



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 508 OF 2017**

**ATTAIN ENTERPRISE SOLUTIONS LIMITED..... PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit vide a plaint dated 19<sup>th</sup> December, 2017 seeking for judgment against the Defendant for :-

*(a) A permanent injunction restraining the Defendant from cancelling the award granted to the Plaintiff and/or awarding the tender to a 3<sup>rd</sup> Party including the re-tendering and in particular the Request for Proposal for Provision of Service Delivery Platform and payment Solution for Mwananchi Gas Project – Tender No. NOCK/PRC/03(1339) 2017-2018, closing on the 29<sup>th</sup> December, 2017;*

*(b) An order of specific performance of the Tender No. NOCK/PRC/03 (1194) ;*

*(c) In the alternative special damages in the sum of Kenya Shillings Kenya Shillings Six Hundred and Ninety Million (Kshs. 690,000,000);*

*(d) Interests thereon at the court rates from 10<sup>th</sup> July 2017 until payment in full; and*

*(e) Costs of the suit together with interests thereon at court rates from the date of judgment until payment in full.*

2. The facts of the case are that, the Defendant, in May 2017 advertised a Tender for the “Provision of a Service Delivery Platform and Payment Solution for Mwananchi Gas Project - Tender No. NOCK/PRC/03 (1194), with a closing date on 31<sup>st</sup> May, 2017. Pursuant thereto, the Plaintiff duly submitted a bid in accordance with all stated requirements and thereafter, the Plaintiff was declared and notified vide a letter dated 10<sup>th</sup> July, 2017 that it was the successful bidder of the tender in the sum of; Kenya Shillings Seventy Nine Million Thirty Eight Thousand Four Hundred and Twelve and Fifty Cents (Kshs. 79,038,412.50) inclusive of VAT.

3. The Plaintiff was required to acknowledge receipt of the notification letter and sign the same accepting the award within thirty (30) days of the date thereof. The acceptance was to be accompanied by a Professional Indemnity Cover in the sum of; Kenya Shillings Seven Million Nine Hundred and Three Thousands, Eight Hundred Forty One only (Kshs. 7,903,841), being 10% of the tender sum. The Plaintiff avers that it accepted the award and complied with the conditions set.

4. That the parties thereafter engaged in a series of contract negotiation meetings which resulted in the issuance of a Contract and Service Level Agreement. The Plaintiff then commenced on the implementation of the contract as follows:

*a) Put together a robust technical project team thus acquiring staff and the necessary technology and machinery to develop the platform and payment solution;*

*b) Developed a financial and marketing model for the project;*

c) Created and paid for NOCK credentials, domains, applied for the USSD codes/pay bill numbers in line with the development of the platform;

d) Discussed with Commercial Bank of Africa Limited and Equity Bank on behalf of the Defendant with respect to leveraging on the banks strengths in mobile banking to secure financing of end users and business people;

e) Negotiated and discussed with Safaricom (K) Limited and Airtel Limited on behalf of the Defendant with respect to the USSD Code platform to enable the roll-out of the software solution; and

f) Held trainings with various stakeholders so as to integrate the solution more effectively and efficiently;

5. The Plaintiff avers that the Defendant subsequently vide a letter dated 11<sup>th</sup> December 2017 and without notice, reasonable justification or lawful cause purported to terminate the award, pursuant to; Section 63 of the Public Procurement and Disposal Act 2015 (herein "the Act") and proceeded to invite new bids the following day, via advertisement in the local dailies of 12<sup>th</sup> December 2017.

6. The Plaintiff argues that the purported termination is contrary to the provisions of the Act and the tendering process. It amounts to breach of the contract; as it was issued after the plaintiff had been notified of the award of the tender and it is contrary to Section 63(1)(a)(i) Public Procurement and Disposal Act 2015. Further the purported termination was actuated by bad faith and malice resulting in loss of goodwill and brand identity.

7. As such the Plaintiff stands to suffer loss and damages in terms of; contract price for the provision of the services contracted, agreed revenue share; premium for an indemnity cover; and anticipated profits.

8. However, the Defendant filed a statement of defence dated 22<sup>nd</sup> June 2018, and denied the alleged breach of contract. The Defendant stated that, it complied with inter alia; the Public Procurement and Asset Disposal Act, the Regulations and guidelines made there under in terminating the tender.

9. That the Plaintiff is guilty of material non-disclosure and active concealment of material facts pertinent to the suit and has failed to reveal that, the award was valid for a period of one hundred and twenty (120) days, from the date of the tender opening on 31<sup>st</sup> May 2018 and lapsed on 28<sup>th</sup> September 2017 before execution of the contract.

10. Further the Plaintiff's claim is untenable because; the Plaintiff failed, neglected, refused and/or ignored to execute the notification of award dated 10<sup>th</sup> July 2018 within thirty (30) days, as stipulated in notification letter and/or neglected to sign a contract with the Defendant for the performance of services. That the Plaintiff further failed to supply the Defendant with the mandatory professional indemnity cover in the sum of; Seven Million, nine Hundred and three thousands eight hundred and forty one only (Kshs.7, 903,841.00) as stipulated in the notification of award. In addition, contrary to the averments in the plaint, no works have been undertaken by the Plaintiff under the tender and no consideration has passed.

11. That under the relevant law, a tender validity period cannot be extended after its expiry and no contract capable of enforcement can be formed between a successful bidder of a tender and a procuring entity until the written contract is executed by the parties. However the Defendant conceded that, since the notification of award on 10<sup>th</sup> July 2017, the parties have been engaged in negotiations as envisioned of the tender document.

12. The Plaintiff filed a reply to the statement of defence on 2<sup>nd</sup> July, 2018 and reiterated that indeed the parties were involved in active negotiations in order to reach *consensus ad idem* but at no time did the Defendant invoke the tender validity period to cease negotiations. That the period for the execution of contract was extended by acquiesces and conduct of both parties. The Plaintiff maintained that it supplied the Defendant with two professional indemnity covers, which were received at their offices and stamped.

13. It was argued that the Defendant is approbating and reprobating by denying non-existence of a contract totally on the grounds that the parties were still negotiating and more so outside the tender validity period. The Plaintiff called to its aid; the maxim *quodapprobo non reprobo*.

14. Finally it was argued that the Defendant is estopped by conduct from relying on its own default and failure to execute the contract within the tender validity period to seek to avoid liability for the damage accruing to the Plaintiff.

15. The case proceeded to full hearing. The Plaintiff's case was supported by the evidence of; its director Dr. William Nyaega Motende. He relied on the statement dated 28<sup>th</sup> June 2018 and adopted the same as his evidence. He basically reiterated the averments in the plaint. In a nutshell he testified that, the works on the project commenced immediately the tender was awarded and even before the scope of the works was reduced in writing as the President of the Republic of Kenya was supposed to launch the project by 5<sup>th</sup> August 2018.

16. He further testified that, as the Defendant was not able to meet the contract sum of; Kenya Shillings, Seventy Nine Million, Thirty Eight Thousand, Four Hundred and Twelve (Kshs 79, 038,412), the Plaintiff agreed to reduce the amount to, Kenya shillings Thirty Million (Kshs.30,000,000) subject to other conditions as herein stated. He averred that, the works were under taken and substantially completed. It was sanctioned by the Defendant's Chief Executive Officer, its full Board and the Permanent Secretary in the Ministry of Petroleum and Mining.

17. The Defendant's case was supported by the evidence of; its procurement officer Erastus Kanyiri, who relied on the statement he filed in court, dated 25<sup>th</sup> June 2018 and adopted it as his evidence. He testified that, the Plaintiff was supposed to have acknowledged the notification

of the award by 17<sup>th</sup> July 2017 but did not. That the tender was valid for a period of one hundred and twenty (120) days and lapsed on 28<sup>th</sup> September 2017, before the parties had signed a contract and/or sought for extension. However he conceded in cross examination that despite lack of a contract the parties continued with negotiations.

18. The parties filed final submissions, whereby the Plaintiff invited the court to determine the following issue:-

a) *Whether there was a valid contract existing between the Plaintiff and the Defendant for the Provision of a Service Delivery Platform and Payment Solution for the project dubbed 'Mwananchi Gas Project'.*

b) *If the answer to (a) above is in the affirmative, whether there was breach of that contract by the Defendant;*

c) *Whether the relief of specific performance sought is available to the Plaintiff;*

d) *Whether in the alternative to (c) above, the Plaintiff suffered any damages as a result of the breach and if so, whether it is entitled to damages;*

e) *What is the quantum of damages awardable to the Plaintiff?; and*

f) *Who shall bear the costs of this suit?*

19. However before submitting on these issues, the Plaintiff dealt with the issue raised by the Defendant on the jurisdiction of the court to entertain this matter as opposed to the Tender Review Board. The Plaintiff submitted that, the tender process herein closed on 28 September 2017 and the purported cancellation of the tender was done months later on 11<sup>th</sup> December, 2017 under the Act. As a result, by the time the award was being cancelled, there no longer existed a tender process upon which the board would exercise jurisdiction. Thus the board became *functus officio*. Any other disputes arising would effectively fall within the jurisdiction of the High Court. Further, no disputes ever arose during the tendering process and by the time of the purported cancellation, the Plaintiff was no longer a candidate or a tenderer capable of seeking review as anticipated under section 167 (1) of the Act.

20. It was argued that for the Tender Review Board to be possessed of jurisdiction under section 67 (1) of the Act, there must be a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due at any stage of the procurement process. That in any event, the issues brought forth in these proceedings are not the subject of a tender process but of a contractual relationship between the parties. Therefore the reference to the tender process is merely incidental.

21. The Plaintiff maintained that, there is a valid contract between the parties which it executed on time and handed to one; Mr. Laban Serem, a member of the technical team of the Defendant. That he send an email to the effect that the Defendant had signed and sent it back. Further the legal responsibility of reducing and ensuring that there is a formal relationship between the parties rested squarely on the lap of the Defendant.

22. That in anticipation of the signing of the contract and because of the pressure to deliver the "Mwananchi Gas Project", the Plaintiff was categorically instructed by the Defendant to commence work pending the formalization of the contract. The instructions were repeated in various sittings with the technical team set up by the Defendant to ensure that the project was delivered on time. The team was tasked with delivering the project.

23. The Plaintiff insisted that it satisfactorily discharged the tasks envisioned by the contract as clearly evidenced by the fact that after the purported termination, the Plaintiff was required to return credentials and USSD code it had created on behalf of the Defendant, which mean that it had already created the solution for the Defendant.

24. That Mr. Erastus Kanyiri, the Defendant's witness, could not confirm or deny, that the Plaintiff had forwarded the signed contract but argued that the Defendant had not followed up for the execution of the same. The Plaintiff relied on the case of; William Muthee Muthami vs. Bank of Baroda, Civil appeal no. 21 of 2006, where the elements of a valid contract were dealt with as being inter alia; offer, acceptance and consideration. The case of; Rose & Frank Company v J.R. Crompton and Brothers Limited & others [1923] 2 K.B. 261 was also cited which stated that, for there to be a valid contract the parties must intend to create legal obligations.

25. The Plaintiff further submitted that, the fact that the Defendant allowed it to negotiate third party contracts and create obligations on their behalf; is evidence of the existence of the contract. That the culmination of the relationship between the parties is evidenced by letter dated 19<sup>th</sup> October, 2017 written by the Defendants' Chief Executive Officer notifying the Ministry of Interior and Co-ordination to grant the Plaintiff access to collect information on the would be beneficiaries of the Project. The letter names the Plaintiff as "the Designated Intergrator."

26. It was argued that the Defendant breached the statutory provisions governing the termination or cancellation of procurement proceedings under section 63 of the Act, which states that; procurement proceedings may be cancelled prior to notification of award. Further, clause 12 of the contract provided the procedure for termination of the contract which was not followed. The Plaintiff thus submitted that; to purport to terminate this relationship outside of this governing contract amount to breach.

27. The Plaintiff argued that it should be allowed to complete the project because the contract has been preferred to its near logical conclusion, therefore it will be able to deliver the full solution granted a chance by the Honourable Court. The Plaintiff relied on the write up of; Halsbury's Laws of England, Fourth Edition, in Volume 44; to submit that a party seeking the equitable remedy of specific performance of a contract; "must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the action".

28. Further reliance was placed on the case of; Gurdev Singh Birdi and Marinder Singh Gatora and Abubakar Madhbuti, where Gicheru, JA (as he then was), stated that a party who seeks for the relief of specific performance must demonstrate performance or is ready and willing to perform all the terms of the agreement, which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement. The Plaintiff submitted that, the Defendant was ready and willing to compile a summary of work done based on the “Terms of Reference” which is proof of performance of the contract.

29. Be that as it were, the Plaintiff submitted that notwithstanding the aforesaid and on a without prejudice basis, should the Honourable Court find that no binding agreement was formed, then it is nevertheless entitled to the sum claimed in the plaint in equity, under the doctrines of *quantum meruit*, unjust enrichment and restitution. The Plaintiff relied on the case of; Robinson vs Haraman (1848) 154 E.R. 363 where the Court of Exchequer stated; “the rule of the Common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

30. However, the Defendants filed response submissions and invited the court to consider the following issues for determination:-

a) *Whether there is a valid contract existing between the Plaintiff and the Defendant within the meaning of Public Procurement and Asset Disposal Act, No. 33 of 2015, and if so, was there breach by the Defendant;*

b) *Whether the Plaintiff suffered any damages as a result of the breach and if so, whether it is entitled to damages or in the alternative the relief of specific performance; and*

c) *Who should bear the costs of this suit?*

31. It is noteworthy that, the Defendant did not respond to the Plaintiff’s submission on jurisdiction of the court to hear this matter and informed the court that, its notice of preliminary objection dated 5<sup>th</sup> January, 2018, challenging the jurisdiction of the Honourable court was withdrawn and therefore any submissions on it have been overtaken by events.

32. Be that as it were, the Defendant submitted it is not in dispute that there is no signed letter of notification as per the conditions in the notification of award and that no contract was executed by both parties within the period specified in the letter of notification of award and as envisaged under the provisions of; Sections Section 87 and 135 of the Act.

33. It was argued that once a contract contravenes these statutory provisions, it is null and void. The Defendant relied on the case of; Lordship Africa Limited vs Public Procurement Administrative Review Board & 2 Others [2018] eKLR where it was held that once a contract expires, it suffers a natural death. Further reference was made to the case of; Delta Guards Kenya Limited vs Kenya Power & Lighting Company Ltd, PPARB No. 2 of 2009 where a similar holding was made.

34. The Defendant further submitted that the process the parties engaged in after the notification of award, as evidenced by the various correspondences between them, were pursuant to clause 2.9 of the tender document and does not amount to a contract. That, any costs incurred by a tenderer or bidder are simply commercial business risks that a procuring entity cannot be held liable for. Reliance was placed on the decision in; Uto Creations Studio Limited vs Ministry of Housing PPARB No. 5 of 2013. As such the Plaintiff cannot recover special damages. Further reference was made to the cases of; Purple Rose Trading Company Limited vs BhanooShashikant Jal [2014] eKLR and Abram Kitumba vs Uganda Telecommunications Corp Kampala HCCS No. 395 of 1991, where it was held that no action can be maintained on contracts which is prohibited by statute and no one can recover in an action formed on that which is a breach of the provisions of a statute.

35. It was argued that the remedy for specific performance is based on the existence of a valid and enforceable contract. The case of; Thrift Homes Limited vs Kays Investment Limited [2015] eKLR relied was on. Further it is trite law that special damages must only be specifically pleaded but must also be strictly proved, with as much particularity as circumstances permit. That in the instant case, apart from listing the alleged loss and damage, the Plaintiff did not lead any evidence at all in support of the alleged loss and damage. Its witness merely threw figures at the Honourable court without any evidence whatsoever in support thereof. Thus, there was no credible documentary evidence in support of the alleged special damages.

36. The Defendant relied on the case of; Paul Muiyoro t/a Spotted Zebra vs Bulent Gulbahar Remax Realtors [2016] eKLR where the Court of Appeal held that; Plaintiffs who do not plead their damages properly and who then do not prove the same do so, at their own risk, as they will not get those damages however sympathetic the court may feel about them. That the rules of pleadings and modes of proof must be adhered to. Finally it was submitted that the Plaintiff has failed to establish its claim on the balance of probability, therefore the suit should be dismissed with costs.

37. At the close of the entire case, I have considered the evidence tendered by the parties as supported by the documents produced. I find that the following issues have arisen for determination;

(a) *Whether the parties entered into a valid contract;*

(b) *If so, whether the defendant breached the same;*

(c) *If the answer to (b) is in the affirmative, whether the Plaintiff is entitled to the prayers sought;*

(d) *Finally, who should bear the costs of the suit?*

38. As regards the first issue, I find that, there is no dispute that the Defendant invited advertised tender no. NOCK/PRC/03 (1194), inviting the interested bidder to tender for; provision of Service Delivery Platform and Payment Solution for Mwananchi Gas Project. It is not in

dispute too that, the Plaintiff tendered for the same and was subsequently invited to attend a pre-bid meeting held at the Defendant's board room on 23<sup>rd</sup> May 2017. The Plaintiff was subsequently awarded the tender.

39. Indeed it is evident from letter dated 30<sup>th</sup> June 2017, the Plaintiff was invited to make a presentation and/or demonstration on the project on 3<sup>rd</sup> July 2017, at the Defendant's office to enable the Defendant make its final decision on the project. The demonstration was made and by a letter dated 10<sup>th</sup> July 2017, the Plaintiff was notified that its bid in the sum of; Kenya Shillings Seventy Nine Million, Thirty Eight Thousand, four hundred and twelve and fifty cents (Kshs 79,038,412.50) was accepted by the Defendant.

40. The contents of this letter are very important, as it confirms the Plaintiff was the successful bidder and in that regard, I shall reproduce it here below verbatim. It states that:-

*“This is to notify you that your bid received on 13<sup>th</sup> June 2017 for execution of the above stated tender at a total cost of; Kshs. 79,038,412.50 inclusive of VAT has been accepted by National Oil. Please acknowledge receipt of this letter of notification by signing your acceptance and return to the undersigned on or before 17<sup>th</sup> July 2017.”*

*1. Kindly provide us with a Professional Indemnity Cover of Kshs. 7,903,841.00, prior to signing of the contract;*

*2. The contract shall be signed by the parties within 30 days of the date of this letter but not earlier than 14 days from the date of the letter.*

*3. You may contact the officer whose particulars appear below on the subject matter of this letter of notification of award.”*

41. The question that arises is whether, the Plaintiff complied with the above conditions. The Defendant argued that the Plaintiff did not accept the notification within the stipulated time and did not return it. The Plaintiff argues to the contrary and has produced a delivery note as evidence that, the Defendant acknowledged and accepted the notification of the award on 12<sup>th</sup> July 2017. The Defendant alleges that the same was not received.

42. However, I note from the delivery note produced herein that, it was received on behalf of the Defendant and signed for by one Elizabeth. That signature has not been disputed by the Defendant and/or subjected to forensic examination to prove otherwise. I therefore find and hold that the Plaintiff acknowledged receipt of the notification of the award within the stipulated time and returned to the Defendant. The same is therefore not an issue.

43. Similarly, although the Defendant alleges that the Professional Indemnity Covers were not provided, it is also evident that, the Plaintiff provided the same as evidenced by a letter dated 14<sup>th</sup> July 2017, forwarding a cover issued by; Amaco Insurance and another dated 2<sup>nd</sup> August 2017, forwarding a Professional Indemnity Insurance Policy issued by; Jubilee insurance Company Limited. Therefore the Defendant's allegation that these covers were not provided holds no water and is a mere denial.

44. It is also noteworthy that, the notification of the award letter required that the parties sign the contract within thirty (30) days of the letter. The central question is whether the contract was signed within that period. In that regard, the contract should have been signed on or before 10<sup>th</sup> August 2017.

45. However, it is not in dispute that the thirty (30) days expired before the contract was signed. This is evidenced by an email dated 23<sup>rd</sup> August 2017, written by Mr. Laban Serem on behalf of the Defendant requesting the Plaintiff to review the contract attached thereto and incorporate the milestones as agreed when printing the final copy. The Plaintiff responded to the email the same date vide a letter entitled; “Amendment of the contract for Provision of Service Delivery Platform & Payment Solution for Management Project”. The Plaintiff then enclosed to the reply the draft contract for the attention of the Defendant.

46. On 5<sup>th</sup> September 2017, the Defendant acknowledged receipt of the contract for action vide an email of the same date from Dr. William Motende, addressed to Mr. Laban Serem. The email indicate that the contract is received and acted on. However, a perusal of a copy of the contract produced by the Plaintiff in its bundle of documents filed in court on 29<sup>th</sup> June 2018, I find that a copy of the agreement is undated and is signed by the Plaintiff alone. It is not signed by the Defendant. It is therefore clear as aforesaid, that the contract was not executed by both parties within time provided for.

47. In that regard, it suffices to note that, the provisions of; section 87 of the Act, provides as follows:

*“ (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.*

*(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.*

*(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.*

*(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” ( emphasis added).*

48. The provisions of Section 135 of the Act further provides as that:-

*(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.*

*(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.*

*(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.*

*(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.*

*(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.*

*(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—*

*(a) Contract agreement form;*

*(b) Tender form;*

*(c) Price schedule or bills of quantities submitted by the tenderer;*

*(d) Schedule of requirements;*

*(e) Technical specifications;*

*(f) General conditions of contract;*

*(g) Special conditions of contract;*

*(h) Notification of award.*

*(7) A person who contravenes the provisions of this section commits an offence.” (Emphasis added).*

49. The evidence herein reveals the Plaintiff accepted the award and signed the contract but the Defendant did not. I find that although the Plaintiff argues that, there is a valid contract in that, all the essentials thereof were met and that the parties intended to create legal obligations, the statutory provisions referred above, expressly require that, for there to be a valid contract, the parties should have executed a contract within the period stated in the notification letter. That was not done herein; therefore there is no valid contract for enforcement.

51. However the Plaintiff further relies on the letter written by the Chief Executive officer; dated 19<sup>th</sup> October 2017 and other correspondence and/or documents exchanged between the parties to argue that, they strongly indicated the existence of a valid contract. Thus the Plaintiff relies on the doctrine of estoppel to argue that, the Defendant should not be allowed to benefit from its own conduct of breach of the law, the accounting officer to prepare the contract having failed to prepare the contract as required under section 134(1) of the Act.

52. The Plaintiff has sound argument, which I shall consider herein shortly, however as aforesaid the requirements for execution of a contract are couched in a mandatory form. Failure to comply with the same cannot be remedied by the conduct of the parties, correspondence relied on and/or the doctrine of estoppel.

53. However, be that as it were, it is evident from the correspondence produced and is not disputed that, despite the absence of the valid contract, the parties continued to exchange correspondence as evidenced by several emails produced herein. These emails reveal that the parties communicated on; inter alia; the steps to be taken to implement the project, the team to undertake the same, and the execution of the contract. It is indeed, evident again from these correspondences that the Defendant formed a technical team to work with the Plaintiff. The team was led by mainly two officers; Mr. Laban K. Serem, the Project Manager–Business Optimization, Corporate Planning Department and Mr. Ken Kuimbe, Head of Corporate Planning, Strategy and PA to Chief Executive Officer.

54. I have considered the documents produced and I note from there from that, on 16<sup>th</sup> August 2017, the parties held stakeholders engagement workshop at the Defendant’s boardroom. The program of the workshop reveals that; both parties’ personnel participated as resource persons. The Defendant officials made presentation on “overview of SDP & PS for Mwananchi Gas solution” and led the brainstorming, questions and answer session, while the Plaintiff officers made presentation on “understanding of the SDP & PS for Mwananchi gas solution and presented a demonstration of the solution and the opportunities for platform going forward”.

55. Subsequently, the parties held several meetings inter alia; on 4<sup>th</sup> September 2017, to review the USSD process flow and Integration

between USSD solutions. Other meetings involved discussions with Banks, Safaricom (K) Limited, Airtel and Company ERP. These meetings were attended by seven officers from the Defendant, four from Safaricom (K) Limited, two from National Bank of Kenya Limited and two from the Plaintiff.

56. On 10<sup>th</sup> September 2017, Mr. Ken Kiumbe from the Defendant, wrote a mail to; Dr. William Motende, in which he stated inter alia that, the Defendant was having a Board and Management Retreat starting from that day being; Sunday to Wednesday 13<sup>th</sup> September 2017 and that one of the key areas of interest was the “LPG project and the USSD solution”. He informed Dr. Motende that, the Defendant wanted to have the USSD completed and tied up the mobile app and the board wanted to see both. Dr. Motende replied to the effect that; the Plaintiff would comb the TORs, line by line to ensure they are all met.

57. On 18<sup>th</sup> September 2017, Mr. Laban Serem sent an email to the team that was working on the project, giving details of the action they needed to take as they await the USSD short code from Telco’s. The email was acknowledged by the Plaintiff the same date, wherein the Plaintiff states inter alia that “as for the messages, we shall shift from Afrigas taking to National oil once the contract is signed, as we shall then have the mandate to brand “National Oil’ the purchased SMSs.”

58. On 28<sup>th</sup> September 2017, Mr. Laban Serem writes to the Plaintiff thanking them for the support given and requesting them to proceed with the 642 for both Safaricom and Airtel. Earlier on, on 27<sup>th</sup> September 2017, the parties had communicated on the need to apply for Paybill number and the terms and the conditions thereto and had settled on “416444” as the paybill number.

59. Finally, as stated herein, on 19<sup>th</sup> October 2017, MaryJane N. Mwangi, the Chief Executive Officer; of the Defendant wrote a letter to Mr. George Anyango, OGW, Director, Integrated Population Registration System (IPRS), Ministry of Interior and Coordination of National Government Nyayo House, entitled “Request for Access to the National Population Register Database for use in Verification of Beneficiaries of the overnment Discounted LPG Cylinders.” The letter states, inter alia; that;

*“We recognize that the Directorate of Immigration and Registration of Persons has an integrated Population Registration System (IPRS) which would provide us with rich information in our efforts to validate beneficiaries for this discounted cylinder program. In this regard we are requesting for access by our designated integrator; Attain Enterprises Limited, to the IPRS database to support verification and validation of beneficiary details.”*

60. It is clear from the content of this letter that the Defendant acknowledged and recognized the Plaintiff as a service provider. It is also noteworthy that, by this time, a period of about three (3) months had lapsed from; the 10<sup>th</sup> July 2017, when the Plaintiff was notified that its tender bid was successful. From all the correspondences, it is evident that the parties were engaged in active in communication to implement the project from the month of July 2017, through to 11<sup>th</sup> December 2017, when the Defendant served the Plaintiff with a letter cancelling the award.

61. Indeed thereafter, the parties held a meeting on 15<sup>th</sup> December 2017, with the main agenda being the letter of the cancellation of the award. From the minutes of the meeting, it is indicated that, the Plaintiff maintained its position as follows;-

*a) It had delivered on their mandate of the USSD component and the remaining components were subject to 3<sup>rd</sup> party integrations with Safaricom and Airtel and banking service providers;*

*b) More than 10 workflows for the solution had been signed off from their end and implemented in the solution development;*

*c) Received the letter cancelled award on Monday 11<sup>th</sup> December 2017 and on Tuesday 12<sup>th</sup> December 2017, NOCK re-advertised the tender afresh;*

*d) M/S Attain Enterprise Solutions Limited were of the opinion that the cancellation followed by an immediate advert was not in good faith;*

62. It is also indicated in the same minutes that, the Defendant observed that, “the Gas Yetu Portal Credentials” were still with the Plaintiff and needed to be released back to the Defendant. The representative of the Plaintiff confirmed that they would release these credentials and USSD short codes to the Defendant. It was also noted that the Defendant had compiled a summary of work done so far based on the milestones outlined in the terms of reference. It was therefore agreed that the Plaintiff would also come up with a scope of the project deliverables provided thus far and what was still pending and a meeting would be held with the Defendant’s technical team on Monday 18<sup>th</sup> December 2017’ to discuss and agree on these deliverables. However the meeting did not materialize as Plaintiff moved to court.

63. The question that arises is whether from these correspondence an inference of existence of a valid contract can be made, and whether Defendant by the cancellation of the award breached the contract. I have already held that there was no valid contract executed by the parties. However, it is noteworthy that, the Defendant in terminating the award by the letter dated 11<sup>th</sup> December 2017, relied on Section 63(1)(a)(i) of the Act. The provisions thereof provide the procedure of termination or cancellation of procurement and asset disposal proceedings and states as follows:-

*“63. (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—*

*(a) the subject procurement have been overtaken by—*

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination”

64. These provisions provide for termination of procurement prior to notification of a tender and before parties enter into a contract. The Defendant herein specifically relied on ground that; the procurement had been overtaken by operation of law, as the contract was not executed within the stipulated time. The question that arises is whether at this stage the Plaintiff had been notified of the award or not.

65. First and foremost the provisions of; Section 63(1) of the Act deals with termination of “Procurement” not the “Award” and before notification of a tender. Therefore the Defendant could not rely on Section 63(1) of the Act. Indeed the Defendants conceded that the matter herein was post procurement stage, and in fact, that is what informed the withdrawal of notice of preliminary objection challenging the jurisdiction of the court. Similarly by the time the Defendant wrote the letter of termination, they had already notified the Plaintiff of the award. Therefore there was no contract capable of breach.

66. The question that arises is; whether the orders sought for by the Plaintiff under paragraph 17 to 21 of the plaint can be awarded. The first prayer seeks for a permanent injunction to restrain the Defendant from cancelling the award. As already stated, there is no valid contract between the parties, therefore the court cannot grant a permanent injunction in that, even if the order was to be granted, it will be in vain, as it cannot be enforced in the absence of a valid contract between the parties.

67. The next prayer is for an order for specific performance of the tender. As already stated and at the risk of repeating what is already stated, the Plaintiff averred that; it had completed and/or undertaken the project works substantially; as evidenced by the fact that, the Defendant asked them to tidy up and complete the USSD and mobile app, which literally meant the contract was already in performance. Further, the Defendant was willing to compile summary work so far done based on the milestones outlined in on the terms of reference. The Plaintiff was to come up with a scope of the project deliverables provided thus far and what was still pending. That the details of the work done is tabulated under paragraph 7 of the plaint, and based on the evidence herein; most of the activities there under were undertaken.

68. However I find that, it would have been more evident and useful if the Plaintiff had prepared a list of the activities accomplished as at the time of the alleged cancellation of the award; for comparison with the Defendant’s list. Be that as it may, from the evidence adduced herein, it is evident that, quite substantial amount of work had been done.

68. The question is, should the court give an order for specific performance. As submitted by the Plaintiff, supported by the case of; *Gurdev Singh Birdi & Marinder* (supra), an order of specific performance can only be given where the applicant proves that, they have substantially performed the contract and they are ready and willing to comply with the terms of the agreement which they are bound to perform. Further, the applicant has not acted in the contravention of those terms. However, the legal principles stated presuppose that, there is a valid agreement between the parties.

69. In the same vein, it suffices to note that, an order of specific performance is an equitable remedy in the law of contract issued by the court to compel a party to perform a specific act. It can only be issued if damages prove inadequate. The grant of this order is discretionary, so that its availability depends on its appropriateness in the circumstances.

70 Indeed, the case of; *Thrift Homes Ltd vs Kenya Investment Ltd (2015) eKLR* held that; “the jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some mistake, defect, or illegality.” I have already held that there is valid contract herein. Therefore, an order of specific performance cannot be issued and/or granted.

71. That leads to the next prayer as to; whether the court should award the Plaintiff the special damages in the sum of Kenya shillings six hundred and ninety million (Kshs. 690,000,000). I note that, when a contract is breached, special damages may be awarded to reimburse the non-breaching party for damage that resulted directly from or that flow from the breach. Special damages are specific type of damages that cover losses beside contractual losses and may include losses such as loss of profit, product or business property, operating revenue, or damage to business reputation, and time or other inconveniences.

72. In order to obtain special damages award, the aggrieved party must show inter alia, that the losses suffered were foreseeable within the contemplation of the parties at the time the contract was formed. There should be some casual connection between the losses and the breach. Further, special damages must not only be specifically pleaded but they must also be strictly proved with as much particularity as circumstances permit. (See; *National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR*). Similarly, Plaintiffs who do not plead their damages properly and then, do not prove the same, do so at their own risk.” (See; *Bonham Carter vs Park (1948) 647*).

73. In the instant case, the Plaintiff’s claim for special damages is covered to under paragraph 13 and 19 of the plaint. Paragraph 13 the Plaintiff states as follows:-

*“And the Plaintiff’s claim is for an order of specific performance and/or special damages in the cumulative sum of; Kenya shillings six hundred and ninety million (Kshs. 690,000,000) together with interests thereon and general damages on account of malicious breach of contract and injury to brand identity.”*

At paragraph 19 it is stated as follows:-

*“Special damages in the sum of Kenya shillings six hundred and ninety million (Kshs. 690,000,000)”*

74. It is clear from these two paragraphs that the Plaintiff has not tabulated or broken down how the figure of Kenya Shillings Six Hundred and Ninety Million (Kshs.690, 000,000), was arrived at. Therefore the court cannot be able appreciate clearly what this sum represents. Even still, the Plaintiff is duty bound to provide evidence in proof of the same. The following pertinent issues are worth noting:-

(a) *The Plaintiff states under paragraph 5 of the plaint;*

*that the tender sum herein is; Kshs. 79,038,412.50;*

(b) *The Plaintiff’s witness stated in his statement at paragraph 13 that, the Plaintiff acceded to the request of the Defendant to scale down the tender sum to Kshs. 30,000,000;*

(c) *The witness statement at paragraph 14 states that; the payments were to be made in three (3) tranches as follows;-*

*(i) down payment upon the negotiation and signing of the contract – 15% of the agreed contract price;*

*(ii) actual delivery of the registration and payment solution – 25% of the agreed contract price;*

*(iii) 60% to be paid on monthly basis at the rate of 10% per month over the first six months via charges to end users after initial launch – 60%*

*None of these payments have been made to date.*

75. Thus from the above observation, it is clear that the amount recoverable as special damages cannot exceed the initial tender sum and/or the negotiated sum or the equivalent to the total sum payable upon completion of the project, and/or provision of the services. Therefore the figure of Kenya Shillings Six Hundred and Ninety Million (Kshs. 690,000,000) is not tenable. Even then, the only expense that the Plaintiff may have incurred may be in relation to the professional indemnity covers which were procured in fulfillment of the requirement of the tender. But still, I have gone through all the documents produced by the Plaintiff filed in court on the 29<sup>th</sup> June 2018 and those annexed to the plaint and found no documentary evidence in support of payment for professional indemnity covers. In that case, there is no proof of payment and in the given circumstances; I find that generally the court cannot grant the prayer for special damages as prayed for under paragraph 19 of the Plaint.

76. The next prayer under paragraph 20 of the Plaint, is seeking for, interest on any sums that may have been awarded. In the absence of any award of damages or monetary sums, the prayer cannot be granted. Finally the Plaintiff seeks for costs of the suit together with interest thereon. Naturally and legally cost follow the events.

77. However before I deal with the issue of costs, I would like to consider whether in the given circumstances of this case, the Plaintiff has no remedy available to it. This is informed by the fact that, it is trite law that there is no wrong without a remedy.

78. The Defendant herein is described under paragraph 2 of the plaint as a “State Corporation” and confirmed by the Defendant’s witness in his statement at paragraph 2. Section 2 of the State Corporation Act (Cap 446) of; the Laws of Kenya, states that a State Corporation means;

*(a) A state corporation established under Section 3;*

(b) A body corporate established before or after the commencement of this Act by or under an Act of parliament or other written law but not-

- (i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act (Cap 101);
- (ii) a local authority established under the Local Government Act (Cap 265);
- (iii) a co-operative society established under the Co-operative Societies Act (cap 490);
- iv) a building society established in accordance with the Building Societies Act (cap 489);
- v) a company incorporated under the Companies Act (cap 486), which is not wholly owned or controlled by the Government or by a State Corporation;
- vi), the Central Bank of Kenya established under the Central Bank of Kenya Act, (cap 491);

79. In the same vein, Section 3 of the same Act provides for establishment of State Corporations and states as follows:-

“(1) The President may, by order, establish a state corporate as a body corporate to perform the functions specified in that order;

(2) A state corporation established under this Section shall-

- (a) have perpetual succession;
- (b) in its corporate name be capable of suing and being sued;
- (c) subject to this Act, be capable of holding and alienating movable and immovable property.”

80. From the provisions above, a State Corporation is in all intent and purpose similar to a company incorporated under the Companies Act, save that; it does not engage in commercial trading business for profits and that each state corporation is regulated by its own parent Act of parliament. Indeed, both exist as an artificial legal person with separate legal entity status, distinct from its owners. Both can hold physical assets and properties in their own name.

81. In a nutshell, an officer of a State Corporation and/or a company will not generally be held personally responsible for the acts of omission committed by the corporation and/or the company. Thus an officer of a corporation whether as a shareholder, director or employee cannot be held personally liable and an officer's personal liability for the corporate affairs depends on the facts of the case and the officer's formal relationship in the corporation.

82. If an officer however does something illegal or grossly negligent, he can be held personally liable even if his action is done under the umbrella of the corporation. In that regard, an officer who is complicit in misleading the public, embezzles public funds or does anything that is illegal or fails to act and expose the corporation and results to damage or harm to someone, can be held personally liable and may face civil or criminal penalties. In that case, court will disregard corporation's limited liability protection and hold the officer personally liable, by lifting “the corporate veil of incorporation

83. In the instant case, the following pertinent issues arise:-

(a) By a letter dated 30<sup>th</sup> June 2017, the Plaintiff was notified by the Defendant that it had qualified to proceed to the tender award stage;

(b) The Plaintiff was then requested to do a presentation/demonstration to the Defendant on the project on 3<sup>rd</sup> July 2019 at 1100 hours at the Defendant's offices at Kawi Complex South C, Red cross Road. The demonstration was done on 10<sup>th</sup> July 2017;

(c) Parties agreed on implementation plan as evidenced by email at page 68 of the Plaintiff's documents as per the email dated 21<sup>st</sup> July 2017;

(e) By email dated 7<sup>th</sup> August 2017, it is indicated that although the Defendant was constrained with the budget, still sought to go ahead with the project;

(f) By email dated 21<sup>st</sup> July 2017 at page 69 of the Plaintiff's documents, Laban Serem writes to other staff members of the Defendants notifying them that they had been proposed as internal Technical team to work with the Plaintiff to develop the USSD, subsequently the technical team was set up;

(g) By an email dated 10<sup>th</sup> September 2017, the Plaintiff was requested to present the USSD and the mobile app to the Board of the Defendant and on 19<sup>th</sup> October 2017, the Chief Executive Officer as herein already states writes to Mr. George Anyango, OGW and requests for access to IPRS database by the Plaintiff whom she describes as a designated intergrator.

84. All these pertinent issues lead to only one conclusion that the officers of the Defendant were actively, substantially involved in the process of evaluating the tenders for the subject services herein, award of the same and the subsequent implementation thereof by the Plaintiff from the time the Plaintiff was notified of the award on the 10<sup>th</sup> July 2017 to the time of purported cancellation of the same on 11<sup>th</sup> December 2017.

85. The question that arises is; Did all these officers know that no valid contract had been signed as required under Section 135(4) of the Public Procurement & Asset Disposal Act 2015. If they did, are they liable personally? In the same vein, did the Plaintiff equally know that there was no contract that had been executed? And if so, what is the Plaintiff's contribution towards any loss that it may have incurred.

85. Be that as it were, it is very clear that, work was done and obviously the Plaintiff must have used its own funds and/or professional skill that would call for monetary compensation or award of damages, for there is no wrong without a remedy. The question is, between the Plaintiff and the Defendant who is liable? Having found that the Defendant cannot be held liable on an illegal contract, then based on the concept of corporate veil, it is possible for the officer who led the plaintiff to believe that the contract would be signed and/or the whole transaction was valid would be held personally liable. In addition Article 260 of the Constitution of Kenya, defines a "Public Officer" to include a person other than a "State Officer" who holds a public office and Public Office includes an office of an officer whose remuneration and benefits are payable directly from money provided by Parliament. In that regard Article 6 of the Constitution on leadership and integrity comes into play. The Article stipulates that the general guiding principles include inter alia; "honesty in the execution of public duties" "accountability to the public for decision and actions", basically transparency and accountability. The officers who dealt with the Plaintiff may be hard pressed to skip the rope of Article 6.

86. However, it suffices to note that none of these officers are parties to this suit and the rules of natural justice require that, a person should not be condemned unheard, neither can the court issue orders against a person who is not a party to a suit or against whom no orders have been sought.

87. In the given circumstances, as much as the court may be sympathetic of the Plaintiff, the court cannot grant any of the prayers in the plaint. The Plaintiff is at liberty to evaluate the options available to it.

87. The upshot of all this is that, the Plaintiff's suit is dismissed with no orders as to costs, taking into account the circumstances of this case.

88. Those then are the orders of the court.

**Dated delivered and signed in an open court this 12<sup>th</sup> day of September 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Ms. Katemo for the Plaintiff

Mr. Ratemo for the Defendant

Dennis -----Court Assistant