



**Yang Guang Property Design & Manufacturing Limited v Accounting
Officer Special Economic Zones Authority (Commercial Case E928 of 2021)
[2025] KEHC 19063 (KLR) (Commercial and Tax) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E928 OF 2021
MN MWANGI, J
DECEMBER 17, 2025**

BETWEEN

**YANG GUANG PROPERTY DESIGN & MANUFACTURING
LIMITED PLAINTIFF**

AND

**THE ACCOUNTING OFFICER SPECIAL ECONOMIC ZONES
AUTHORITY DEFENDANT**

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 24th November 2021 and amended on 23rd January 2021 against the defendant, seeking Judgment against if for special damages amounting to Kshs.12,746,582.20 being the value of the performance bond, Kshs.20,394,531.49 for loss of business opportunity, Kshs.2,022,558.45 as bank guarantee payments and interest, and Kshs.3,823,974.65 being the operating and administrative expenditure incurred. The plaintiff also seeks Judgment for Kshs.24,218,506.14 as loss of profits, Kshs.137,576,320.00 for expenditure on unused plant and equipment, and Kshs.31,900,000/= for payment of unused labour. The plaintiff also prays for general damages for breach of contract, costs of the suit and interest on all the foregoing claims at Court rates.
2. The plaintiff's case is that it lawfully participated in Tender No. WP Item No. D117/RV/NKU/1902 for proposed piling and substructure works at the Naivasha Industrial Park. That subsequently, the plaintiff's Tender amongst others was evaluated and the plaintiff was declared the successful bidder, and was awarded the Tender at a contract price of Kshs.254,931,643.58 through a Notification dated 26th January 2021, which it accepted on 1st February 2021. The plaintiff stated that upon expiry of the statutory review period, it secured and furnished a performance bond valued at Kshs.12,746,582.20, and received a formal contract which it duly executed and returned to the defendant for counter-



execution. The plaintiff contended that the defendant without any justifiable reason failed to execute the contract within its validity period and subsequently unlawfully assigned the same works to another company, Vaghjivani Enterprises Ltd, contrary to the *Public Procurement and Asset Disposal Act* and its Regulations.

3. The plaintiff averred that as a result of the foregoing, it pursued administrative and judicial review remedies, which culminated in the High Court quashing the decision of the Public Procurement Administrative Review Board on grounds of legitimate expectation and misapplication of procurement law. The plaintiff asserted that the defendant's conduct amounts to breach of contract, resulting in its inability to discharge the performance bond and causing it extensive financial loss, including loss of business opportunity, loss of profits, administrative and operational expenditure, bank guarantee payments, and expenditure on labour, plant, and equipment. It further averred that despite persistent requests and issuance of a demand and notice of intention to sue, the defendant has refused or failed to execute the contract, thereby necessitating this suit.
4. In opposition to the suit, the defendant filed a statement of defence dated 8th February 2023 where it denied all the averments in the plaintiff's amended plaint. The defendant averred that the process leading to the Tender advertisement and award was subject to the Instructions to Tenderers. It specifically denied liability concerning the performance bond referred to in paragraph 8, stating that it was not the holder of the bond and that the bond lapsed upon expiry. It asserted that any failure by the plaintiff to secure discharge of the same, cannot be attributed to the defendant.
5. The defendant asserted that the Tender awarded to the plaintiff was lawfully cancelled following advice from the State Department for Industrialization that a single contractor should undertake both the piling and building works to ensure structural integrity and manage limited resources. It added that the said cancellation was also followed by a directive by the National Development Implementation Committee to vary an existing contract with Vaghjivani Enterprises Limited to include the piling works previously awarded to the plaintiff, in order to reduce project costs.
6. The defendant emphasized that such cancellation was permitted under the Instructions to Tenderers. It maintained that the Public Procurement Administrative Review Board correctly recognized that the Tender was no longer in existence and could not compel the signing of a contract. The defendant further contended that plaintiff ignored the Tender's invalidity and improperly pursued multiple applications, including one later withdrawn after submissions had been filed. The defendant maintained that no contract was ever executed between the parties herein and therefore no contractual obligations arose. Further, that since no contract existed and no site was handed over, the plaintiff was not authorized to commit any resources and could not have incurred the alleged losses.
7. This matter proceeded to hearing where the plaintiff called one witness in support of its case, and the defendant also called one witness to ventilate its case.

Plaintiff's Case.

8. Mr. Lejia Chen, the plaintiff's Managing Director testified as PW1. He adopted his witness statements dated 24th November 2021 & 23rd January 2023 as his evidence in chief. He produced the documents in the plaintiff's list and bundle of documents dated 24th November 2021 and further bundle of documents dated 23rd January 2023 as plaintiff's exhibits No. 1 to 14, and disregarded the Expert Report. Mr. Chen confirmed the plaintiff's participation in Tender No. D117/RV/NKU/1902 for piling and substructure works at the Naivasha Industrial Park. He testified that the plaintiff was evaluated, declared the successful bidder, and awarded the subject Tender at a contract price of Kshs.254,931,643.58 through a Notification dated 26th January 2021, which the plaintiff accepted



on 1st February 2021. He contended that no request for review was filed within the statutory period, rendering the Award final.

9. PW1 stated that the plaintiff thereafter secured a performance bond of Kshs.12,746,582.20 from ABC bank and submitted it to the defendant. He further stated that the defendant issued the contract, which the plaintiff executed and returned for counter-execution, but the defendant failed to sign it without justification. Mr. Chen explained the plaintiff's administrative challenge before the Public Procurement Administrative Review Board, which struck out the request for review and the subsequent Judicial Review application in which the High Court quashed the Board's decision on grounds of legitimate expectation and improper application of procurement law. He stated that through the aforesaid proceedings, the plaintiff came to learn that the defendant had unlawfully allocated the Tendered Works to Vaghjivani Enterprises Limited without adhering to the requisite procurement procedures.
10. PW1 stated that the said action caused the plaintiff significant loss and damage, including the inability to obtain discharge of the performance bond, loss of business opportunity and profits, and various expenditure committed in preparation of the project. Mr. Chen explained that the plaintiff incurred substantial costs during the Tender process, including providing the performance bond, conducting technical research, and mobilizing equipment such as a crane with a trailer for transporting pillars, an excavator, a loading machine, a drilling machine, two pick-ups, a concrete mix plant, and a welding machine. He added that the plaintiff also booked twenty (20) rooms for workers, engaged five (5) Engineers for specialized works, entered into contracts with them, and later compensated them. He stated that as a result, the plaintiff assumed considerable financial risk, provided bank security for the performance bond, which in turn affected its other Tenders.
11. During cross-examination, PW1 acknowledged that the only document provided by the defendant was a Notification of Award, not a formal contract. He stated that the finality of a Notification of Award is contingent upon the bidder's capacity to perform. He further confirmed his awareness of Section 87(4) of the *Public Procurement and Asset Disposal Act* and maintained that the plaintiff complied with the requirements relating to the performance bond, which led to the bank charging the plaintiff's property. He conceded that he did not produce any documentary evidence to support this claim. PW1 affirmed that the performance bond was valid for 365 days. He explained that the plaintiff is claiming interest because the performance bond attracted interest charges and the bank continued to hold the plaintiff's security, thereby diminishing its cash flow and financial capacity to undertake business.
12. PW1 testified that despite repeated assurances from the defendant's Director General that the contract would be signed, this never materialized, prompting the plaintiff to escalate the matter to the Public Procurement Review Board and subsequently to the High Court, but by that time, the Tender had already been awarded to another contractor. PW1 confirmed having received the letter dated 7th June 2021, but asserted that it was issued after the Tender validity period had lapsed and not within the prescribed 120 days. He added that once a contract is signed, work is expected to commence within fourteen (14) days. He stated that although the plaintiff had not undertaken work at the site, it had carried out substantial preparatory activities. PW1 testified that as a result of the plaintiff committing itself to the project by signing the letter of acceptance, the bank withheld its security, preventing it from taking up other projects for at least six (6) months.
13. Mr. Chen explained that the claim for Kshs.2,022,558.45 relates to the security held by the bank, while Kshs.3,823,974.65 represents operational and administrative expenses incurred following the Notification of Award, including costs associated with proceedings before the Public Procurement Administrative Review Board and the High Court. He stated that although the plaintiff undertakes other projects and employs other staff, it was also claiming general office and utility expenses. He stated



that the claim of Kshs.137,576,320.00 pertains to expenditure on unused plant and equipment. PW1 confirmed that in anticipation of the contract, the plaintiff begun preparing specialized equipment, engaging experts, and booking equipment even before any contract was signed.

14. In re-examination, PW1 reiterated that the defendant did not sign the contract within thirty (30) days of the plaintiff issuing the letter of acceptance of the Tender Award. He emphasized that during that thirty-day period, the plaintiff was not notified of any cancellation of the Notification of Award.

Defendant's Case.

15. Mr. Fredrick Otieno Okumu, the defendant's Manager Supply Chain, testified as DW1. He adopted his witness statement dated 4th May 2024 as his evidence in chief and produced the documents in the defendant's list and bundle of documents dated 21st March 2023 as defence exhibits No. 1-4. He made reference to paragraphs 5, 6 and 7 of his witness statement and explained that the Tender was cancelled due to inadequate budgetary allocation. He stated that although the Tender in question related to piling works, there was an earlier Tender awarded to Vaghjivani Enterprises Limited for the construction of an administrative block. According to him, the contractor on site discovered soil-related issues, making it impossible to proceed with construction until piling was completed. He stated that a decision was made to cancel the subject Tender so that the piling works could be incorporated into the first Tender, with the scope of the original works being reduced accordingly.
16. Mr. Okumu testified that a letter dated 26th April 2021 from the State Department for Industrialization recommended varying the original contract for the construction of the administration block. He stated that a subsequent letter dated 14th July 2021 from the State Department of Public Works recommended retaining the contractor already on site and carrying out direct procurement for the piling works.
17. DW1 emphasized that direct procurement is lawful and stated that consolidating the two Tenders resulted in savings. He added that the said State Department also observed that having one contractor on site would minimize complications. He maintained that the letter dated 7th June 2021 aligned with the letters of 26th April 2021 and 14th July 2021. He confirmed that the defendant received a copy of the performance bond, which was valid for 365 days and stated that upon its expiry, the defendant bore no liability.
18. He noted that after receiving the letter dated 7th June 2021, the plaintiff never wrote to the defendant seeking discharge from the bond. He denied the claim for loss of business opportunity, stating that the defendant had not instructed Tenderers to refrain from undertaking other business. Mr. Okumu contended that there was no formal site hand over and no meeting to determine the duration of mobilizing equipment and labour. He disputed the claim for loss of profits and asserted that the alleged cost of Kshs.137,576,320.00 was not incurred, as no plant or equipment had been mobilized to the site. He argued that since no site hand over occurred and no contract existed, the plaintiff could not have legitimately incurred Kshs.31,900,000/= in unused labour costs.
19. He further stated that the claim for Kshs.3,823,974.65 for operating and administrative expenses could only arise if a contract had been executed and the plaintiff had moved to a site office, which was not done. Referring to Clause 6.2 on page 18 of the defendant's bundle of documents, he stated that it reserved the employer's right to accept or reject any Tender and to cancel the tendering process at any time before the Award of a Contract. He explained that a Notification of Award is merely an intention to award a contract and not a contract itself, issued under Section 87(4) of the [*Public Procurement and Asset Disposal Act*](#), and does not authorize commencement of site activities.
20. During cross-examination, DW1 confirmed that under Section 53 of the [*Public Procurement and Asset Disposal Act*](#), the defendant was required to prepare a procurement budget. He stated that the Tender



for construction of the administration block and boundary wall had been awarded around 2020, but he could not confirm whether that contract and the Tender in issue were intended to be implemented in the same financial year. He testified that the defendant prepared its procurement budget and submitted it to the State Department of Public Works prior to advertising the subject Tender. Although he claimed that budget approvals had been given, he acknowledged that he did not have any documents to prove this.

21. DW1 stated that there was correspondence dated 26th April 2021 addressed to the State Department of Public Works and that several consultative meetings had been conducted. He conceded that he was not aware of the exact date when the meeting that led to the cancellation of the Tender was held, and could only rely on the letter of 26th April 2021. DW1 testified that the defendant communicated the cancellation of the Tender to the plaintiff on 7th June 2021, approximately one and a half months after the letter of 26th April 2021. Referring to Section 63(1) of the [Public Procurement and Asset Disposal Act](#), which permits cancellation of a Tender at any time before Notification of Award, he explained that their letter dated 26th January 2021 was merely an intention to issue a Notification of Award, although it was titled "Notification of Award." He pointed out that paragraph 1 of that letter indicated that the Award was subject to there being no appeal, and none had been filed.
22. He stated that a formal letter of Notification of Award was to be issued to the plaintiff together with the contract documents, and that such notification letters are sent to all bidders. DW1 confirmed that the Tender validity period was 120 days from the date of submission being 30th November 2020 and conceded that the cancellation letter was issued after the expiry of the Tender validity period. Nonetheless, he maintained that the defendant was awaiting official communication from the Ministry and denied that the cancellation was unprocedural. He insisted that the plaintiff could not have had any legitimate expectation of executing the contract before signing it.
23. In re-examination, DW1 reiterated that a Notification of Award does not amount to a contract. He asserted that since there was no contract, any claim made on expenses incurred by the plaintiff are false.
24. On being examined by the Court, DW1 clarified that a Letter of Award is issued only to the successful bidder and it is accompanied by contract documents, and before that stage, a letter of notification of intention to award is issued pursuant to Section 87(1) of the [Public Procurement and Asset Disposal Act](#). He explained that Section 135 of the said Act governs the issuance of an Award. He also stated that Standard Tender Documents contain a template for a notification of intention to award, which is sent to all bidders. In regard to the letter dated 26th January 2021, he noted that it is headed "Notification of Award," and its last paragraph states that in view of the Award, the bidder is required to acknowledge acceptance within seven (7) days from the date of the letter.
25. At the close of the defendant's case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 26th February 2025 by the law firm of Jamal Bake & Associates Advocates, while the defendant's submissions were filed by the Hon. Attorney General on 1st April 2025.
26. Mr. Bake, learned Counsel for the plaintiff submitted that the defendant unlawfully cancelled the subject Tender after issuing a Notification of Award on 26th January 2021, despite the plaintiff having complied with all conditions set out therein, including forwarding the executed contract on 26th February 2021. He stated that the defendant only communicated the alleged budgetary constraints on 7th June 2021, nearly four (4) months later, during which period the plaintiff had mobilized significant resources in preparation of the project commencement. Counsel argued that although the Tender document reserved to the defendant a right to cancel the Tender, that provision is subordinate to Section 63 of the [Public Procurement and Asset Disposal Act](#) (PPADA), which strictly permits



cancellation only before Notification of Award and sets out mandatory procedures for reporting and notifying bidders.

27. He relied on the cases of Wilfak Engineering Limited v Kenya Ports Authority [2020] KEHC 3283 (KLR) and Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] KEHC 8337 (KLR), and asserted that the cancellation of the subject Tender was in blatant violation of Statute. Mr. Bake pointed out to the testimony of DW1, who admitted that the defendant advertised the Tender before securing an approved procurement budget contrary to Section 53 of the PPADA, an issue previously identified by the High Court in JR No. E094 of 2021, where the defendant's conduct was found to be inconsistent with the Act. Counsel asserted that the Notification of Award created a legitimate expectation that contract documents would be issued within 14 days and the contract executed within the Tender validity period, which expectation the defendant frustrated without justification.
28. Mr. Bake submitted that the defendant, being a public entity bound to uphold the rule of law, acted illegally and unprocedurally in cancelling the Tender and should be held liable for the losses occasioned. He cited the cases of Adan v Farah & 3 others [2021] KEHC 107 (KLR), Republic v County Government of Lamu & 2 others Ex parte Superserve Limited [2021] KEHC 825 (KLR), and asserted that the plaintiff is entitled to the reliefs being sought in the amended plaint.
29. Ms Kanini, learned Counsel for the defendant submitted that the Notification of Award issued to the plaintiff on 26th January 2021 neither concluded the procurement process nor did it create a binding contract. She relied on the provisions of Sections 87(4) & 135(4) of the PPADA and stated that a Notification of Award does not constitute a contract and that no binding Agreement arises until a written contract is signed by both parties. She argued that since there was no contract between the parties herein, the Tender process had not reached the contractual stage, thus no enforceable rights or obligations as against the defendant had crystallized. She maintained that the Tender document applicable to all bidders expressly reserved the employer's right to reject any Tender or cancel the procurement process at any time prior to the Award of the Contract.
30. Counsel cited the case of Republic v Kenya Ports Authority; Ethics & Anti-Corruption Commission (Interested Party) Ex parte Feradon Associate Limited [2020] KEHC 6674 (KLR), and stated that since no contract had been formed, the defendant's decision to cancel the Tender on account of budgetary constraints was within the parameters of both the Tender document and the PPADA.
31. Ms Kanini referred to the Court of Appeal case of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR), and submitted that the plaintiff had failed to strictly prove special damages as required by law. She argued that although the plaintiff pleaded losses relating to performance bonds, mobilized equipment, labour, administrative expenses and loss of business opportunity, none of the said claims were backed by credible evidence. She submitted that the plaintiff cannot claim reimbursement for costs allegedly incurred without authorization, since the project site had not been handed to over, and no contract existed permitting mobilization.
32. Counsel maintained that the plaintiff's claim is untenable as the Tender validity period lapsed on 31st March 2021 before any contract could be signed. Further, that since the plaintiff conceded awareness of Sections 87(4) and 135(4) the PPADA, it makes it clear that a Notification of Award neither forms a contract nor alters the Tender validity period. Ms Kanini relied on the Supreme Court case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR), and argued that expecting a contract to be signed after expiry of the validity period, or after notification of budgetary constraints, contravenes Article 227 of *the Constitution* and



the principles of transparency, competitiveness, and cost-effectiveness governing public procurement. She submitted that reliance and the alleged mobilization costs was unreasonable and unsupported.

Analysis And Determination.

33. I have considered and analyzed the evidence adduced in line with the pleadings filed, as well as with the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether a binding contract existed between the parties herein;
 - ii. Whether the cancellation of the Tender was lawful;
 - iii. Whether the plaintiff had a legitimate expectation; and
 - iv. Whether the plaintiff is entitled to the reliefs being sought.

Whether a binding contract existed between the parties herein.

34. The plaintiff contended that a binding contract arose upon issuance of the Notification of Award dated 26th January 2021, which it accepted on 1st February 2021. The plaintiff stated that in addition to accepting the Notification of Award, it executed the contract documents and returned them to the defendant for counter-execution, but the defendant failed to execute the contract. It contended that failure to sign the contract within thirty (30) days, coupled with its subsequent allocation of the works to another contractor, constituted a breach of contract.
35. The defendant on the other hand stated that the letter dated 26th January 2021 was merely a notification of intention to award, despite its title. It emphasized that a formal contract can only arise once executed by both parties in accordance with Section 135(4) of the *Public Procurement and Asset Disposal Act*. The defendant asserted that no enforceable contract was ever formed between the parties herein and no contractual obligations arose.
36. A Notification of Award is provided for under Section 87 of the PPADA which states that –
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).
37. From the above provisions, it is clear that pursuant to the provisions of Section 87(4) of the PPADA, a Notification of Award does not form a contract. In addition, Section 135(4) of the PPADA which is couched in mandatory terms provides that a procurement contract must be in writing and signed by both parties. In view of the above, and the plaintiff's admission that the defendant never executed any contract, this Court is satisfied that no binding contract ever came into existence between the parties herein. Consequently, no contractual obligations capable of enforcement, performance, or even implication can arise as between the parties herein.



38. In the circumstances, this Court finds that the plaintiff's claim for breach of contract automatically fails.

Whether the cancellation of the Tender was lawful.

39. The plaintiff's position is that the cancellation letter dated 7th June 2021 was unlawful as it was issued after the lapse of the Tender validity period of 120 days, which begun on 30th November 2020. According to the plaintiff, the earlier communication constituted a Notification of Award and therefore the subsequent cancellation contravened Section 63 of the PPADA. The plaintiff further asserted that although the defendant cited budgetary constraints as the basis for the cancellation, it failed to provide evidence of such constraints or of the alleged meetings, rendering the decision abrupt, procedurally flawed and unfair.
40. The defendant maintained that the cancellation was justified on the grounds of budgetary constraints and concerns regarding structural integrity. It explained that the decision was reached following directions from the State Department for Industrialization and the State Department for Public Works. The defendant relied on Clause 6.2 of the Tender document, which granted discretion to cancel the Tender process at any stage prior to execution of the contract. It further argued that the letter of 26th January 2021 constituted only a notice of intention to award, not a binding Award.
41. As correctly pointed out by the plaintiff, Section 63 of the PPADA provides for cancellation of Tenders. It states that –
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.
42. It is clear that Section 63(1) of the PPADA regulates cancellation before Notification of Award. In the present case, the defendant had issued communication that amounted to a Notification of Award, meaning the stage contemplated under Section 63 had already passed. Accordingly, Section 63 of the PPADA was not applicable to the cancellation undertaken in this case. The defendant instead relied on Clause 6.2 of the Tender documents, which expressly reserved the right to cancel the tendering process prior to the execution of the contract, without incurring liability. Clause 6.2 of the Tender document provides as follows-
- Notwithstanding clause 6.1 above, the Employer reserved the right to accept or reject any Tender, and to cancel the Tendering process and reject all Tenders, at anytime prior to the award of Contract, without thereby incurring any liability to the affected Tenderer or Tenderers or any obligation to inform the affected Tenderer or Tenderers of the grounds for the action.
43. Upon reviewing the Tender document, this Court notes that Clauses 6.14 and 6.15 similarly empowered the defendant to terminate the procurement proceedings before contract execution, subject only to the requirement to notify Tenderers. Courts have consistently held that such contractual clauses are enforceable provided that the decision is not arbitrary, irrational or tainted by procedural unfairness.
44. The plaintiff argued that the defendant's reliance on Clause 6.2 was misplaced as it allegedly conflicted with Section 63 of the PPADA. However, Section 63 is not framed in prohibitory terms and does not bar termination after notification, it simply enumerates statutory grounds applicable before notification. It is my considered view that once the notification stage passed, termination was governed by the Tender document, and general procurement principles. In the circumstances, I do not find any conflict between Section 63 of the PPADA and Clause 6.2 of the Tender document. I am satisfied that the defendant was entitled to rely on the discretion contained therein.
45. Having earlier found that no contract had been executed between the plaintiff and the defendant in respect of the subject Award, as the defendant had not signed the contract, the procurement process had not reached the stage of contract formation. The defendant therefore retained the discretion to terminate the Tender process.
46. It is not in dispute that the cancellation letter was issued after the expiry of the Tender validity period and more than one and a half months after the defendant received directions to effect the cancellation. While the defendant cited budgetary constraints, it did not produce documentary proof of the alleged approvals or minutes. Nevertheless, Clauses 6.2 and 6.14 of the Tender document permitted termination at any time prior to contract execution and shielded the procuring entity from liability for such termination. Clause 6.14 states that -
- The procuring entity may at any time terminate procurement proceedings before contract award and shall not be liable to any person for the termination.
47. Upon perusal of the letters dated 26th April 2021 and 14th July 2021 produced as defence exhibits No. 1 & 3, it is evident that subsequent to Tendering, the geotechnical survey revealed a need for piling and a suspended ground-floor slab, materially altering the scope of works. Technical Officers advised that the revised works were best undertaken either through variation or through direct procurement to the



contractor already engaged at the Naivasha Special Economic Zone site, to ensure continuity, avoid conflicts between contractors, reduce delays and additional costs, and maintain quality standards.

48. This Court is therefore persuaded that these exhibits demonstrate a considered administrative and engineering rationale behind the decision to discontinue the initial procurement and reorganize the works under a different procurement approach.
49. In light of the foregoing and notwithstanding the delay in communicating the cancellation of the subject Tender, I am persuaded that the reasons cited by the defendant, particularly, budgetary constraints and the need to address revised technical requirements, were legitimate and fell within the discretion provided by the Tender documents. Further, although the evidence of budgetary approval was not produced, the defendant was not required under Clause 6.2 to justify the grounds for termination, provided the decision was not arbitrary.
50. In the end, this Court finds that the cancellation of the subject Tender was lawful.

Whether the plaintiff had a legitimate expectation.

51. The plaintiff averred that after receiving the Notification of Award and executing the contract, it expected the defendant to sign and proceed with the project. The defendant on the other hand, argued that legitimate expectation cannot arise contrary to Statute in light of the provisions of Section 87(4) of the PPADA which expressly states that a Notification of Award is not a contract.
52. It is now well settled that the doctrine of “legitimate expectation” must operate within the law, not contrary to it. On the reliance of the doctrine of “legitimate expectation”, the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra) held that -

“Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

An illuminating consideration of the concept of “legitimate expectation” is found in the South African case, *South African Veterinary Council v Szymanski* 2003(4) S.A 42 (SCA) at [paragraph 28]: the court held as follows:

“The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:

- i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell* (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.



- ii. The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra [1989 (4) SA 731 (A)] at 756I - 757B); *De Smith, Woolf and Jowell* (supra at 417 para 8-037).
- iii. The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell* (op cit at 422 para 8-050); *Attorney- General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j.
- iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.”

This was also referred to with approval in *Walele v City of Cape Town and Others*; 2008 (6) S.A 129 (C.C.) paragraph 41.

The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

De Smith, Woolf & Jowell, in “Judicial Review of Administrative Action cited in *Republic v Kenya Revenue Authority Ex Parte M- Kopa Kenya Limited* thus:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

- 53. The import of the foregoing authority is that a party cannot successfully invoke the doctrine of “legitimate expectation” where a Statute explicitly provides otherwise. In this case, Sections 87(4) and 135(4) of the PPADA categorically state that a Notification of Award does not constitute a contract and that binding obligations only arise upon execution of a written Agreement. Consequently, even if the plaintiff anticipated contract signing, such expectation cannot override express statutory provisions. Further, since the Tender documents expressly permitted cancellation prior to contract execution, the Notification of Award cannot in law, amount to a promise capable of giving rise to legitimate expectation. It is only upon execution of a formal contract by both parties that the plaintiff would reasonably be expected to mobilize and commence works.
- 54. It therefore follows that prior to execution of the contract, the doctrine of “legitimate expectation” did not arise and the plaintiff cannot rely on it.
- 55. Bound by the Supreme Court decision cited hereinbefore, this Court finds that the plaintiff’s claim of “legitimate expectation” cannot be sustained.



Whether the plaintiff is entitled to the reliefs sought.

56. On the plaintiff's claim for Kshs.12,746,582.20 being the value of the performance bond, this Court notes that the bond was communicated to the defendant in a letter dated 19th February 2021. It is further noted that the defendant by its letter dated 7th June 2021, duly notified the plaintiff of the cancellation of the Tender. No explanation has been offered as to why upon receipt of the said cancellation letter, the plaintiff failed to take any steps to secure discharge or cancellation of the performance bond.

57. It is trite law that an aggrieved party is under an obligation to mitigate its losses once it becomes aware of circumstances giving rise to potential loss. This position was affirmed by the Court of Appeal in the case of *African Highland Produce Limited v John Kisorio* [2001] KECA 364 (KLR) as follows –

The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See *Halsbury's Laws of England* Vol 11, Page 289, 3rd Edn 1955

58. In the circumstances, this Court finds that once the plaintiff was notified of the cancellation on 7th June 2021, it was incumbent upon it to take reasonable steps to mitigate its losses by seeking the discharge of the performance bond. Any losses subsequently incurred due to its failure to act swiftly cannot be shifted to the defendant.

59. Moreover, the law is clear that a performance bond or guarantee constitutes an independent contract between the Principal and the Surety, separate from the underlying procurement relationship. In this case, it is evident that the defendant never called up the performance bond and did not receive any sums thereunder. I am therefore satisfied that the plaintiff suffered no loss attributable to any action or omission by the defendant. Consequently, the plaintiff cannot legitimately claim the value of the bond or the interest allegedly incurred thereon after the cancellation of the Tender. Any such losses flow solely from the plaintiff's own failure to mitigate, for which the defendant cannot be held liable.

60. In view of the foregoing, this Court finds that the plaintiff has no legal basis for contractual damages, loss of profits, mobilization losses, or any of the financial claims advanced. Prior to the signing of a binding contract, by the defendant, the plaintiff should not have mobilized the workforce and machinery it allegedly did and for which it claims compensation from the defendant due to being overzealous.

61. In the premise, this Court finds that the plaintiff's suit against the defendant is not merited.

62. Section 27 of the *Civil Procedure Act* provides that costs follow the event. The costs of this suit shall be borne by the plaintiff.

63. The upshot is that the plaintiff's suit is hereby dismissed with costs to the defendant.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Asasha h/b for Mr. Bake for plaintiff

No appearance for the defendant

Ms B. Wokabi – Court Assistant.

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