-
F.	Swivta Construction Services Limited	Karunga-ini Road & Waihara to Kigumo and Thunguri Kiabebu Road (Othaya Constituency) and Nyewasco to Gitathi-ini, Manguru Roads (Nyeri Town)	3,564,000/-
G.	Bewa Wholesalers Limited	Rosewood Road, Kwa Mario Road and Cumba Road	4,400,000/-

H.	Geocast Agencies Limited	Roads/Areas: Mukurwe-ini, Chaka Ranch and Grace Land	5,577,360/-
I.	Fast World Solutions Limited	Ngangarithi, Nyeri Town	975,000/-
J.	Javannah Enterprises Limited		8,000,000/-
K.	Chromawave Enterprises Limited		9,837,200/-
L.	Nyeri Star Transporters Limited		2,000,000/-

It is the plaintiff's contention that at the time of carrying out the works they were only required to provide the duly filled quotations during the pre-contract stage- after which they were awarded the contracts and they proceeded to undertake the works. That these works were carried out in emergency situations including the preparation of roads for the burial of terrorist victims of the Garissa attack and renovation of roads on account of visits by high profile officials from both the National and County Governments.

That upon completion of works they each raised invoices for payment but were never paid. That the County Government of Nyeri formed a task force to look into the said claims and certified the same as true claims and acknowledged the same as owing and due and that the defendant was in breach of the contract with the particulars set out at paragraph 17 of the plaint as: -

- a) *Failure to honour the salient terms, conditions and stipulation of the contract, despite being obliged to do so.*
- b) *Failing to comply with its obligations-express or implied- arising from the contract.*
- c) *Failing, refusing and/or neglecting to pay the plaintiffs for the works despite the latter being successfully completed to its satisfaction.*
- d) *Failing to act in good faith in the discharge of its Constitutional mandate and powers.*

In its defence filed on 17th January 2018 by Kamotho Njomo & Co Advocates the defendant denied every allegation except its description as though the same were set out and traversed seriatim. The defendant denied contracting the services of the plaintiffs and put them to strict proof thereof. The defendant averred that it was not aware of the allegations of requesting for emergency works on roads, on the particulars set out in paragraph 9 and 10 and put the plaintiffs to strict proof thereof.

The defendant denied the existence of any task force or its report and put the plaintiffs to strict proof thereof. The defendant denied owing or acknowledging sums claimed. The defendant contented that it was bound by the provision of the Public Procurement and Asset Disposal Act at all times with regard to the procurement of goods and services from private entities.

The defendant denied alleged breach of contract as alleged at paragraph 17 or receipt of any demand letter and prayed that the suit be dismissed without costs.

The matter was heard by way of *viva voce* evidence.

The plaintiffs testified through Emma Wanjiru Njooora director of 4th plaintiff. She testified that the

others had authorized her to act on their behalf and she had filed the bundle of documents, the witness statements on which she solely relied.

She told the court that they were given the jobs late 2015 after people died in Mandera that the bodies came by air, and were at Chiromo. It was rain season, and they were asked to do the roads to the homes of the deceased to ease burial programmes.

That they received calls from the procurement office telling them that the governor had approved the works. That the County Government of Nyeri had carried out inspections and was satisfied with the works. That each of the plaintiffs was pre-qualified to do the works. She referred court to the bundle of document at page 42 and 43.

That when payment was not forthcoming they paid a visit to the governor who formed an ad hoc committee in December 2015. That the various roads were visited by people from KURA, the County Government, CECs and MCAs who certified that the jobs had been done. That thereafter each plaintiff presented its invoice together with an affidavit sworn by the directors at there were at page 4-59 of the bundle accompanying the plaint.

That the procurement person at the material period had been sacked by the time of filing this suit. That the County Government had acknowledged their debts but the governor then told them to go to court and obtain a court order then they would be paid. She referred the court to page 79 and 80 of the bundle.

On cross-examination by Mr. Kamotho she confirmed that 12 plaintiffs were not related in anyway but they had all sat and agreed that she would speak on their behalf and gave her the authority fund at page 17 of her bundle. She also confirmed that for each of the plaintiffs only one of the directors had signed the authority and for the 8th plaintiff the authority was not signed, none of the said authorities bore the plaintiffs seal.

She confirmed that she did not have the contracts/letters of award for any of the plaintiffs. She could not state the specific date when any of the plaintiffs was awarded the alleged contracts. Asked how many contracts for example were given to 1st plaintiff she said she did not know but only knew the amount owed.

Referred specifically to the 1st plaintiff's claim, she said she did not know the numbers of kilometres that were to be done but she knew that they all came to Kshs.1.8m for grading, gravelling, spreading, watering and compacting.

Asked how many lorries of murram were used for the works for 1st plaintiff, she could not tell. She did not have the documents to show how many lorries of murram the 1st plaintiff delivered/used. She also said that the plaintiffs were all pre-qualified. She could not tell for example which burial was happening along Ring Road, or what repairs were being done or the dates when the works were inspected or the breakdown for the contracts or the specifics of the quotations or the list of items that would be required for each job.

That some of the work was done by the County tractor and when asked about the cost- she responded that the plaintiff whose work was partly done by the County tractor would invoice less the value of work done by the county tractor.

That the sums owed were inclusive of VAT but probed further said that the directors of these companies were present in court and could provide the requisite documents. At some point she abdicated from her being the representative of the other plaintiffs to "answer for only own companies".

On cross-examination about her own company- the 4th Plaintiff she said she was pre-qualified but did not have the letter in court, that she wrote a letter of acceptance regarding the pre-qualification to the County Government of Nyeri but did not have the letter in court, that she did not get any quotation from the

County Government of Nyeri for the works where she was claiming Kshs. 400,000/-. She said hers was for Ihururu – the cost was at Kshs. 560,000/- but she only incurred Kshs. 470,000/- for a 3.2km road. The invoice for that was not in the bundle of documents. She could not tell the date the inspection was done but that it was done by one Mau who came from the County with the local MCA and they inspected the work and confirmed it was done but no documentation of the said inspection was given. No certificate of completion was issued. Neither was there evidence of purchase of the materials used except that the same was obtained from the County quarry. There was no evidence that any materials had been obtained from the said quarry.

On further cross-examination and reference to documents she said there was nothing on them to show that any of the plaintiffs had won any tender, or that the quotation had been opened by the County Government of Nyeri. That they were just given blank quotation forms which were not serialized or numbered and asked to fill them.

She also confirmed that for PW10, 11 and 12 it was not specified in the claim what work they did or where they did it but there was a sum due and owing next to their names. For PW10, it was 9.8million, for PW11, 8 million.

On re-examination she said she could confirm that all the work was done- that demands for payment factored in the tax element.

The defence called Julius Kiogora Ringera the Chief Officer Transport, Public Works, Infrastructure and Energy a quantity surveyor by training. He relied on his witness statement. He testified that even if there were emergency works, quotations from pre-qualified contractors would still have to be raised- that for jobs above Kshs.4 million there would have to be a tender.

He said upon a contract being awarded, the contractor was required to accept the award, sign the agreement/ be issued with Local Service Order upon signing of the contract/issuance of Local service order the contractors was then taken to the site.

That the works when awarded would have a finite time, upon completion, inspection, acceptance with documentation would support the request for payment.

On cross-examination he said he could not state whether the claims were valid because when he took over the docket in 2018 there were no files, that there was no procedure from emergency works and the only procedure available had to be followed that it was risky to act on verbal instructions.

Upon close of each party's case, counsel put in written submissions.

The plaintiffs set out 4 issues for determination: -

- i) Whether there was a valid contract between each of the plaintiffs and defendant for execution of various works within Nyeri County.*
- ii) Whether the alleged works were undertaken by the plaintiffs to completion.*
- iii) Whether the plaintiffs are entitled to the reliefs sought including an order for the payment of the total sum of Kshs. 53,607,369/- plus costs and interest.*
- iv) Who should bear the costs of the suit.*

The defendant raised the following issues for determination; -

- a) Were the plaintiffs pre-qualified by the County Government of Nyeri as contractors for classified and unclassified roads?*

b) *Were the plaintiffs engaged by the defendant during the financial year 2014/2015 to undertake the works?*

c) *Whether the works were under taken by the plaintiffs to completion.*

d) *Whether the plaintiffs are entitled to the reliefs sought.*

I have carefully considered the evidence, the submissions by each party. The issues are the same only worded differently. If the plaintiffs establish that there was a contract, that the works were done to completion and to the satisfaction of the defendant, then the defendant may be found to be liable to pay the sums sought.

Before delving into these issues, the defendant raised preliminary issues with regard to the form of the suit- whether the plaintiffs could file a joint suit in view of the provisions of Order 4 rule 4 of the Civil Procedure Rules 2010.

It was submitted for the defendant that the plaintiffs did not comply with order 4 rule 3 of the CPR - first because the verifying affidavit was not sworn by an officer of each company, and two- that the authority given to PW1 was incompetent for various reasons – that the alleged authority was signed by one director, that the authorities were not sealed, that the 8th plaintiff's authority was not even signed, that the 10th plaintiff had not signed its minutes, that being limited liability companies the plaintiffs could not authorize the director of a different company to swear the verifying affidavit on their behalf.

The defendant relied on the case of **Pakatewa Investment Company Ltd vs Municipal Council of Malindi [2016] eKLR.**

The plaintiff relied on the case of **Kabuito Contractors Limited vs Attorney General [2018] eKLR.**

The preliminary issues

The plaintiffs response was that there was commonality amongst them and what they did was supported by Order 1 rule 1 of the CPR which states:-

1. Who may be joined as plaintiffs [Order 1, rule 1.]

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

They listed the areas of commonality as follows: -

- 1. Prequalification and award of tenders for the works funded on a rather informal statutory and procedural regime*
- 2. Undertaking of works on an emergency basis*
- 3. Performance of assigned works to practical completion and to the defendant's satisfaction*
- 4. Prequalification, award and execution during the 2014/2015 financial year*
- 5. Preparation, obtaining and /or submitting documents and claims for payment after the performance of works.*

It is evident that this is from the plaintiffs' perspective, as it is denied by the defendant. Nevertheless, they form the basis for the issues for determination.

On the hand, it is correct that the plaintiffs did not comply with the provisions of Order 4 rule (1) (4) which clearly states that “*where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so*”.

The verifying affidavit herein was sworn by the PW1-Emma Waithera Njooora –the managing director of Lend Contractors Limited. She deponed that “*I have been expressly authorized to swear this affidavit on behalf of my co-plaintiffs*”.

The plaintiffs held Board meetings between 10th and 19th May 2017 where for each the substantive agenda was “*filing of civil suit against County Government of Nyeri*”

Each of the minutes contains Minute 001/2017 item (4) which states;

“The Board authorized, directed and empowered the managing director (Emma Waithera Njooora) to execute for and on behalf of the company and its name, and to affix the common seal of the company on any and all documents required in connection with filing of the above suit and to do all things connected thereto”.

Firstly, the plaintiff was only an officer of her own company and therefore could only swear a verifying affidavit with regard to her own company.

Secondly, nowhere in the minutes of the Boards of the other plaintiffs was the name of the plaintiff mentioned – each company authorized its own Managing Director to carry out that mandate hence the authority to Act filed on 23rd October 2017 and signed by officers of all the plaintiffs except the 10th and 12th plaintiffs is incompetent. It is not sealed. It does not bear the seals of the various plaintiffs and hence it cannot be said to be a competent authority to Act.

In signing it, those who signed it appear to be making the attempt to bring themselves with the ambit of Order 4 rule (1) (3) which states: -

“where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit may swear the verifying affidavit on behalf of others”.

This sub rule does not negate the provisions of sub rule (4) whose requirement are couched in mandatory terms. The officers of each company ought to have sworn their individual verifying affidavits – under the seal of the respective companies. Failure to comply – order 4 rule (1) (6) provides that: -

“The court may of its own motion or on the application by the plaintiff/defendant order to be struck out any plaint/counter claim which does not comply with the sub rules (3) (4) and (5) of this rule”.

Ideally therefore this suit ought to be struck out for incompetence. However, courts have been slow to strike out suits on this basis because again ideally it is the overriding principle of the Civil Procedure Act and CPR to do facilitate the just, expeditious and proportionate and affordable resolution of civil disputes. This read together with Article 159 of the Constitution has informed the decision of the Court of Appeal in **Kamami vs Kenya Anti-corruption Commission [2010] eKLR** cited in **Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015] eKLR** (F. Gikonyo J) See also Ohungo J in **Szaredo Investments Limited vs Chief Land Registrar & 2 others [2018] eKLR** where, the remaining true to the wise counsel of **Madan JA in D. T. Dobie & Co (Kenya) Ltd vs Joseph Mbaria Muchina & Another [1980] eKLR** saying:-

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case

beyond it”.

In this case, it is too late for any amendment. The only thing left is for the court to determine it on the evidence on record. That settles the preliminary issues raised by the defendant.

I will deal with the other issues together.

Were the plaintiffs’ pre-qualified? Was there a contract between each individual company and the defendant? Is the defendant is liable to pay the sums claimed?

The only evidence of a contract/pre-qualification between the plaintiffs and the defendant were said to be the two letters one undated but bearing date stamp of 5th May 2015 to M/s Lend Supplies and Transport Limited with reference to **Tender No. CGN/69/2014-2016/B25**, Tender name: pre-qualification of Haulage Contractors and Transport.

The letter requires that the recipient of the letter to acknowledge receipt of the notification of the award to signify acceptance.

No such acknowledgment is attached to show that M/s Lend Supplies and Transport Limited accepted the offer made by the County Government of Nyeri.

The other document is the letter dated 14TH November 2013 addressed to Ganyimu Ltd with reference to **“Tender No. NCG/22/2013-14 Pre-qualification of Bidders for classified and unclassified Roads in Nyeri County”**. The letter also contains a request for the recipient to acknowledge receipt as an acceptance of the offer. No such response has been attached. In both documents no effort was made to connect the 2 to the current claims. None of the other plaintiffs had any offers or acceptance of offers from the County Government of Nyeri.

The other documents relied on were the *“Request for quotation”*, three bearing the names of Geocast Agencies Ltd, one bearing the names of Fast World Solutions (K) Ltd. None of the documents bear a quotation number, there is no evidence as to when they were opened by the County Government of Nyeri and except for the stamp of *“Chief officer Lands & Infrastructure Development Nyeri County”*.

The document clearly states: -

“You are invited to submit quotation on materials listed below.

THIS IS NOT AN ORDER. Read the conditions and instructions on reverse before quoting. This quotation should be submitted in a plain wax sealed envelope marked “Quotation No..... for supply ofand be addressed to reach the buyer or be placed in the Quotation/Tender not later than 9. 30a.m on.....

(c) Your quotation should indicate final unit price which includes all costs for delivery, discount, duty and sales tax.

(d) Return the original copy and retain the duplicate for your record.

CODE NO.	ITEM DESCRIPTION	UNIT	QUANTITY REQUIRED	UNIT PRICE	BRAND	COUNTRY OF ORIGIN	REMARKS
5	TRANSPORT FROM MURRAM MWEIGA-NGANGARITHI	557	557	1750			TOTAL 975,000/-

Clearly from the plain wording of the Request for Quotations – there was still another step to be followed – the opening of the quotation and the awarding of the contracts.

There are no requests for quotations from the other plaintiffs. Of the four that were filed – 2 have dates of 13th December 2014, and 14th December 2014 and the commonality is that they all are generally incomplete.

The totality of this evidence is that the plaintiffs failed to establish that they individually had a contract with the defendant or that the defendant did or said anything that could amount to a contract.

The claims for payment are seen from the next set of documents relied on by the plaintiffs: invoices from the various plaintiffs. These are from Geocast, Greystone, Bizmark and Green Highland- none of the other plaintiffs has annexed their invoices.

For Geocast, it is noteworthy that their “request for quotation” and their invoices tally.

After that we have the demand letters.

Green highland Services Limited stated in their letter of 9th November 2015 that they were “*requested by officers of the Infrastructure Department as an emergency services as a result of heavy rains around the time which made the roads impassable*” Similarly, for Bizmark in both letters it has indicated that the “*Excavation, loading, spreading of the gravel was done by the County Government*”. Lend in their letter of 29th October 2015 said they had done the road as “*an emergency for burial given that the road was impassable there*”. Ganyimu said in their four letters dated 29th October 2015 that they had done the work for an emergency and had hired work hands- exceeding the amount quoted. Goecast also mentioned in their 2 letters of 29th October 2015, that they did emergency work on roads to facilitate the burials of “*victims of the Garissa Massacre (Quarry Attack)*”.

Then there are affidavits sworn by the various directors to confirm that the amounts claimed are due and owing.

There are 2 letters alleged to have emanated from the County Government of Nyeri- one dated 15th May 2015 addressed to Equity Bank- with reference to Green Highlands Services Limited acknowledging that the company was pre-qualified with County Government of Nyeri and that there were some pending payments with respect to work he had undertaken. The letter is signed by John M. Maina County Executive Secretary Land Housing and Infrastructure.

The other letter is dated 19th November 2015 with reference to James Karimi Muiuru addressed to the same Bank- signed by Eng. J. W. Kiragu – saying that there was a delay in release of funds from the National Government to pay for road works by the County Government which owed the said person money. The signatory assured the bank that the process of paying the arrears was in an advanced stage. These 2 letters make no reference to any specific claim in this suit. There is no evidence that the letters were with reference to the alleged works given under emergency/ they were related to any other claim that the 2 parties who have presented them had. The one about James Karimi Muriu makes no reference to any of the plaintiffs to this suit.

Then there is a letter from the County Executive Member Engineer J.W. Kiragu dated 24th June 2014 to the Principal Finance Officer through the County Executive Secretary to release 10% retention to Green Highlands Services with respect to Tender No. NCG/63/2013-2014. The roads are named as Lilonge-Gwa Gatheri- Kiandu, and Karuki – Gwa Githithu. Looking at the claims by 1st plaintiff these roads were not part of its claim in this suit and hence cannot be evidence that they were contracted to do the works.

In the face of all these shortcomings in the evidence the plaintiffs submit that:

“This was a period when counties were beginning to operationalize their mandate pursuant to

their establishment under Article 176 of the Constitution. It was a time of great uncertainty regarding applicable statutory and procedural laws and rules with many teething problems experienced. Accordingly, the issue of pre-contract and contractual documents applicable in emergency cases was not well defined. It is no surprise that the defendant's officials resorted to asking the plaintiffs to undertake works, after which the issue of preparation of the most appropriate documentation would follow.....that the plaintiffs undertook the assigned works on various roads to full completion and to the satisfaction of the defendant thus entitling them to payment”.

With due respect to counsel and the plaintiffs I find this submission to be fantastic. Despite the fact that the County governments had just come into place the mode in which government does legitimate business is known, and established. It can never be the same as one going to the market and making an order for goods and services. At no time after the coming into being of the County Governments was any law suspended. County Governments are public entities- there was no uncertainty about anything- the Public Procurement Law *in situ*. It clearly set out the procedure to be followed and it was in the interests of the plaintiffs, as upright businesses to carry out due diligence to ensure that the proper procedures were followed as they were the ones spending their money to do the work- hence the need to secure the same.

It is clearly evident from the evidence that none of the plaintiff could tell who had given them the contract – who specifically at the county government of Nyeri had called them. They cannot be heard to submit that the works were done to the satisfaction of the defendant yet they could not produce any evidence to support the same. In fact, not a single piece of evidence was produced to support even the alleged delivery of the gravel, the spreading etc. - none! It is one thing to submit that the works were done to the satisfaction of the defendant and it is another to prove the same.

I have read the authority cited by the plaintiffs – relying on **Combe vs. Combe (1951) 2KB 215** – the words of Denning L. J on estoppel quoted as follows:

“The principle as I understand it, is that, where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him but he must accept that legal relations subject to the qualifications which he himself has introduced, even if it is not supported in a point of law by any consideration, but only by his word”.

The plaintiffs have not established by evidence what *words or conduct, promise or assurance* were made to them by the defendant with the intention of creating a legal relationship between them to warrant the application of the doctrine of estoppel with the regard to the claims in this suit to any or all of the plaintiffs.

The plaintiffs further submitted,

“The very nature of the emergency engagements made it improbable if not impossible to follow the strict provisions of the law regarding the award of tenders for provision of goods and services by private entities.....it was highly unlikely and indeed impractical for a contractor to be instructed to deliver murrum/gravel to a road leading to a burial of terror victims slated for say two days away, then be subjected to the vigorous public procurement process involving requests for quotations, convening of tender committees, opening and evaluation of bids, award, issuance of LSO, request from inspection upon completion.....”

From this submission the plaintiffs knew the legal process *vigorous public procurement process involving requests for quotations, convening of tender committees, opening and evaluation of bids, award, issuance of LSO, request from inspection upon completion*. They chose to circumvent it. Surely they cannot expect the court to aid them in violation of procedures set up by the people of Kenya to regulate the use of public funds, when they have not placed before the court evidence to support the claim.

As at the time of the alleged contract the law in place was the Public Procurement and Disposal Act, 2005 which was repealed by the Public Procurement and Asset Disposal Act No.33 of 2015 which came to force on 7th January 2016.

In that Act, urgent/emergency is defined at s.3 as: -

*“The need for goods, works, services in circumstances where there is an **imminent /actual threat to public health, welfare safety or damage to property**, such that engaging in tendering proceedings or other procurement methods would not be practicable” (emphasis mine)*

The procedure to be followed was set out under sections 74 and 75 of the Act.

74. When direct procurement may be used

(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied—

(a) there is only one person who can supply the goods, works or services being procured; and

(b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied—

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

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

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

75. Procedure

The following shall apply with respect to direct procurement—

(a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;

(b) the procuring entity shall not use direct procurement in a discriminatory manner; and

(c) the resulting contract must be in writing and signed by both parties. (emphasis mine)

The County Government of Nyeri is a public entity. It would not have been expected that it would act outside the law- there was no lacuna people who did not want to follow the law chose to decide to do things their own way.

The case of **Kabuito** is clearly distinguishable. There the plaintiff already had a contract with the defendant. The court observed

“The defendant was actively involved in the road construction works by sending engineers to give necessary instructions to the plaintiff and to supervise the works done, approving the quality and quantity of materials used and ultimately receiving the payment certificates raised. It is clear in my mind that the defendant was well aware of the ongoing works and approved the same.... the bundle of document to show that the work was done and the DW1 confirmed”

That is not the case here.

The case here is captured in the similar case of **Pakatewa**. In the words of Chitembwe J which I adopt-

“A supplier cannot expect to receive a phone call from an assistant procurement officer to supply goods and jump into the process of supplying. One has to be pre-qualified.....”

From the foregoing it is quite clear that;

- i) There was no evidence of a contract for supply of the services between the plaintiffs and the defendant.
- ii) The plaintiffs have not established that they are entitled to be paid the sums claimed.
- iii) The suit is dismissed with costs to the defendant.

Dated signed and delivered in open court at Nyeri this 4th March 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Njomo holding brief for Kamotho for defendant

Peter Mucheru holding brief for S.Ndung’u for plaintiffs.

Judge