REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 352 OF 2014

ROYAL MEDIA SERVICES.....PLAINTIFF

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION…….……1ST DEFENDANT

MR. ISSAK HASSAN ……..…….2ND DEFENDANT

MR. J. H OSWAGO…….…….3RD DEFENDANT

MINISTRY OF FINANCE (SUED THROUGH

THE ATTORNEY GENERAL)……...……4TH DEFENDANT

JUDGMENT

1. The claim of Royal Media Services Ltd (RMS or the Plaintiff) is predicated upon services allegedly procured through single sourcing by the Independent Elections & Boundaries Commission (IEBC or the 1st Defendant). RMS sues for the principal sum of Kshs.182,000,000/= and interest, and names IEBC alongside Issak Hassan (Mr. Hassan), J.H Oswago (Mr. Oswago) and the Cabinet Secretary Ministry of Finance as the Defendants.

2. The case for RMS is that in December 2012, Mr. Hassan and Hon. Njeru Githae (the then Minister for Finance) visited the offices of Samuel Kamau Macharia (PW1 or Mr. Macharia) and enquired how RMS could promote the voter registration exercise that was then ongoing. Mr. Macharia is the Chairman of RMS. Present in that meeting was also Mr. Wachira Waruru (PW2 or Mr. Waruru), the Group Managing Director of RMS.

3. The concern then of IEBC was that voter registration was lagging behind and there was need for an aggressive campaign to be mounted throughout the Country through roadshows, in radio stations and on television. RMS offered to help in the provision of those services.

4. Mr. Macharia's testimony was that the roadshows would be conducted for 6 days from 13th December 2012 to 18th December 2012 in different parts of the Country. The charges agreed are said to be Khs.3m per station per day which RMS claims is the cost price at no profit. Following that meeting and on the same day (11th December 2012) (P Exhibit page 11), Mr. Waruru wrote to Mr. Hassan confirming the meeting and what was supposedly agreed therein. One notices however that in the letter the charges are fixed at Kshs.3.5m per station per day.

5. The case for RMS is that it then forwarded to IEBC Advertising Booking Sheets with full details and charges of all the roadshows to be undertaken and IEBC approved the Bookings by stamping and signing all the sheets. A bundle of the Booking Sheets were produced at the hearing.

6. Consequently, on 13th December 2012, the roadshows were launched under the leadership of Fred Ngure who is a Director of Programmes in RMS. The promotion, it is said, was flagged off by a representative of IEBC and its representatives accompanied RMS staff countrywide. RMS boasts that because of its effort, voter registration spiked from 9 million to 14 million, an increase of 5 million.

7. RMS is aggrieved that it has not been paid for the services offered. In the Further Amended Plaint of 20th February 2015 and filed on 22nd February 2017, RMS explains why it has joined the other 3 Defendants. Mr. Hassan was at the material time the Chairman of IEBC while

Mr. Oswago was its Chief Executive Officer. The 4th Defendant is the Accounting Officer Ministry of Finance (the Treasury).

8. RMS avers that it was Mr. Hassan in both his personal capacity and Chairman who initiated the contract. Mr. Oswago on the other hand executed and endorsed his signature on the Booking Sheets in furtherance of the contract. In respect to the 4th Defendant, RMS states that through his Principal Secretary a letter dated 14th December 2012 (P Exhibit page 13) was written to IEBC and Mr. Hassan to proceed with the exercise and utilize the funds in their vote. RMS asserts that the authority to incur was given by the 4th Defendant to IEBC and Mr. Hassan.

9. The Defendants resist the claim. IEBC, Mr. Oswago and Mr. Hassan take a somewhat common position. First they deny the existence of a contract or that services were rendered as alleged by the Defendant. Further that any procurement of services by IEBC were subject to the Public Procurement and Disposal Act 2005 (PPD Act, 2005 or the Act) and that the services in controversy were not procured as required by statute. In addition that the claim by RMS is *contra bonos mores* (against good morals and conscience), illegal, unlawful and irregular. Lastly that the services offered by the Plaintiff were gratuitous and did not attract any liability on the part of the Defendants.

10. For the 4th Defendant it was pleaded that in discharging its Constitutional and Statutory mandate of overseeing/controlling expenditure, the National Treasury merely advised IEBC to utilize its financial resources in the voter provision to cater for voter education. That in carrying out the mandate, the 4th Defendant did not become a party to the contract between the Plaintiff and the 1st Defendant. Finally, the 4th Defendant pleads that the suit against it is statute barred.

11. At the hearing only Mr. Hassan testified on behalf of the Defence. He confirmed the meeting of 11th December 2012. In the meeting an offer to help in promotion of voter registration was made by RMS. He says that he understood the offer from RMS to be one given as national service. He got the impression that RMS was offering it in corporate social responsibility (CSR) and that IEBC would pay costs for fueling the vehicles. But even then, he passed the offer to Mr. Oswago for the Commission's consideration. That no agreement was reached on 11th December 2012 nor were the services single sourced.

12. He however concedes seeing roadshows by RMS on voter registration but denies that IEBC participated in the official launch of the mobilization exercise.

13. As I turn to evaluate the evidence and arguments raised by the parties, it is useful to isolate matters in regard to the 4th Defendant. Through leave granted by Court on 10th February 2017, the 4th Defendant was joined into these proceedings vide a further Amended Plaint presented to Court on 22nd February 2017. Paragraph 2b of that Pleading reveals the capacity in which the Cabinet Secretary is sued, it states:-

> "2b. *The 4th Defendant is the accounting officer Ministry of Finance (Treasury) and sued through the Attorney General (service of summons be effected through the Plaintiff's Advocates office*)".

14. Without a doubt the 4th Defendant is not sued in a personal capacity and the proceedings against him are civil proceedings brought against the Government.

15. On 4th July 2017, the Attorney General filed a statement of Defence on behalf of the 4th Defendant. Amongst other pleas taken is that the suit by RMS against the 4th Defendant is statute barred. Although the nature of bar is not specified, it would seem to Court that it is in respect to limitation imposed by the Public Authorities Limitation Act (Cap 39 Laws of Kenya). This is a statute providing for limitation of proceedings against Government. The action of RMS being founded on contract then the provisions of Section 3(2) would apply. These are-

> "No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued".

16. The contract herein is said to have been entered sometime in December 2012. Although it is unclear from the evidence how soon after the provision of the services payment was to be made, it is clear that by 19th November 2013 RMS was alleging breach of payment. This is the day when it called for payment of Kshs.203,840,000/= within 14 days (see Plaintiff Exhibit page 15). It is clear therefore that the cause of auction had accrued by at least the first week of December 2013. Three years hence would lapse in December 2016. In respect to the 4th Defendant this suit was brought against him not on the presentation of the original Plaint but on the further Amended Plaint which first joined him. To hold that the amendment had retroactive effect would be to deny the 4th Defendant the right conferred on him by The Public Authorities Limitation Act (See for example Atieno vs. Omoro & Another [1985] eKLR. That pleading was filed on 10th February 2017, outside the 3 year period. The action against the 4th Defendant clearly runs afoul the provisions of Limitation of Section 3 of The Public Authorities Limitation Act. The action would not go any further in respect to that Defendant.

17. For the other Defendants the issues are somewhat narrow. Although the Defendants had denied provision of roadshows, radio and TV coverage, the only witness for the defence, Mr. Hassan was tepid when confronted with question whether the services were indeed provided. In his written statement he states,

> "*I suggested that Royal Media Services considers conducting the same as part of its corporate social responsibility; the next day I saw Royal Media Services road shows urging eligible Voters to turn out in large numbers and register and I thought they had accepted my proposal for a free corporate service Responsibility*".

In his oral testimony he adds,

"*I saw Roadshows by Royal Media on Voter Registration among other things*".

18. The Court is persuaded that those services were provided. Indeed there is corroboration of this in the Advertising Booking Sheets that bear the stamp of IEBC. The approval by IEBC was to signify that the services therein could be provided. These sheets have not been disputed by the Defence.

19. Given that finding the issues that have to be determined are as follows:-

(i) Was the procurement of the services in breach of the Public Procurement and Disposal Act 2005 and the Regulations then applicable?

(ii) If the answer is in the affirmative, is IEBC, Mr. Hassan and Mr. Oswago nevertheless still liable?

(iii) What is the appropriate order as to costs?

20. There is evidence that the voter registration exercise carried out by IEBC in the year 2012 was falling short of target. There is evidence in this regard in a letter of 11th December 2012 (P Exhibit 10) by no less than Mr. Hassan the Chairman of IEBC in which he pleads to the Cabinet Secretary for Treasury for funds for purposes of voter education. He ends by observing that,

"*An aggressive media campaign with local FM stations will also contribute towards the realization of the targeted numbers. The requested Kshs. 200 million will go towards these two strategies*".

21. This Court, therefore, does not doubt the evidence of Mr. Waruru and Mr. Macharia that there was an urgent need for voter mobilization in December 2012. The testimony of Mr. Macharia is that at the meeting of 11th December 2012, Mr. Hassan informed them that it was 2 weeks to the close of voter registration and that there was an outcry in the Country that the numbers be increased or the impending elections be postponed.

22. It is against this picture of urgency and crisis that RMS sought to defend the manner in which IEBC procured its services. The evidence of Mr. Waruru was that,

"*This was presented in the meeting as special circumstances. It was like an emergency service. There was need for special intervention".*

23. It is common ground that IEBC is a Commission established under Article 88 of The Constitution. It is therefore a Public entity (see section 3 of The PPD Act, 2005) and procurement of services to the Commission was undoubtedly governed by the PPD Act,2005. Perhaps it is apt at this point to state that at the time relevant to the dispute at hand the law on public procurement was the PPD Act, 2005. That statute has since been repealed by the Public Procurement and Asset Disposal Act (Act No. 33 of 2015). Any reference to statute shall therefore be reference to the repealed statute.

24. Under the provisions of the PPD Act, 2005, Public entities such as IEBC could only procure for goods and services by way of open tendering, restricted tendering, direct procurement, request for proposals, request for quotations, procedure for low-value procurements and specifically permitted procedure (Section 92 of PPD Act, 2005). The submission by Counsel for RMS is that its services were procured by way of direct procurement under Section 74 of the Act.

25. Section 74 provides as follows:-

"(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."

26. Counsel for RMS asserts that there was compelling reason for direct procurement to be employed for the following reasons:-

(i) There was no reasonable alternative considering the time constraints and the urgency of the matter.

(ii) There was an urgent need for the services.

(iii) The circumstances of poor voter registration was not foreseeable.

The Court is further asked to find that RMS was the only media house that could supply those services given that it had 14 vernacular radio stations with a vast country outreach which other media houses lacked.

27. The Court was asked to give regard to the importance of the exercise in helping fulfil the Political Rights under Article 38 of the Constitution which includes the Right of every adult citizen to be registered as a voter. RMS beseeches the Court to find that,

> "*If services were acquired and consumed for urgent public good and interests of the Country as a whole in achieving objects enshrined under Article 38 of the Constitution, then provisions of the Public Procurement and Disposal Act ought to be treated as subservient to Article 38 and should not be cast in stone or interpreted strictly so as to deprive of his right*".

28. That would not be the end of the matter from the perspective of RMS. It was argued that the statute on procurement does not give a public entity the right to consume services and then refuse to pay for reason that procurement rules were not followed. Pressing the point, RMS asserts that public entities cannot lure a person by holding out representations to supply services and upon consuming them, refuse to pay.

29. In support of this latter proposition, the Court was asked to adopt the reasoning of Visram J (as he then was) in HCC No. 1096 of 2000 Brite Print (k) Ltd vs. Attorney General where he held:-

> ***"The Government acts through it human agents. The human agents are its tool. The scope of the authority and powers of the Government servant and agent is set by the Government……An outside person is not party to the setting down of any of these things. He may not even know of them, unless aspects of them are incorporated in terms of agreements or contracts between him and Government. They cannot just be assumed to be known by the whole world and by everyone who does business with Government. Compliance with them when dealing with persons outside Government depends on Government servants.***
>
> ***But if these internal policies and procedures are flouted by officials of Government who are supposed to protect Government and to act at all times in the interest of the Government and as a result commit the Government to contracts with other persons and those contracts turn out to be to the detriment of Government, then surely it is those officers to answer for any resultant loss to Government. In the meantime the Government must honour those contractual obligations into which its bad officers plunged it. A person dealing with the bad officers in a Ministry can only be denied any contractual benefits if it is shown that he was an accomplice to the breach of the internal Government regulatory procedures by the officers of the government, or if it is shown that he had exercised undue influence or played fraud or tricks in the matter."***

30. The Defendants on the other hand submit that the material contract, if any, violates the provisions of the procurement law in Kenya and that actions against public interest are not enforceable (**Nedermar Technology BV LTD vs. KACC & Another [2008] eKLR**). **Further that the Chairman of RMS is related to the then Minister for Finance and so the alleged contract is tainted with abuse of office, nepotism and corruption. In the end the Court was asked to find that public interest and public good must triumph over the Plaintiff's mercantile ambitions.**

31. What does the Court make on the rival submissions?

32. On the issues raised regarding the PPD Act, 2005 it is incumbent upon this Court to first examine whether the provisions of statute on Direct Procurement (as were existing) were complied with. This is because if there was compliance then IEBC would be liable and that would be the end of the matter.

33. Kenyans have deemed matters of public procurement as being of such significance that it has found its way into the Constitution. Article 227(1) provides as follows:-

> **"(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective".**
>
> **Although the PPD Act (No. 3 of 2005) predated the Constitution, its stated objectives and purpose are not dissimilar to the Constitutional imperatives. Section 2 reads:-**
>
> > **"The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives—**
> >
> > **(a) to maximize economy and efficiency;**
> >
> > **(b) to promote competition and ensure that competitors are treated fairly;**
> >
> > **(c) to promote the integrity and fairness of those procedures;**

(d) to increase transparency and accountability in those procedures;

(e) to increase public confidence in those procedures; and

(f) to facilitate the promotion of local industry and economic Development".

34. Given those overall and broad objectives, procurement procedures which are an alternative to open tendering can only be adopted in the limited circumstances permitted by the statute. Direct procurement can only be employed as long as the purpose is not to avoid competition. That is the avowed statement of Section 74(1) of the Act. Section 74 also delineates when direct procurement may be used in the following terms:-

"(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."

35. The argument by RMS is that the circumstances obtaining in December 2012 were such that the services needed were urgent and because of the urgency the other available methods of procurement were impractical. In addition, poor voter registration was not foreseeable and was not a result of dilatory conduct on the part of IEBC. RMS sought to make the case that it was the only person or entity capable of supplying the services required and there was no reasonable alternative or substitute to those services.

36. Yet even where there is justification for direct procurement, statute requires that the procedure set out in Section 75 be adhered to. Section 75 reads:-

"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".

37. In addition to that requirement is Regulations 62 as read with Regulation 58 of The PPD Rules. Regulation 62 reads:-

"(1) A procuring entity that conducts procurement using the direct procurement method pursuant to section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 74 of the Act has been satisfied.

(3) A procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.

(4) The procedure for negotiations for proposals set out in regulation 58 shall apply *mutatis mutandis* to negotiations relating to direct procurement pursuant to section 75(a) of the Act.

(5) A procuring entity shall not enter into a contract under section 75(c) of the Act unless it is satisfied that the offer—

(a) meets the requirements of the procuring entity as specified under paragraph (2); and

(b) is at the prevailing real market price.

As the above provisions require that negotiations be undertaken between the Public entity and the proposed contractor, Regulation 58 is to be applied in the negotiations. Regulation 58 reads:-

> "(1) A procuring entity shall not enter into any negotiations pursuant to section 84 of the Act until the tender committee has approved the successful proposal.
>
> (2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit.
>
> (3) The members of staff conducting the negotiations under paragraph (2) shall prepare a report of the negotiations and submit it to the tender committee for decision making.
>
> (4) The report prepared under paragraph (3) shall form part of the records of the procurement."

38. Read together, the hallmarks of this procedure include:-

> a) The Head of the user Department is the person responsible for initiating the procurement (see the First Schedule referred to in Regulation 62(1))
>
> b) That reasons for adopting the procedure must be clearly spelt out by the public entity.
>
> c) Negotiations with the contractor must be conducted by at least 2 members of staff of the entity.
>
> d) The best prevailing real market price is to be obtained.
>
> e) The resulting contract must be in writing and signed by both parties.

39. It would seem to this Court that the objective of these strict rules is to guard against the abuse of direct procurement. Reasons for adopting the method should be readily apparent and available to scrutiny. The method should not be employed in a discriminatory manner or to avoid competition or to achieve any other collateral reason. In addition, the public entity and by extension the public should get the best deal in the circumstances. These are safeguards that ensure that even in the exceptional circumstances where statute permits direct procurement, the overall objective of sound procurement practices contemplated by Article 227 (1) of the Constitution are not trampled over or defeated. In essence parties to a direct public procurement must ensure an irreproachable compliance with the law. Does the transaction under dispute pass that test?

40. The position taken by IEBC was that there was in fact no procurement at all. That as far as it is concerned the offer by RMS was gratuitous and was neither sought nor formally procured. As is apparent from the provisions of Regulation 62 the inception of the process may be an internal affair of the public entity. However having decided to apply that method, the public entity is then required to negotiate with the proposed contractor(Sub Regulation 4).The procedure for negotiations is found in Regulation 58. The negotiations are to be conducted by at least 2 members of staff of the procuring entity. And the language of Regulation 58(2) is mandatory in that respect. It reads;-

> "(2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit".

41. The common evidence is that the meeting of 11th December 2012 was attended by Hon Githae, Mr. Macharia, Mr. Waruru and Mr. Hassan. That was the only meeting that preceded the alleged contract. It is also the case for RMS that it is in the meeting that the terms of the engagement were discussed. There is no evidence of other negotiations! The question to be answered is whether that meeting met the mandatory requirements of Regulation 58. Put differently whether the meeting were negotiations within the contemplation of Regulation 58. As is clear the only representative of the Commission was Mr. Hassan. Yet the law requires at least 2 representatives of the procuring entity. None of the parties addressed this strict requirement of the law and this Court did not receive any suggestions as to the rationale for the requirement. The Court can only surmise that an objective is to minimize the possibility of an individual negotiator either colluding with the proposed contractor or negotiating a bad deal for the procuring entity. Whatever the policy consideration, it is a binding requirement. On this single score the alleged direct procurement was flawed.

42. The transaction may yet be problematic for another reason. By dint of the provisions of Section 75(c) a contract that results from the direct process must be in writing and signed by both parties. Responding to a question posed in cross-examination in this regard, Mr. Waruru answered;

> "*We never had a written services contract*."

This is a concession that the resulting contract intended by statute was not entered. While the Advertising Booking Sheets issued by RMS and duly endorsed by IEBC can in different circumstances be accepted as constituting a contract/s, this court very much doubts that these sufficiently meet the formality required by Section 75(c). Yet still, it can be argued that the exigencies of a situation can be so overwhelming such that there is no time to make and execute a contract. For example, where firefighting services are procured to put off a raging fire. But in the matter at hand it is not said that there was such a pressing urgency that it was impossible to make the contract required by Section 75(c).

43. The evidence at hand is that the law in respect to direct procurement by public entities was not complied with. Unfortunately for RMS, it

is in the genre of law that, it bears repeating, must be observed scrupulously.

44. That notwithstanding, this Court is urged to find that RMS should not be prejudiced by noncompliance of what are essentially internal processes of IEBC. An argument that RMS was entitled to presume that all legal requirements had been met by the Commission.

45. This Court very much doubts that a Contractor can, in all circumstances, benefit from such a proposition when it comes to public procurement matters. In this regard the force of Section 27 of the Act is not to be taken lightly. It provides;-

> "(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.
>
> (2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).
>
> (3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.
>
> (4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.
>
> (5) The accounting officer may use the procurement unit and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.
>
> (6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed".
>
> *(my emphasis)*

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

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

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

> 57. The Court reaches its decision even in the face of the submissions by the Claimant's Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.
>
> 58. If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.

48. In reaching the decision that IEBC is not liable, this Court has shunned the invitation by Counsel for the Defence that the contract was tainted with abuse of office, nepotism and corruption. These are allegations of a criminal conduct which needed to be specifically pleaded and particularized and proved to the standard required by law (higher than a balance of probabilities but not as high as beyond reasonable

doubt).These are not allegations to be made casually. It was unfair for the Defence to make such grave assertions at the submission stage yet they were unpleaded and unproven.

49. In regard to the liability of the 2nd and 3rd Defendants this Court is unable to find any material that supports a proposition that the two were personally liable for the Plaintiff's claim.

50. The upshot is that the Plaintiff's suit is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th day of April, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Orege for Plaintiff

Muiruru for Kipkorir for 1st, 2nd and 3rd Defendants

Kihara for 4th Defendant

Nixon – Court Assistant