

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
SMALL CLAIMS APPEAL NO. E064 OF 2025

THE BOARD OF MANAGEMENT, FRIENDS

SCHOOL KAIMOSI GIRLS.....APPELLANT

VERSUS

**ALICIA BAKERS AND CONFECTIONERS
LIMITED.....RESPONDENT**

*(Being an appeal from the judgment of Hon. J.P Mkala (RM)
in Siaya Small Claims Court Case No. SCCMM E209 of 2025
dated 8/8/2025)*

BETWEEN

**ALICIA BAKERS AND CONFECTIONERS LIMITED.....
.....CLAIMANT**

VERSUS

THE BOARD OF MANAGEMENT FRIENDS SCHOOL

KAIMOSI.....RESPONDENT

JUDGMENT

1. The appeal arises from the judgment of Hon. J. P Mkala (RM) in Siaya Small Claims Court Case No. E209 of 2025 wherein he entered judgment for the Respondent as against the Appellant in the sum of Kshs845,378/= plus assessed costs of Kshs 40,000/=.
2. The Appellant was aggrieved by the said judgment and who lodged its Memorandum of Appeal dated 3/9/2025 wherein it raised the following grounds of appeal namely:
 - 1) That the trial magistrate erred both in law and fact in awarding a claim whereas there was no valid suit before the court.
 - 2) That the trial magistrate erred in law and fact in failing to find and hold that the Respondents' claim as against the Appellant was statute-barred.
 - 3) That the trial magistrate erred both in law and fact by awarding judgment in favour of the Respondent in the sum of Kshs.845,378/= yet there are no deliveries and or evidence in support of such an award.
 - 4) That the trial magistrate erred both in law and fact in failing to find and hold that the contract between the Appellant and the Respondent, if any, was marred by

serious flaws, irregularities, improprieties and illegalities and thus awarding the claim of Kshs.845,378/= to the Respondent was tantamount to not only awarding an illegality but also sanitizing and laundering the fraudulent tender.

5) That the learned trial magistrate erred in both law and fact by failing to consider the pleadings, evidence and written submissions of the Appellant, thus arriving at the erroneous judgment.

The Appellant therefore prayed that the impugned judgment dated 8/8/2025 be set aside, the appeal be allowed, and that it be granted costs of the appeal and of the lower court.

3. This being the first appellate court, its duty is well spelt out, namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and come up with its own conclusion as to whether or not to uphold the decision of the trial court. This court will also have to take into account the fact that it did not hear or see the witnesses testify and hence provide due allowance for the same. See **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123.**
4. The record of the trial court indicates that the Respondent filed its claim for Kshs845,378/= being the balance of monies due and owing from the Appellant for goods supplied between the period 01/01/2016 and 25/5/2023. The Respondent further pleaded that the agreement was that the Appellant would make payments within 30 days upon receipt of invoice. It was further pleaded that the Appellant despite being supplied with goods

made small payments here and there and eventually refused and/or neglected to pay forcing the filing of the claim.

5. The Appellant denied the claim and further contended that if a contract existed, then the same was marred by irregularities and contraventions of the law from which the Respondent could not benefit, and further that the claim was statute-barred and thus the court lacked jurisdiction to hear and determine the matter.
6. The hearing commenced on 4/8/2025.
7. **Kelvin Amollo (CW1)** testified that he works as an accountant and proceeded to adopt the statement of claim. He also produced several exhibits inter alia; demand letter, copy of cheque dated 27/4/2023; invoice dated 25/1/2019, invoice dated 15/2/2019, invoice dated 28/5/2019, invoice and delivery note No. 37344 dated 25/6/2019, invoice and delivery note No. 37573 dated 3/7/2019; invoice No. 37355 dated 3/7/2019; invoice 39227 dated 11/9/2019; LPO dated 24/6/2018; bank payment slip posted on 9/1/2016; bank paying slip 29/7/2016; bank slip posted on 16/9/2016; cheque No. 003639; cheque dated 1/12/2016; LPO dated 25/5/2019; demand letter dated 16/6/2021; demand letter 6/5/2025; cheque leaf dated 27/4/2023.

On cross examination, he stated inter alia; that he did not supply the employment letter with the Respondent's company nor any document showing that he was an accountant; that the

statement of account is not signed; that invoice No. 32598 was for supply of 100 bags of 50kgs bakers flour that was not supported by any LPO; that the LPO dated 24/6/2016 lapsed in 2024; that the LPO was signed by the bursar; that they did not bid for the supply of flour; that he had worked for Alicia Bakers for seven (7) years; that they did not receive any certificate confirming that the goods were delivered; that the delivery note was stamped and signed by one Julyn; that LPO dated 20/4/2019 was signed by the bursar; that he has not submitted any tender document; that the school issued them with an LPO; that there is no agreement between the school and Alicia Bakers; that the amount is in respect of bread and flour; that he is aware of meetings between the school and other creditors; that the claimant is a company; that he does not have a resolution authorizing him to appear as a witness on behalf of the company; that there is no resolution to institute this claim; that he has never visited Kaimosi Girls and that he does not know the storekeeper.

On re-examination, he stated inter alia; that it is not part of his obligation to know the storekeeper; that once it is signed by the school, it is enough for the delivery notes; that all delivery notes are stamped; that LPO are from Kaimosi; that they supplied goods from 2016 to 2019; that payments were not made promptly; that payments were not made in full and that the last payment was made on 25/5/2023; that the statement is from Alicia Bakers; that there is no dispute to his qualification as an accountant; that he is not in a position to know who is to receive goods once delivered.

That marked the close of the Respondent's case.

8. **Fred Akhumwanya Shunguli (DW1)** testified that he is a school foreman. That he recorded and filed his witness statement dated 25/7/2025 which he adopted as his evidence and produces it as exhibit 1-8. Further, he stated that Timothy Anyika has been the store man from 2008 to date and that the school has had one store- man since 2016. That the supplier must have LPO tender documents to show that he has succeeded. That he has never seen an invoice dated 3/7/2019 and which is unsigned. That invoice dated 25/6/2019 is signed by Rael Murila who is a secretary at the school. That storekeeper is supposed to sign the delivery note. That LPO worth Kshs540,000/= is not properly written. That it has not quoted tender reference. That the person who signed has not been stated. That LPO is supposed to be signed by the principal. That the goods were to be delivered in April 2019. That in April, schools were on recess. It is not signed by the bursar or the principal. That LPO dated 24/6/2018 has no tender reference and that the chief accounting officer has not signed. That the amount is not high and cannot have been consumed within a short period. That the supplier picks LPO from the school and sign delivery book.

On cross examination, he stated that he has been a foreman for the last 17 years. That he is a member of transportation and acceptance committee. That he has not brought evidence to show that he is a foreman. That LPO dated 24/6/2019 is signed by unauthorized person and it is in their letter head. That the stamp can be made by anybody. That the stamp belongs to the school and that he knows what an LPO is. That it is a public

school and should go as per the procurement documents. That a request was made for supply of goods. That he could not tell whether payment was made. LPO for 26/3/2019 belongs to the school and the stamp belongs to the bursar. That a request was made and that he cannot tell whether payment was made. That he has supplied tender notice of 2019. That he cannot show the list of prequalified suppliers as he does not have the list. That there was no advert for delivery of baking flour and bread. That tender 42 indicates school to source directly or to be advertised. That in 2019 there was room for direct sourcing. That there are no pre-qualified suppliers and that the school can issue a supplier an LPO. That the cheque was issued by the school. That it must be made for something, and that I do not know the payment it was meant for. That according to him, Kaimosi is a public school which must follow the public procurement. That the payment was not illegal. That he cannot tell whether the school can make illegal payments. That payments were made to a supplier. That invoice bears school stamp and that they did not respond to the demand letters.

On re-examination, he stated that they should have invoices to show delivery. That the school should issue a certificate for delivery. That delivery was not done.

9. **Bright Makay Ndang'ale (DW2)** adopted his statement dated 23/1/2025 as his evidence in chief. That he has worked from 2012 to date as a bursar. That the store man was Timothy Anyika. That LPO dated 24/6/2016 is unknown to him and that the stamp on the LPO dated 25/2/2019 is not his and further that the signature is not his. That for the period 2016- 2019, Julyn was a Librarian on contract.

On cross examination, he stated that the LPO dated 25/3/2019 has the name of the school. That the stamp is foreign to him. That he is not aware that the witness has stated that the stamp belongs to the school. That the invoice is stamped on 25/3/2019 but which he is not familiar with. That a cheque was issued by the school and that the same was for paying for bread. That the cheque was for goods supplied. That sometimes there is delay in paying. That he does not know what the school was paying for. That they were served with demand letters.

10. Both parties duly closed their respective cases and exchanged submissions leading to the impugned judgment.

11. The appeal was canvassed by way of written submissions.

12. Appellants submissions are dated 6th November 2025. Learned counsel for the Appellant submitted that the Respondent pleaded under nature of the claim to the effect that being a balance of the price on account of goods supplied to the Appellant between the period 1/1/2016 - 25/5/2023 and now owing and amounting to Ksh845,378/=. That the Appellant denied the claim and therefore put the Respondent to strictly prove thereof. That the Respondent called CW1 who produced exhibits namely demand letter, copy of cheque dated 27/4/2023; invoice dated 25/1/2019, invoice dated 15/2/2019, invoice dated 28/5/2019, invoice and delivery note No. 37344 dated 25/6/2019, invoice and delivery note No. 37573 dated 3/7/2019; invoice No. 37355 dated 3/7/2019; invoice 39227 dated 11/9/2019; LPO dated 24/6/2018; bank payment slip posted on 9/1/2016; bank paying slip 29/7/2016; bank slip

posted on 16/9/2016; cheque No. 003639; cheque dated 1/12/2016; LPO dated 25/5/2019; demand letter dated 16/6/2021; demand letter 6/5/2025; cheque leaf dated 27/4/2023.

The counsel placed reliance in the case of **E.P Communications Limited v East Africa Courier Services Limited [2019] eKLR** where the Superior Court stated that a delivery note is a proof of delivery of goods, that invoices alone do not prove or receipt of goods and that in the absence of a delivery note or other evidence of receipt of goods, it becomes doubtful whether the goods were actually delivered. Further, the Superior Court stated that, courts of law act on hard evidence not sympathy or speculation.

Further, it was submitted that the Respondent's invoices produced as exhibit 4,5,6,9, 10,11 and LPOs' produced as exhibit 12 and 18 alone do not prove delivery of receipts of the goods by the Appellant. The invoices produced as exhibits 4,5,6,9,10 and 11 are not supported by any duly stamped and signed delivery note. In absence of delivery note or evidence of receipt of the goods, the Honourable court is called upon to find that the goods mentioned in invoices produced as exhibits 4,5,6,7,9, 10 and 11 and LPOs' produced as exhibit 12 and 1j8 were never delivered and or supplied to the Appellant. That the Respondent only produced two delivery notes dated 25/6/2019 and 03/07/2019 as exhibit 7(b) and 8(b) as shown in the record of appeal. That that the delivery note dated 25/6/2019 bears the stamp of Friends school Kaimosi Girls and is illegally signed by one Rael Murila. That the delivery note dated 3/7/2019 only

bears the stamp of Friends School Kaimosi Girls and does not bear the signature of approval by an agent and or employee of the Appellant herein and that without the signature of approval, the goods mentioned in the delivery note dated 25/6/2019 were never supplied. That CW1 produced a copy of the Respondent statement of account as exhibit No. 1. Counsel further relied on Section 37 of the Evidence Act which provides that:

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

Further, reliance was placed in the case of **Five Continents Ltd v Mpata Investments Ltd [2003] eKLR** where it was held that:

“The plaintiff mainly relied on the accounts analyzing to show the defendant’s indebtedness. That accounts analysis was apparently prepared by the Plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the Evidence Act). It follows that the accounts analysis on which the learned judge relied has no evidential value.”

Flowing from the above, it was submitted that the Respondent failed to render signed and verified evidence to

demonstrate the debt. That the Respondent's unstamped and unsigned statement of account lacks legal binding force without proper authentication and that this Court should disregard it.

13. On the issue of whether the contract between the Appellant and Respondent was marred by serious flaws, irregularities, improprieties and illegalities making it unenforceable, it was submitted that the Appellant is a Public entity and that Article 227 (1) of the Constitution obligates state organs and public entities to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Further that the Public Procurement and Assets Disposal Act of 2015 provides the framework within which policies relating to procurement are to be implemented. That counsel relied on Section 5(1) of the procurement and Assets Disposal Act 2015 as regards to whether an oral or implied contract can be implied between the Appellant and the Respondent which states as follows:

“ 5 Conflicts with other Acts.

- (1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and Asset Disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services...”

That the alleged supply and the alleged part payment if any cannot be related to this case so as

to find that there was an implied contract between parties.

On the issue of whether the Respondent had a similar and equal responsibility to ensure that the tender and or procurement herein followed the law, it was submitted that the Respondent had a similar and equal responsibility to ensure that the procurement followed the law as outlined in Section 72 of the Public Procurement and Assets Disposal Act of 2015 that responsibility for complying with Act, contractors, suppliers and consultants shall comply with the provisions of this Act and Regulations. Further, it was stated that the ignorance/omission by the Respondent to ensure that there was compliance with the law before supplying bread and flour if any is not excusable. Reliance was further placed in the case of **Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR** where it was held that:

“45. It is the duty of the Contractor as it is of the procuring entity to observe the provisions of statute and the Regulations thereunder. Section 27 imposes as unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into contract which is procured in apparent disregard of the law. For

that reason, a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when he/she has not done enough to enquire about compliance or himself/herself guilty of infringement.”

14. As regards the issue of whether the procurement and supply of bread and flour by the Respondent if any complied with the statutory provisions of the Constitution and the Public Procurement and Assets Disposal Act of 2015, it was submitted that vitiating factors in contract are those factors the existence of which will cripple or invalidate the contract. They include mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreements. That these factors may infect either at its formation or at the performance. That CW1 did not confirm that he did supply any tender documents in support of the Respondent's claim as against the Appellant. That the Appellant did produce tender notice for the year 2019 and dated 19/10/2018 and page 41, under tender notice No. 20 FSK/TENDER/2019/42 BAKERY ITEMS/MAINTENANCE, that the Appellant invited eligible suppliers to make bid in relation to the tender. That it was a mandatory condition for eligible suppliers to pay Kshs1000/= non refundable tender fee and thereafter tender their bid on or before 26/11/2018. That the Respondent neither paid the non-refundable tender fee nor made any application in relation to the above tender advert. That the Appellant produced a copy of the minutes of the Adhoc Tender Committee held on 30/1/2019 as exhibit 6 in relation to tender notice number 20 FSK/TENDER/2019/42 BAKERY

ITEMS/MAINTENANCE and the adhoc tender committee recommended that the school to source directly or re-advertise for the same. That Public Procurement and Assets Disposal Act of 2015 provided it meets the parameters set out in Section 103 and 104 of the Act which provides that:

“103. When direct procurement may be used

1) A procuring entity may use direct procurement as allowed under sub-section (2) as long as the purpose is not to avoid competition.

2) **A procuring entity may use direct procurement if any of the following are satisfied -**

a. The goods, works or services are available only from the particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;

b. Due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, work or services, and engaging in tendering proceedings or other method of procurement would therefore be impractical, provided that the circumstances giving rise to the

urgency were neither foreseeable by procuring entity nor the result of dilatory conduct of its part

c. Owing to a catastrophic event, there is an urgent need for the goods, works or services

(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares

well with known prices of goods, works or services in the circumstances.

(3) A public officer who contravenes the provisions of subsection (2) commits an offence.

104. Procedure for direct procurement

An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—

- (a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.**
- (b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;**
- (c) ensure appropriate approvals under this Act have been granted;**
- (d) ensure the resulting contract is in writing and signed by both parties.”**

15. It was further submitted that in regards to the provisions of Section 103 (1) and (2) of the Public Procurement Act above, it is not in dispute that the same fails to meet the threshold set under Article 227 (1) of the Constitution which obligates state

organs and public entities to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. That on the aspect of competition, the Respondent failed to tender evidence on how they were awarded the tender. In the absence of re - advertisement of the tender, it is our submission that the Respondent chose a procurement mode that was not fair, competitive, equitable and transparent. It was done in Secrecy to the exclusion of other eligible supplier's contrary to the Clear provisions of Statute. That the mode of procurement chosen herein does not comply with the clear provisions of **Section 103 (2) of the Public Procurement Act**. For Instance, there no evidence on record that the Respondent has exclusive rights in respect of supply of bread and flour. There is equally no evidence that due to war, invasion, disorder, natural disaster or there was an urgent need for bread and flour and engaging in tendering proceedings or any other method of procurement would therefore be impractical. Similarly, there is no evidence that owing to a catastrophic event, there was an urgent need for supply of bread and flour making it impractical to use other methods of procurement because of the time involved in using those methods. There is equally no evidence that the Respondent previously supplied bread and flour for reasons of standardization or there was need for compatibility with existing goods. Lastly, there is no evidence that the acquisition price by the Respondent is fair and reasonable and compares well with known prices of bread and flour.

16. As regards the aspect of Procedure as provided for under Section 104 of the Public Procurement Act, it was submitted that the above - mentioned procedure provides to the effect that in direct procurement an accounting officer of a procuring entity shall adhere issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations. That in the above context is interpreted as imposing a mandatory and compulsory duty implying that the procedure and duty imposed pursuant to the provisions of Section 104 of the Public Procurement Act is mandatory and compulsory. That in the above provision, it is only the Accounting Officer of the Appellant herein who is obligated to give tender documents. Further, upon issuance of the tender documents by the Accounting Officer, the said documents shall form a basis for negotiations. That CW1 did produce the following exhibits namely; a statement of account, demand letters dated 16/06/2021 and 06/05/2025, copies of cheques dated 27/04/2023, 25/01/2019, 15/02/2019, 28/05/2019, 03/07/2019, 11/09/2019, 03/10/2019, bank slips dated 09/01/2016, 29/07/2016, 16/09/2016, cheque number 003639, cheque dated 01/12/2016. My Lord the above-mentioned exhibits were never issued by the Accounting Officer of the Appellant herein and the same cannot form basis for negotiation in direct procurement.

17. Again, under this condition, the Appellant produced a copy of an LPO dated 24/06/2018 and 25/03/2019. A perusal of the LPO dated 24/06/2018 and 25/03/2019 at pages 101 and 106 of the Record of Appeal respectively, it is not in dispute that both are

neither signed nor stamped by the Accounting Officer of the Appellant herein. That by signing and stamping, the Accounting Officer would simply be approving the documents but in this case the documents were never issued, signed nor approved by the Accounting Officer. It was therefore submitted that the said LPO's were never issued by the Accounting Officer of the Appellant and that the same cannot form basis for negotiation in direct procurement.

18. As regards whether the Accounting Officer did appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided, it was contended that the Respondent failed to tender evidence of establishment of an ad hoc evaluation committee. That the Respondent also failed to supply minutes from which an inference would have been made that indeed negotiations were ever held pursuant to the provisions of Section 104 (b) of the Public Procurement Act.
19. As regards the issue of approval, reliance was placed on the provisions of Section 104 (c) of the Public Procurement Act, no appropriate approvals were granted since none were supplied by the Respondent. Lastly, pursuant to the provisions of Section 104 (d) of the Public Procurement Act, there is no evidence that the resulting contract was in writing and signed by both the Accounting Officer of the Appellant and the Respondent herein.
20. It was submitted that the Appellant established that the tender transaction herein was an execution of illegality. That

the tender transaction is illegal, fraudulent and violated the clear provisions of the Constitution and the Public Procurement and Asset Disposal Act. That in order to qualify for payment the contract had to be legal and lawful. That allowing the Respondent to receive monies on the impugned contract will be tantamount to not only rewarding an illegality, but also sanitizing and laundering those fraudulent tenders.

21. Counsel further relied in the case of **Nairobi High Court Anti - Corruption suit No. E026 of 2018; Ethics and Anti - Corruption Commission versus Joseph Muindi Tevulo, Benjamin Ruto Timitim and Robert Simiyu Wambulwa T/A Koyi Building Contractors** by Justice Prof (Dr) Nixon Sifuna wherein the learned Judge held as follows at paragraph 40, 41, 42, 43 and 44: -

“40. The evidence so far on record in this suit has revealed serious flaws, irregularities, improprieties and illegalities in the manner the Defendants handled the subject tenders. It has gravely faulted not only the award of the said tenders but also the payments (overpayments) as well the entire tendering processes.

41. With extensive details, detailing the anomalies and outright violations of the procurement process and law. These infractions and fraud were aptly summed up

by PW6 in his testimony. A testimony that notably clearly bore out his expertise in conducting such investigations. He in a blow-by-blow account left nothing to guess work; as he dissected and explained the entire scam with graphic details on every element and material particular of the scheme and fraud perpetrated by the Defendants in the subject tenders.

42. This covered the entire process from the bids to the tender award and to the payments. As already noted, the effect of the Defendants having filed Defence and subsequently failed or elected to call witnesses and adduce evidence in support of their Defence(s) and to controvert the Plaintiff's assertions, is that those assertions remain uncontroverted and if they meet the evidentiary threshold, they are to be believed and relied on by the Court in its determination of the suit.

43. Notably, the County had a budget for the said works, but which as a result of this fraud-laden tender caused the County Government to pay more than was budgeted. I need to emphasize though, that the Defendants' sin was not only overshooting the budget. But also the irregularities, illegalities and fraud in

the said tenders. The contracts were as illegal as the

44. This Court considers the subject transaction as an execution of illegality, rather than the rendering of a service for which payment should be made. To qualify for payment the contract had to be legal and lawful. Allowing the 3rd Defendant to retain the monies paid on those contracts, will be tantamount to not only rewarding an illegality, but also sanitizing and laundering those fraudulent tenders.

22. Further, in the case of **Alphas Ngonda - Chairman & 3 others v Joseph Kitonga Kithuku t/a Muki Hardware & General Works [2020]** eKLR Justice P.J.O Otieno held as follows at paragraph 25: -

“25. ...I do find that the evidence led showed that Public procurement and asset disposal act was not followed in awarding the tender upon which the suit was grounded and that on that account it was not open to the court to enforce such an agreement by entry of judgment. This present the second compelling ground that the appeal be allowed and the judgment of the lower court set aside.”

23. Learned counsel further submitted that in the instant case, there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. That Judicial tradition in this country is to frown upon illegal contracts and that regard must be given to the doctrine of ***Ex lurpi causa non oritur action***, that is from a dishonorable cause an action does not arise. That there may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless. See the case of **Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards [2016] eKLR** wherein it was determined as follows:

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“The Court reaches its decision even in the face of the submissions by the Claimant’s Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the

one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.”

24. The learned counsel urges this Honourable court to be guided by the above authorities and find merit in our submission that there was no valid contract between the parties herein capable of being enforced and that the Respondent is not entitled to the reliefs sought in the lower court. That it behooves this Honourable Court to protect public interest, by dismissing this Claimant's claim in the lower court that is premised on a transaction that went contrary to the Constitution and the law. That a contract that contravenes statutes and public policy is void ab initio for all purpose and intends. **In the case of Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR** the Court of Appeal stated as follows: -

“23. Likewise, we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.”

Further, it was submitted that the principle of contract being void ab initio for contravening public policy and statute was captured by **Lord Truro in Egerton versus Brownlow (1853) 4HL Cas at page 196** where he stated: -

“Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may

be termed the policy of the law, or public policy in relation to the law”

25. That in the case of Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, at page 388, Devlin L.J (as he then was) had this to say on the issue of illegality,

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

Further, the principle has been followed in the High Court case (Githinji, J) in Mohamed versus Attorney General (1990) KLR 146 and Nyeri Civil Appeal No. 40 of 2001, Nyeri County Council versus Monicah M. Mwangi (Kasango, J) where it has been held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.

26. From the foregoing decisions, the Claimant now Respondent having participated in the illegality and further its alleged contract being in contravention of the law and or statute, it was submitted that the contract if any is not enforceable and thus the appeal should be allowed and the Respondents suit in the Lower Court be dismissed with costs.

27. On the issue of whether the Claimant's claim is barred by Section 4 (1) (a) of the Limitation of Actions Act, it was submitted that if the answer is in the affirmative, the issue to determine is whether the learned trial magistrate had the Jurisdiction to hear, admit and determine the claim. Learned counsel proceeded to cite the provisions of he said Act as Section 4 (1) (a) of the Limitation of Actions Act provides as follows:

“The following action may not be brought after the end of 6 years from the date when the cause of action accrued

(a) Actions found on contract.

(b) ...”

28. From the foregoing provision, the issue for determination herein is when did the Respondent’s cause of action accrue for the purposes of Section 4 (1) (a) of the Limitation of Actions Act? It was submitted that according to the Black’s Law Dictionary (10th edition) the word **“accrue”** means **“to come into existence as an enforceable claim or right.”** In a bid to prove its claim, the Respondent did produce a copy of an invoice allegedly stamped on 23/01/2019, 16/05/2019, 29/05/2019 and a delivery note allegedly stamped on 26/06/2019. When CW1 testified at page 3 of the supplementary record of appeal, he adopted his witness statement dated 30/06/2019 as examination in chief. It was the testimony of CW1 that it was a term of the Agreement that the Appellant would make payment within 30 days of receipt of invoice. However, no evidence was tendered in support of the above allegation. That the same was unsubstantiated and that this Honourable Court should disregard the same. As regards the invoices at pages 93, 94, 95 and 96, the right to sue accrued on 23/01/2019, 16/05/2019, 29/05/2019 and a delivery note allegedly stamped 26/06/2019 respectively when they were issued and that is when the cause of action accrued

and in terms of section 4 (1) (a) of the Limitation of Actions Act time begun to run. That this suit was instituted against the Appellants on the 30/06/2025 after the lapse of 6 years. Section 26 (c) of the Limitation of Actions Act on the other hand provides as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

29. It was submitted that vide the Statement of Claim herein at pages 4 - 6 of the Statement of Claim herein, it is not in dispute that the issue of fraud is not pleaded and that this Honourable Court cannot speculate as to whether there was fraud and if so, when it was discovered by the Claimant. That this Honourable Court is invited to find merit in the submission that the

Claimant's claim based on invoices allegedly stamped on 23/01/2019, 16/05/2019, 29/05/2019 and a delivery note allegedly stamped 26/06/2019 is hopelessly out of time and thereafter proceed to dismiss the same with costs to the Appellant.

30. The learned counsel further submitted that the claim herein is statute barred by Section 4 (1) (a) of the Limitations of Actions Act and thus the next issue for determination is whether the learned trial magistrate had the jurisdiction to hear, admit and determine this claim. The court of appeal in the case of **Anaclet Kalia Musau V Attorney General & 2 Others (2020) Eklr** cited with approval the Supreme Court decision in the case of case of **Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others**, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue *suo motu*. The Supreme court said:

“40 A jurisdictional issue is fundamental and can even be raised by the court *suo motu* as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and

Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E.A 62, where it was stated that;

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief.....

The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.”

31. In light of the provisions of Section 4 (1) (a) of the Limitations of Actions Act, above and in light of the findings of the Court of Appeal as well the Supreme Court above, it was submitted that the suit is statute barred in light of the findings by the superior court and that the learned trial Magistrate was barred from entertaining this claim on account of invoices allegedly stamped on 23/01/2019, 16/05/2019, 29/05/2019 and a delivery note allegedly stamped 26/06/2019.

32. On the issue of whether the claim this claim can be sustained and or maintained without a resolution of the company as required by law, it was submitted that it is not in dispute that the PW1 alleges to be an accountant at the Claimant's company but that he did not adduce a copy of the certificate of incorporation of Alicia Bakers and Confectioners Limited and that there is no evidence as to who the director(s) of the company are. That on cross examination, CW1 did confirm that there is no resolution by the Company authorizing the filing and institution of the suit and also did confirm that there is no resolution authorizing him to testify on behalf of the Company. The Superior Court in the case of **Steel Formers Limited v SGS (Kenya) Limited & another [2020] eKLR** wherein Justice J.A Kamau held as follows: -

“The Courts have clearly spoken on the need of being armed with a resolution of the company as required by law before a party can purport to commence an action before Court. The board resolution sanctioning the commencement of a

suit in its favour is always mandatory and necessary. It is not a walk in a park. Such a suit is dead at the first instance and cannot be revived by an amendment. I find the Petitioner's failure to respond to the 1st Respondent's submissions squandered an opportunity for the Petitioner to be heard. The Petitioner's failure to file the Company Resolution sanctioning the commencement of the action by the company, leads this Court to no other conclusion but to find and hold that this Petition is fatally defective and it is for striking out.

33. From the foregoing, it was submitted that there's no mandatory resolution sanctioning the commencement of this suit. Similarly, there is no valid resolution authorizing PW1 to make statements, sign pleadings and testify on behalf of the Claimant herein. It was therefore submitted that the claim herein is dead on arrival for want of mandatory documents and that the same should be dismissed with costs to the Appellant.

34. The Respondent's submissions are dated 26th November 2025.

35. It was submitted that the Respondent's case is built upon a complete documentary ecosystem that provides multiple, overlapping layers of verification. That the evidence forms an

unbreakable chain that conclusively proves the debt and is collectively an impenetrable evidential fortress.

36. That the evidentiary chain begins with the **Local Purchase Orders (See page 3 of the Supplementary Record of Appeal being Exhibits 12 and 18 and pages 101 and 106 of the Record of Appeal) issued by the Appellant.** These LPOs are crucial as they represent:

- a. The **Appellant's own initiation** of the commercial relationship
- b. **Official authorization** from the Appellant for the supply of goods
- c. **Specific instructions** to the Respondent to supply the described goods
- d. The **contractual foundation** upon which the Respondent legitimately relied.

37. That the existence of these LPOs fundamentally undermines the Appellant's subsequent defences about authority and validity, as the transaction originated from the Appellant's own procurement system.

38. In response to the Appellant's LPOs, the Respondent executed the contract through;

Delivery Notes (See page 3 of the Supplementary Record of Appeal being Exhibits 7b and 8b and pages 93 and 94 of the Record of Appeal): Duly stamped by the Appellant's stores department upon physical receipt of the goods.

Invoices (See page 3 of the Supplementary Record of Appeal being Exhibits 7b and 8b and pages 93 - 100 of the Record of Appeal): Similarly stamped by the Appellant, confirming receipt and acceptance of the goods supplied.

39. These documents are not stand-alone documents but constitute conclusive acts of acknowledgment by the Appellant. The stamp of the Appellant's stores department on both delivery notes and invoices represents:

- a. Physical delivery of goods to the Appellant's premises
- b. Verification that the goods matched what was ordered
- c. Acceptance into the Appellant's inventory and control
- d. Commencement of the payment obligation

40. The dual stamping on both delivery notes and invoices creates a redundancy that eliminates any doubt about receipt and acceptance of the goods.

41. Counsel submitted that the Respondent produced a comprehensive Statement of account that systematically organized the outstanding debt. The critical evidentiary value emerges from the perfect tally between all documents:

The delivery notes prove physical receipt

The invoices confirm the commercial terms and value

The statement of account accurately aggregates and summarizes the complete transaction history.

42. This perfect alignment demonstrates:

- a. Systematic Record-Keeping: The Respondent maintained accurate and reliable business records
- b. Evidential Coherence: Every document supports and corroborates every other document
- c. Transaction Integrity: The complete paper trail leaves no room for legitimate dispute

43. The Appellant's complaint about the unsigned statement of account is rendered meaningless when the statement of account perfectly correlates with multiple stamped primary documents.
44. The probative value of a statement of account depends on whether the underlying transactions are proved which they were.
45. Part-Payment as acknowledgment: The Appellant's own conduct provides the most compelling evidence through the cheque issued to the Respondent in 2023 as part-payment.
46. The Appellant now seeks to impugn the Respondent's evidence by citing a Court of Appeal decision and Section 37 of the Evidence Act, Cap 80, arguing that the Statement of Account prepared by the Respondent "has no evidential value."
47. This argument is a gross misapplication of the law and ignores the specific context and totality of the evidence presented before the Learned Adjudicator. The Statement of Account was not the sole basis for the judgment, but one piece of a coherent and corroborated evidentiary matrix.

48. The Statement of Account served merely as a **summary and organizing framework** for these underlying, corroborating documents. It connected the LPOs, deliveries, and the part-payment into a coherent narrative of the outstanding debt.
49. The Court of Appeal's criticism was directed at a document presented as a "book of account regularly kept in the course of business" that was, in fact, created for litigation. The purpose of the Respondent's statement was to **summarise transactions already documented** through LPOs, delivery notes, invoices, and cheque records. **It was not introduced as the primary basis for claiming the debt but rather as an organisational aid to the court.** The law does not prohibit such use.
50. The Respondent submits that Five Continents case is thus distinguishable and does not apply here. In that case, the plaintiff relied primarily on an uncorroborated accounts analysis prepared for litigation, with guest folios showing a nil balance, creating a genuine dispute requiring trial. The court emphasized the need for scrutiny of documents and noted the absence of best evidence, such as vouchers. In contrast, the Respondent's Statement of Account is a summary derived from primary transactional records maintained in the ordinary course of business, including invoices and delivery notes, which were not contested below.
51. Crucially, the Statement is corroborated by independent evidence from the Appellant itself: the Local Purchase Orders

(LPOs) issued by the Appellant, which confirm the orders, quantities, and prices of the goods supplied. These LPOs constitute admissions by the Appellant of the contractual obligations and acceptance of the goods, forming the basis of a binding contract. Unlike in Five Continents, there is no contradictory evidence showing payment or nil balance; the Appellant has not denied receipt or use of the goods. Therefore, the factual circumstances are distinguishable, making the cited authority inapplicable.

52. In response to the Appellant's reliance on the case of **E.P. Communications Limited vs East Africa Courier Services**, the Respondent respectfully submits that the authority is both distinguishable and inapplicable to the present matter, which is founded on a fundamentally different and more comprehensive evidential basis.
53. The Respondent acknowledges the legal principle, correctly stated in the abstract by the Appellant, that a delivery note **in isolation** may not constitute conclusive proof of delivery. However, this principle only applies where the delivery note stands alone, unsupported by other corroborative evidence. This is precisely the scenario that existed in the **E.P. Communications case**.
54. The present case is the antithesis of that scenario. Here, **the delivery notes do not exist in a vacuum**. They are a single, crucial link in a connected and unbreakable chain of

documentation. The **E.P. Communications case** is therefore distinguished on the facts as follows:

- a. **In E.P. Communications:** The plaintiff likely relied on a delivery note as the primary or sole evidence of delivery, without sufficient corroboration to prove that the specific goods reached the intended recipient.
- b. **In the Present Case:** The delivery notes are:
 - a. **Preceded by** the Appellant's own **Local Purchase Orders (LPOs)**, which initiated the transaction and specified the goods to be supplied.
 - b) **Corroborated by** the **invoices** for the same goods, also stamped by the Appellant.
 - c) **Validated by** the **statement of account** which perfectly tallies the LPOs, delivery notes, and invoices.
 - d) **Conclusively ratified by** the Appellant's **part-payment** in 2023.

55. Therefore, while a lone delivery note may be weak evidence, a delivery note that is:

- a. **Requested** by an LPO,
 - b. **Stamped** by the recipient upon delivery,
 - c. **Invoiced** for payment, and
 - d. **Part-paid** for by the debtor,
- transitions from a mere slip of paper to powerful, corroborated proof of a completed transaction.

56. The Respondent submitted that the central question to be considered is whether the Appellant is a public entity subject to the Public Procurement and Asset Disposal Act (PPADA). That the Respondent's answer to this assertion is that the Appellant bears the full and unshifting burden of proving this affirmative defence, which it has failed to do. The legal maxim is: **"He who alleges must prove"** comes into play (Section 107 of the Evidence Act). The Respondent is under no obligation to prove the Appellant's own legal status. It was further submitted that the Basic Education Act requires all institutions offering basic education in Kenya to be registered, and that no person can offer basic education without accreditation and registration. (See Section 76 of the Act). The Appellant's nature (public or private) is a question of fact that must be strictly proved by evidence and that it cannot be assumed or inferred. That the Basic Education Act does not define the term "public school", and the Appellant has provided no evidence like as certificate of registration/incorporation as a public institution or State Corporation, gazette notice or even a letter from the Ministry of Education, or any governing statute to prove it is a "State organ" or "public entity" as defined by the procurement laws.

57. Further, it was submitted that Section 3 of the PPADA limits its application to State organs and public entities. The mere fact that the Appellant was represented by the Office of the Attorney General (State Counsel) in the lower court is not conclusive proof that it is a public entity. The Attorney General may, in certain circumstances, provide legal representation to other entities.

This representation, without more, does not discharge the Appellant's burden of proof. It was submitted that the Appellant has failed to discharge the threshold burden of proving it is a "public entity" as defined by the PPADA. The burden of proving this foundational fact lies with the Appellant.

58. It was further pointed out that the Appellant's reliance on the case of **Royal Media Services v IEBC & 3 Others [2019] eKLR**, particularly paragraph 45 where the Court observed that both the Contractor and the Procuring Entity have a duty to comply with procurement laws and regulations is not correct since the Appellant seeks to use this authority to argue that the Respondent's supply of goods was unlawful for alleged non-compliance with the Public Procurement and Asset Disposal Act (PPADA). It was contended that the Appellant's reliance on this authority is misplaced and that the decision is wholly distinguishable from the present appeal for the following compelling reasons:

- i. **Royal Media Services applies strictly to established public entities.** The procuring entity was **the Independent Electoral and Boundaries Commission (IEBC)** a constitutional commission expressly recognized as a **public entity** under Article 248 of the Constitution and under the PPADA.
- ii. In the present matter, **the Appellant has not proved that it is a public school or a procuring entity under PPADA.** The simple fact that it is

described as a “school” does not automatically convert it into a public institution.

- iii. The Appellant bore the evidential burden under **Sections 107-109 of the Evidence Act** to establish its status as a public entity. It produced **no registration documents, no certificate of incorporation, no gazette notice, no constitution of a Board of Management, no evidence of government funding, and no legal instrument placing it under State control.**
- iv. Representation by State Counsel **does not automatically convert an entity into a public entity**, nor does it relieve the party from proving its legal status. Appearance by State Counsel can arise from administrative arrangements, insurance-directed representation, or mistaken classification, but **it is not proof of public status.**
- v. Royal Media Services involved allegations of corruption, collusion, and public expenditure irregularities—facts not present here. That case dealt with high-level procurement for election-related ICT infrastructure, involving allegations of public financial loss and statutory violations.
- vi. In contrast, the present case concerns **direct supply of goods through issued LPOs**, goods which the Appellant received and partly paid for by cheque in 2023. There is no

allegation of corruption, collusion, or misuse of public funds.

- vii. The commercial nature of the transaction places it outside the factual ambit of Royal Media Services case which was grounded in protecting the public interest and public resources.

59. It was therefore contended that without proof of public status, the cornerstone assumption necessary for the application of PPADA and thus the application of the holding in Royal Media Services case collapses entirely.

60. Learned counsel further submitted that the Royal Media Services case does not stand for the proposition that a procuring entity may avoid obligations after benefiting from supplied goods. Rather, it emphasizes prospective compliance not retrospective avoidance.

61. Reliance was placed in the case of **Optic Technologies Kenya Limited v County Assembly of Vihiga & another [2023] KEHC 22833 (KLR)** which bears a remarkable resemblance to the present appeal where a public entity (the County Assembly) refused to pay for goods that had been supplied and received, citing procurement irregularities. The Court being alive to the case of Royal Media Services (supra), in its judgment that underscores the primacy of substantive justice, held unequivocally that:

With respect, I differ. The contractor and supplier should only be required to comply with the law to the extent that that law demands of them, and not what it demands of others. In the instant case, the defendant and the interested party have not pointed out any non-compliance on the part of the plaintiff. The non-compliances pointed out were on the part of the defendant, the procuring entity, and the plaintiff should not, in all fairness and justice, be made to blame for the shortcomings of the other party. The plaintiff should not be made, as it were, to carry the cross for the Defendant, who has failed to comply with the law. I am not inclined to accept an interpretation of section 75(4) which imposes a burden on contractors or suppliers to ensure that the internal processes on the part of the procuring entity comply with the law. To do so would be to expect too much of the contractors and suppliers, who, in most cases, may have little or no access to the internal affairs of procuring entities, and in some cases balance of power between the parties may militate against the contractor or supplier accessing such information from the procuring party, who may be in a stronger bargaining position. (See paragraph 56 of the judgment)

If the contracts herein were illegal, on account of irregularities or non-compliances, which is not the

case here, the plaintiff would be the innocent party, who would be blameless, for the irregularities cited, of not subjecting the contracts to the processes set out under the relevant public procurement law, have nothing to do with the plaintiff, but were internal to the defendant, as the procuring entity. (See paragraph 57).

62. It was submitted that even if it were to be assumed that the Appellant were public, the issuance of LPOs by the Appellant **estops** it from denying the validity of the transaction. Non-compliance with procurement procedures, if any, would render the contract irregular. Kenyan courts have held that innocent suppliers may still recover on **quantum meruit** for goods supplied and accepted, to prevent unjust enrichment. Here, the Respondent supplied goods in good faith based on the LPOs, and any procedural lapses are attributable to the Appellant. That the principle of **unjust enrichment** equally applies in the present case. A party cannot retain goods and simultaneously avoid paying on the basis of procurement technicalities. The Appellant issued LPOs, accepted delivery of goods, and even made part payment. These actions constitute a clear contractual relationship that cannot be invalidated retrospectively. That the Appellant is estopped by its conduct and the conclusive documentation: The Appellant, having requested, accepted, and used the goods, is estopped from denying the validity of the contract. The Appellant initiated the transaction, received the goods, and affixed its official stamp on the delivery notes. This conduct creates a binding estoppel; the Appellant cannot now

repudiate a contract it led the Respondent to believe was valid. That the stamped documents are prima facie and conclusive proof of supply and acceptance. The Appellant's allegation that the signatories were "unauthorized" is a belated, unpleaded, and unproven assertion. The Appellant has provided no evidence to challenge the authenticity of its own official stamp, which is an extension of the institution itself. Further, that the PPADA defence was vague, unpleaded, and is an afterthought: The PPADA defence was vague, unparticularized, and not properly pleaded before the lower court, and is thus deemed abandoned. The Appellant's defence in the lower court was vague, lacking particulars on which section of the PPADA was breached or how. It was therefore embarrassing and disclosed no reasonable defence. That a defence not properly pleaded cannot be relied upon. The Learned Adjudicator was correct to ignore it and focus on the substantive claim of debt recovery, which is the core mandate of the Small Claims Court.

As regards the issue of the requirement for a Board resolution, it was submitted that the necessity of a Board Resolution is an internal governance requirement for a company, derived from its Articles of Association. It is not a statutory condition precedent to the filing of a suit prescribed by the Civil Procedure Act (Cap. 21) or the Companies Act, 2015. That the doctrine of indoor management, as encapsulated in the famous case of Royal British Bank v Turquand, (1856) 6 E & B 327 presumes that an outsider (like the Respondent) transacting with a company in good faith is entitled to assume that all internal authorizations have been obtained. That as was rightly pointed out by the Learned

Adjudicator in citing the case of **Arthi Highway Developers Ltd v West End Butchery Ltd & 3 others [2015] eKLR (See paragraphs 44 and 45 of the Judgment of the Court of Appeal)** where it firmly held that the lack of a board resolution cannot be used to defeat a lawful claim by a third party who has contracted with the company. The court stated that such internal irregularities cannot be raised to prejudice an innocent party who has performed their obligations.

63. Further, it was submitted that the Respondent duly filed a Statement of Claim that complied with all mandatory requirements of Order 3 and Order 4 of the Civil Procedure Rules, 2010. The Statement of Claim disclosed a reasonable cause of action against the Appellant. The suit was therefore properly instituted before the court.
64. Consequently, the Appellant having accepted and utilized the goods supplied by the Respondent, is estopped from turning around to challenge the authority of the person who delivered them. To allow this would be to permit unjust enrichment.
65. On the issue of whether the Respondent's claim is not time barred, as it was argued by the Appellant that the claim is time-barred under the Limitations of Actions Act (Cap 22) because the goods were supplied in 2016, and the suit was filed more than three years later, it was submitted that there is evidence of part-payment and acknowledgment of the debt made by the Appellant in 2023. That the Appellant's argument ignores the

crucial and undisputed fact that the Appellant made a payment to the Respondent by cheque dated 27.4.2023 for Kshs. 268,000. This cheque constitutes an unequivocal acknowledgment of indebtedness. Therefore, even assuming arguendo that the debt accrued in 2016, the cause of action revived in 2023, and the claim filed thereafter was within time. That in addition to the cheque, the Respondent did exhibit Invoices and delivery notes for the year 2019. (See page 131 of the judgment of the Trial Court along with the exhibits 93 - 101 which are equally supported by the Statement of Account).

66. That Section 23 of the Limitations of Actions Act provides that a fresh limitation period begins from the date of any acknowledgment of a debt. Section 24(1) states that an acknowledgment for the purposes of Section 23 must be in writing and signed by the person making it whilst Section 26 clarifies that a cheque written by the debtor for a part-payment constitutes a valid acknowledgment of the debt.
67. Counsel further submitted that the Appellant's issuance of a cheque in 2023, is a clear, unequivocal written acknowledgment of the existence of the debt. By this single act, the Appellant reset the clock for the limitation period. The cause of action, for the purpose of limitation, effectively accrued from the date the cheque was issued. That the learned adjudicator applied the correct evidentiary standards and considered the full evidence on record inter alia; procurement documents issued by the Appellant; proof of delivery; acknowledgment of debt through part payment; the Respondent's business records.

68. Further, the learned counsel submitted that the Small Claims Court was established to provide expeditious and affordable justice. That its procedure is intentionally less formal. That the Learned Adjudicator was entitled to look at the totality of the evidence - the LPOs (Appellant's act), the subsequent cheque (Appellant's act), and the Respondent's summary linking them to arrive at a finding of fact on the balance of probabilities. Finally, it was submitted that the present appeal lacks merit and should be dismissed with costs to the Respondent.
69. I have given due consideration to the record of appeal and the submissions filed. It is not in dispute that the Respondent had supplied the Appellant goods in the form of bread and flour for some period starting from 2016 all the way to 2019 as can be seen from the documents presented. It is also not in dispute that some of the Respondent's documents are not accompanied with delivery notes and that the Respondent has relied on the stamping of the invoices by the Appellant. It is also not in dispute that the Appellant made several payments for the deliveries during the period. It is also not in dispute that the Respondent did not avail any contract of supply of goods or a tender document authorizing the supply of goods to the Appellant. It is also not in dispute that the Respondent did not avail its certificate of incorporation and resolutions sanctioning the filing of the suit. It is also not in dispute that the trial court denied the Appellant a right to produce its documents during the trial and thus the version of the Appellant was not presented to the trial

court for consideration. I find the issue for determination is whether the appeal has merit.

70. It is noted that the Respondent's claim before the trial court was for a sum of Kshs845,378/= being the balance of monies for goods supplied between the period of 1st January 2016 to 25th May 2023 and backed by documents comprising of a demand letter, a copy of cheque dated 27/4/2023; an invoice dated 25/1/2019, an invoice dated 15/2/2019, invoice dated 28/5/2019, an invoice and delivery note No. 37344 dated 25/6/2019, invoice and delivery note No. 37573 dated 3/7/2019; invoice No. 37355 dated 3/7/2019; invoice 39227 dated 11/9/2019; LPO dated 24/6/2018; bank payment slip posted on 9/1/2016; bank paying slip 29/7/2016; bank slip posted on 16/9/2016; cheque No. 003639; cheque dated 1/12/2016; LPO dated 25/5/2019; demand letter dated 16/6/2021; demand letter 6/5/2025; cheque leaf dated 27/4/2023. The Respondent had claimed that it duly delivered the goods to the school as demanded and that the school made some payments over the years and later declined to pay the balance. It was the contention of the Respondent that it is entitled to the said amount even though some delivery notes were not availed to back the claim and that the Respondent placed heavy reliance on the fact that the invoices were stamped by the school. Indeed, there was no contract agreement or evidence of a tender availed to the court and it seems the trial court relied on the evidence adduced and the few documents availed to make its determination which is now the subject of this appeal. It is also noted that the Appellant in the trial court attempted to

produce documents to support its case but that the same was declined by the trial court and therefore they were not able to present the evidence. One cannot tell how the determination could have been made had those documents been presented before the trial court for consideration. The Appellant has challenged the Respondent's document which were presented before the trial court as the same were not conclusive to prove that goods were actually delivered to the Appellant. Learned counsel for the Appellant relied on the case of **E.P Communications Limited v East Africa Courier Services Limited [2019] eKLR** where the Superior Court stated that a delivery note is a proof of delivery of goods, that invoices alone do not prove or receipt of goods and that in the absence of a delivery note or other evidence of receipt of goods, it becomes doubtful whether the goods were actually delivered. Further, the Superior Court stated that, courts of law act on hard evidence not sympathy or speculation. It was also contended that the Respondent's invoices produced as exhibit 4,5,6,9, 10,11 and LPOs' produced as exhibit 12 and 18 alone do not prove delivery of receipts of the goods by the Appellant and that the invoices produced as exhibits 4,5,6,9,10 and 11 are not supported by any duly stamped and signed delivery note. It was thus the view of the Appellant that in the absence of delivery note or evidence of receipt of the goods, the Honourable court is called upon to find that the goods mentioned in invoices produced as exhibits 4,5,6,7,9, 10 and 11 and LPOs' produced as exhibit 12 and 18 were never delivered and or supplied to the Appellant. Counsel relied on the provisions of Section 37 of the Evidence Act which provides that

entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. It would appear to me that the Respondent was required to go further and present evidence of receipt of the goods supplied by way of a delivery note or any other documents showing that the Appellant's agent or servant received the goods on the dates in question. The Respondent's attempt to present its statement of account as a substitute for delivery notes must be rejected because the statement of account are the Respondent's personal affairs and not related to the Appellant. The learned counsel for the Respondent has urged this court to disregard the finding in the aforesaid authority arguing that the same is founded on a fundamentally different and more comprehensive evidential basis but concedes that the legal principle is correct that a delivery note in isolation may not constitute conclusive proof of delivery. He submitted that the Respondent's documents were supported by other corroborative evidence. However, it transpired from the evidence and the documents presented by the Respondent that there was no evidence of delivery of goods as contended. It is in that regard that I find that the Respondent did not present credible evidence to support the claim.

71. On the issue of whether the contract between the Appellant and Respondent was marred by serious flaws, irregularities, improprieties and illegalities making it unenforceable, it was submitted by the Appellant that it is a public entity and that

Article 227 (1) of the Constitution obligates state organs and public entities to procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Further that the Public Procurement and Assets Disposal Act of 2015 provides the framework within which policies relating to procurement are to be implemented in that Section 5(1) of the Procurement and Assets Disposal Act 2015 is crucial regarding the question whether a contract can be implied between the Appellant and the Respondent which states as follows:

“ 5 Conflicts with other Acts.

(2) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and Asset Disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services...”

It was contended that the alleged supply and the alleged part payment if any cannot be related to this case so as to find that there was an implied contract between parties.

Learned counsel for the Respondent faulted the Appellant for purporting to shift the burden of proof upon the Respondent regarding the issue of the application of the Public Procurement Asset Disposal Act yet it was supposed to be the Appellant to do so having made the claim and therefore was to go the extra mile by discharging the duty on burden of proof pursuant to the maxim **“he who alleges must**

prove.” Learned counsel for the Appellant contended that the Respondent had a similar and equal responsibility to ensure that the tender and or procurement herein followed the law, and to ensure the procurement followed the law as outlined in Section 72 of the Public Procurement and Assets Disposal Act of 2015 which demand that the responsibility for complying with Act, contractors, suppliers and consultants shall comply with the provisions of this Act and Regulations. Further, it was stated that the ignorance/omission by the Respondent to ensure that there was compliance with the law before supplying bread and flour if any is not excusable. Reliance was further placed in the case of **Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR** where it was held that:

“45. It is the duty of the Contractor as it is of the procuring entity to observe the provisions of statute and the Regulations thereunder. Section 27 imposes as unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into contract which is procured in apparent disregard of the law. For that reason, a contractor or supplier cannot find refuge in the argument that compliance was an

internal matter of the public entity when he/she has not done enough to enquire about compliance or himself/herself guilty of infringement.”

Learned counsel for the Respondent challenged the Appellant’s reliance on the aforesaid case which placed the duty to comply with the Procurement Laws and Regulations upon the procuring entity and the contractor and went ahead to submit that the decision is distinguishable from the present circumstances in that the case aforesaid related to a constitutional body (commission) recognized as a public entity under Article 248 of the Constitution and PPADA and went ahead to throw the ball onto the Appellant’s court when he accused it of failing to prove that it is a public school or a procuring entity under the PPADA as it did not produce any registration documents, certificate of incorporation, gazette notice, constitution of Board of Management, evidence of Government funding and absence of legal instruments placing it under state control. The Respondent’s counsel further contended that the Appellant seems to seek to avoid obligation after benefiting from goods supplied and for which it paid a portion thereof and thereafter run away from responsibility and deny the Respondent its just dues. Learned counsel for the Respondent placed reliance on the case of **Optic Technologies Kenya Limited v County Assembly of Vihiga & another [2023] KEHC 22833 (KLR)** where the court held:

With respect, I differ. The contractor and supplier should only be required to comply with the law to the extent that that law demands of them, and not what it demands of others. In the instant case, the defendant and the interested party have not

pointed out any non-compliance on the part of the plaintiff. The non-compliances pointed out were on the part of the defendant, the procuring entity, and the plaintiff should not, in all fairness and justice, be made to blame for the shortcomings of the other party. The plaintiff should not be made, as it were, to carry the cross for the Defendant, who has failed to comply with the law. I am not inclined to accept an interpretation of section 75(4) which imposes a burden on contractors or suppliers to ensure that the internal processes on the part of the procuring entity comply with the law. To do so would be to expect too much of the contractors and suppliers, who, in most cases, may have little or no access to the internal affairs of procuring entities, and in some cases balance of power between the parties may militate against the contractor or supplier accessing such information from the procuring party, who may be in a stronger bargaining position. (See paragraph 56 of the judgment)

If the contracts herein were illegal, on account of irregularities or non-compliances, which is not the case here, the plaintiff would be the innocent party, who would be blameless, for the irregularities cited, of not subjecting the contracts to the processes set out under the relevant public procurement law, have nothing to do with the

plaintiff, but were internal to the defendant, as the procuring entity.

It was the view of counsel for the Respondent that the Respondent should not be denied its just dues just because there was non-compliance of procurement procedures so as to ensure that suppliers can still be given an opportunity to recover their claims even on quantum meruit basis and to prevent unjust enrichment by procuring entities. It is common knowledge that various schools and institutions in the country engage in business with other entities (contractors) for supply of goods and services and that they at times fail to adhere to the procurement laws and regulations. I find that even if this state of affairs is rife, the contractors or suppliers are required to ensure that they do due diligence and ensure that they secure valid contracts backed by the requisite documents. I am not persuaded by the argument of the Respondent that the internal issues of the Appellant should not concern it yet the legal provision has not exempted the parties from compliance.

72. As regards the issue of whether the procurement and supply of bread and flour by the Respondent if any complied with the statutory provisions of the Constitution and the Public Procurement and Assets Disposal Act of 2015, it was submitted by the Appellant that vitiating factors in contract are those factors the existence of which will cripple or invalidate the contract. They include mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreements. That these factors may be inferred either at its formation or at the performance. It was contended that CW1 did not confirm that he

did supply any tender documents in support of the Respondent's claim as against the Appellant. That the Appellant did produce tender notice for the year 2019 and dated 19/10/2018 and page 41, under tender notice No. 20 FSK/TENDER/2019/42BAKERY ITEMS/MAINTENANCE, that the Appellant invited eligible suppliers to make bid in relation to the tender. That it was a mandatory condition for eligible suppliers to pay Kshs1000/= non-refundable tender fee and thereafter tender their bid on or before 26/11/2018. That the Respondent neither paid the non-refundable tender fee nor made any application in relation to the above tender advert. That the Appellant produced a copy of the minutes of the Adhoc Tender Committee held on 30/1/2019 as exhibit 6 in relation to tender notice number 20 FSK/TENDER/2019/42 BAKERY ITEMS/MAINENANCE and that the adhoc tender committee recommended that the school to source directly or re-advertise for the same. That Public Procurement and Assets Disposal Act of 2015 provided it meets the parameters set out in Section 103 and 104 of the Act which provides that:

"103. When direct procurement may be used

3) *A procuring entity may use direct procurement as allowed under sub-section (2) as long as the purpose is no to avoid competition.*

4) ***A procuring entity may use direct procurement if any of the following are satisfied -***

a. The goods, works or services are available only from the particular

supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;

b. Due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, work or services, and engaging in tendering proceedings or other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by procuring entity nor the result of dilatory conduct of its part

(c) Owing to a catastrophic event, there is an urgent need for the goods, works or services

(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing

goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances.

(3) A public officer who contravenes the provisions of subsection (2) commits an offence.

104. Procedure for direct procurement

An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—

(a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.

- (b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;**
- (c) ensure appropriate approvals under this Act have been granted;**
- (d) ensure the resulting contract is in writing and signed by both parties.”**

73. It would appear that the tender process did not succeed and that the Appellant had the option of resorting to direct sourcing of goods and services. That being the position, the Appellant was required to conduct that exercise in line with the provisions of Section 103 and 104 of PPADA. The Appellant in its evidence and submissions seems to contend that the aforesaid provisions were not complied with and therefore it was incumbent upon the Respondent to furnish the evidence of delivery of the goods so as to support the claim. The Respondent did not manage to surmount this feat. The Appellant has urged this court to allow the appeal so as not to allow the Respondent to benefit from a transaction that was not in compliance with the law. The cases cited by the Appellant are persuasive in that regard and are as follows:

74. **Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards [2016] eKLR** wherein it was determined as follows: -

“The Court reaches its decision even in the face of the submissions by the Claimant’s Counsel that the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is that to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

If the Court were to uphold such breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, then we must be ready to put up with routine and casual violation of our Procurement laws. We must be ready to allow Contractors to benefit from illegal Contracts. And such a lenient stance could encourage Contractors to happily collude in the violation of the law and then turn around to play victim so as to win the sympathy of the Court. The Law on Procurement is on the side of the Kenyan Public and it must be strictly enforced.”

Again, in **the case of Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR** the Court of Appeal stated as follows: -

“23. Likewise, we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.”

Also, in **Lord Truro in Egerton versus Brownlow (1853) 4HL Cas at page 196** where he stated: -

“Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the

public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law”

75. Further in the case of **Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, at page 388**, Devlin L.J (as he then was) had this to say on the issue of illegality,

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

Learned counsel for the Respondent is of the view that even though there was no Board resolution by the Appellant, the

Respondent's claim should not be defeated. Reliance was placed in the case of **Arthi Highway Developers Ltd v West End Butchery Limited & 3 Others [2015] eKLR** where the court held that the lack of a Board resolution cannot be used to defeat a lawful claim by a third party who has contracted with the company and that internal irregularities cannot be raised to prejudice an innocent party who has performed their obligations. Whereas this could be true, I find that the respondent having failed to present credible evidence of delivery of goods to the Appellant, it cannot use the sympathy card to legitimize its claim. It is my considered view that the Respondent did not prove its claim before the trial court. It seems that the Respondent had been dealing with the Appellant's former school management and that upon a new team taking over, tables turned and that the new team demanded for accountability and refused to accede to the Respondent's demand for payment unless he furnished evidence of delivery of goods. The Appellant cannot be faulted for insisting on that evidence from the Respondent. The Respondent therefore should not be allowed to benefit from a transaction that was not backed by the requisite documentation.

76. In view of the foregoing observation, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgment of the trial court dated 8th August 2025 is hereby set aside and substituted with an order dismissing the Respondent's suit with costs to the Appellant. The costs of the appeal are awarded to the Appellant.

Dated and delivered at Siaya this 5th day of February 2026.

D. K. KEMEI

JUDGE

In the presence of:

Jumafor Appellant.

Odongo.....for Respondent.

Maureen/Kimaiyo.....Court Assistant.