

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION  
CIVIL SUIT NO. 35 OF 2018

ETHICS & ANTI-CORRUPTION COMMISSION..... PLAINTIFF

VERSUS

MARY NGECHI NGETHE ..... DEFENDANT

**JUDGMENT**

The plaintiff is a body corporate established under Article 79 of the Constitution and section 3 of the Ethics and Anti-Corruption Commission Act. It has brought this suit pursuant to its statutory mandate donated under section 11(1)(j) of the Act seeking to recover from the defendant Kshs 13,000,000.00 which is said to have been corruptly received by the defendant from proceeds of a fraudulent transaction involving purchase by the defunct City Council of Nairobi (hereinafter referred to as ‘the Council) of L.R. number 14759/2 (hereinafter referred to as ‘the land’).

The defendant is alleged to have played a central role in the transaction where the land which was meant to serve as a cemetery was bought at Kshs 283,000,000.00 despite it being unsuitable for the intended purpose. It was alleged further that the land was intentionally overvalued in a corrupt scheme to embezzle funds from the Council. The plaintiff puts the value of the land at the time of the sale at Kshs 30,000,00.00.

The plaintiff avers further that the purchase of the land was done through public tender process which was irregular and fraudulent. The plaintiff pleaded the following particulars of fraud against the Council's officers generally;

- a. The bids for the tender did not meet the mandatory requirements.
- b. The tender was awarded on the basis of a defective tender instrument despite protests from the Council's experts.
- c. The purported winning bidder lacked the capacity to enter into the procurement contract.
- d. The sale agreement was entered into by a person who did not participate in the tender.
- e. The land was not valued by the Council.

In addition, the plaintiff pleaded specific particulars of fraud against the defendant as follows;

1. She presented a purported letter from the Land Commissioner claiming that the land was valued at Kshs 325,150,000.00.
2. She ignored professional advice from the Council's planning department to the effect that the land was unfit for the intended purpose.
3. She forwarded a report recommending award of the tender yet none of the bidders qualified.
4. She connived to cause the Council to pay Kshs 283,000,000.00 while she was aware that the same would go to various persons for no consideration.
5. She willfully or recklessly failed to make enquiries expected of her as the Director of Legal Services to satisfy herself that she was not furthering a fraud.

In her defence, the defendant denied liability and averred that the transaction was genuine and above board and carried out professionally through the Council's advocates. She denied benefiting or receiving the said Kshs 13,000,00.00 and in turn pleaded a counterclaim for violation of her constitutional rights in that;

1. The plaintiff procured evidence against her illegally.
2. The plaintiff made false assurances of a pardon and refrain from prosecuting her.
3. The plaintiff violated her right not to incriminate herself.
4. The plaintiff abused the legal process.
5. She was denied her legitimate and enforceable expectation.
6. The defendant wrote to the Prime Minister and the former Head of Public Service a report on investigations and published its investigations report.

For the above violations, she prayed for special damages for legal fees and costs incurred and to be incurred in defending a prosecution commenced by the plaintiff, costs of the suit and interest.

### ***Plaintiff's case***

The plaintiff called seven witnesses the first of whom was one Patrick Tom Odongo, a professional physical planner who told the court that he once worked with Nairobi City Council as Deputy Director of City Planning from 1980 to 2013. Among the responsibilities of his department was to advise if there were provisions in the existing plans in regard to suitable locations or actual land available whenever the Council intended to acquire land for public utilities. The advice would include location, soil profile with regard to use,

level of accessibility to services and infrastructure, planning and environmental compatibility of the purpose for which the and was required and surrounding. He added that sometime in October 2008, a memo dated 7-10-2008 came from the Town Clerk appointing him to be a member of a tender technical evaluation committee in respect of a bid for sale of land to the Council for use as a cemetery. The bid was an expression of interest tender no. CCN/MOH/T/2020/08-09. There were 12 tenders. He stated further that the first meeting of the tender committee was held on 9/10/2008 for opening the tenders which he attended as member. The defendant who was the Chairperson of the committee was the Director of Legal Affairs of the Council.

As they opened the bids, they ticked whether they met the parameters set for them to proceed to evaluation. They sorted the tenders and arranged them in serial numbers. He testified that the bid which is the subject of this suit was the one submitted by Naen Rech Limited which was serialized as number 7 on the minutes of the evaluation committee having 120 acres for total price Ksh. 283.2 million in Athi River.

The witness added that the mandatory requirements for the land were specified in the bid document and further specifications. They later conducted a tender evaluation at a meeting held on 14/10/2008 and in the evaluation, none of the bids qualified for the tender. However later, when he saw the minutes during investigations, he realized that they had been doctored and were not an accurate account of the committee's deliberations.

Whereas none for the bidders had qualified, a recommendation had later been secretly added recommending Naen Rech Limited (hereinafter referred to as

‘Naen’) for further consideration and as having attained the highest technical score of 60 points. They noticed that there was an error in distribution of the score in that, the mandatory requirements were allocated only 40 per cent of the points while the administrative requirements were allocated 60 per cent of the total mark meaning that as the pass mark was also 60 per cent, a bidder could qualify without meeting the mandatory requirements.

There was also a challenge on location. The bid document required that the bid be in the Nairobi Metropolitan region. Since the intended purchase of land was an issue touching largely on the planning department, the witness wrote a memo dated 11-11-2008 to the defendant who was the chairperson of the technical evaluation team. Th memo, he pointed out that the tender documents were defective and insufficient to assist in procuring the suitable land for cemetery use. He also empathized that none of the bids had met suitability criteria and disassociated his department from any evaluation which may have been done as he was not aware of the same.

On the 19/12/2008, he wrote another memo to the then Town Clerk one John Gakuo in which he explained the defects in the bid documents and especially the inability of the documents to assist in securing land in a suitable location that had the right soil profile and service, the difficulties in securing land for that purpose and the flaws in the evaluation process.

The witness added that neither the defendant nor the Town Clerk responded to his memos. He gave the following flaws;

1. The tender document prescribed that the land should be within one kilometer from a classified road and must have an all-weather access

road such that any bid that did not meet this requirement, was to score a zero on it. However, the Evaluation Committee meeting had adopted a graduated score format that awarded graduated scores which was contrary to evaluation practice where failure to meet the requirement, one scores zero.

2. The tender document required a soil depth of 1.8 meters and none of the bids met this requirement hence should all have been scored at zero and in the minutes each bid was given a zero on this parameter. Despite this, Naen was awarded the tender.

The witness added that after the Evaluation Committee was done, he never participated in any other process and never interacted with the minutes until later when they were shown to him by the plaintiff during investigations. Despite Naen getting the tender and being paid, the land was never a cemetery. He added that the fake minutes bore the signature of the defendant as the chairperson and Mr. A. Musee as the secretary. He later came to learn that the Government of Kenya lost money in that transaction.

PW1 produced the following documents;

1. Memo dated 7/10/2008 appointing him to the tender evaluation committee.
2. Minutes of the tender opening meeting dated 9/10/2008.
3. The bid document.
4. Minutes of the evaluation meeting held on 14/10/2008.
5. Memo to chairperson of the technical evaluation team dated 11/12/2008.

6. Memo to the Town Clerk, dated 19/12/2008.

In cross examination, Patrick insisted that there was no successful bidder and that he came to know later that there was an award. He admitted that he never participated in the preliminaries which were made by the procurement department. He confirmed that the defendant who worked as Director of Legal Affairs of the Council was part of the Evaluation Committee as the chairperson but she was not working in the procurement department. He added that one Mr. Musee who was the committee secretary was representing the Director of Procurement to give technical advice and take records of the committee meetings.

The witness added that he was present when the tenders were opened and to his knowledge, 12 bids were opened. The second meeting after tender opening was dealing with mandatory requirements and the third meeting was making actual evaluation of the sites. In the meeting of 14-10-2008, they passed all the applicants in respect of the documentation and the team could not consider technical areas as they had not visited the site. Trial holes and accessibility of the land could only be done or ascertained after actual evaluation of the land but he did not go to the site. He stated that someone went for data collection which was shared with the committee.

The witness added that there was another meeting after the site visit which he was in attendance in which they scored but none of the sites met the criteria for proximity to classified road and they should have scored zero. He claimed that he was aware whether there was visit to a second site.

He added that the Permanent Secretary for Ministry of Local Governments had concerns on the progress of procurement of the land. He denied that memo dated 11/11/2008 was a critique to the outcome of the procurement but it was his position on defectiveness of the approach. He stated that the department of planning which had 200 employees was not involved and he was aware that there was a deadline for the procurement to be completed by Christmas and there was pressure to utilize the funds.

He stated further that it was John Barreh from his department who represented him in physically attending the site and that he (the witness) knew the site as he visited later with John Barreh but he did not take different data. He confirmed that the format of the bid document was the same for all bidders and that the award of the tender was recommended by the tender committee. The tender committee does not score but only evaluates what has been done by the Evaluation Committee.

The plaintiff's second witness was Anthony Mathenge Itui, a retired civil servant and formerly until 2014 a Chief Government Valuer and a Deputy Commissioner of Lands, in charge of valuations. He identified a letter dated 4/11/2020 addressed to the Chief Valuer Ardhi house which was requesting his office to value land parcel number L.R. no. 14759 in Mavoko township that the Council had been offered for sale.

The witness testified that, he instructed one of his officers to value the land but first to do a search and the author of the letter to facilitate a date, a vehicle and an officer to go and point out the land. Later, he received a letter dated 6-03-2008 addressed to Commissioner of Land which was authored by the

Controller and Auditor General which wanted him to confirm authenticity of a letter dated 10-11-2008 authored by one A. Otieno purported to have come from the witness' office. This letter had given a valuation of Kshs. 325,150,000/= for the same land.

He added that at that time, they had not yet valued the subject land and that he replied through letter dated 10/3/2009 in which he informed the Auditor General that the letter dated 10-11-2008 was a forgery for reason that the reference thereon was not their reference formation as theirs references started with VAL meaning valuation. Also, the letter head used was for Ministry of Lands and Settlement instead of Ministry of Lands. Further they did not have an officer by the name A. Otieno either at the headquarters or in the field. Also, in a standard form of communication, they would have given full details and particulars of the land and not just a sketchy one paragraph. Again, the title of the signatory was not in correct format. PW2 added that apart from the preparatory steps, the valuation was never done.

He produced the following exhibits;

1. Letter to the Chief Valuer dated 10/11/2008.
2. The defendant's letter dated 10-11-2008.
3. Letter to the defendant dated 13/11/2008.
4. Controller and Auditor Generals letter of us dated 6/3/2009.
5. Letter to the Controller and Auditor General, dated 10/3/2009.

When he was placed on cross-examination, the witness told the court that they received a letter dated 4-11-2008 from one Mr. Otido of the City Council and upon calling the defendant, she told him to hold on because they were no longer

interested. The defendant's letter dated 4-11-2008 came on 13-11-2008 after they had closed the first request for valuation and he marked it to Mrs. Karago to pursue the matter.

He added that the defendant's letter dated 4-11-2008 was the 2<sup>nd</sup> one and both letters were requesting the same thing save for the reference. They never acted on the request after they requested the Council to give them someone to work with. He added that all valuations were to pass through him or any of his three immediate deputies. Letter dated 10-11-2008 purportedly from A. Otieno was brought to his attention by a person from the Auditor General known as Mr. Manguchia.

The witness stated further that he did not report to any authority that someone was impersonating their office and that he has not been a witness in a case where A. Otieno was charged. They came to know that the land was purchased long after it came to their office for assessment of stamp duty and he assumed that there was a transfer or transaction. The papers presented for stamp duty had consideration for the purchase of 283 million and his office assessed the stamp duty with the assessing officer accepting the quoted figure. He added that they did not lower the quoted figure but that was not to say that it was the market value.

PW3, David Mukui Wanjohi, an employee Nairobi City County adopted his statement dated 29-04-2009. He told the court that he was the Senior Funeral Superintendent since 2002. He stated that at the time this issue arose, the Council's cemetery was full and they were looking for alternative land. He was part of the committee tasked to look for a suitable land and which was supposed

to evaluate expression of interest for sale of land for cemetery use. He produced his appointment letter and minutes for meeting held on 9-10-2008 as exhibits. He identified tender evaluation criteria which had mandatory requirements, a copy of authenticated survey plan, certified title deed, certified copy of deed plan and official search from the Ministry of Lands.

The witness added that the mandatory requirements attracted 40 points. The requirements were that the land was to be within Nairobi metropolitan region, soil depth was to reach minimum of 1.8 metres, comprised in one title deed and a freehold. The minimum size was to be 50 acres. The land was also to be accessible by an all-weather road and preferably not more than one kilometer from a classified road. It should have been close to electricity and water. The bidders were also supposed to supply certificate of registration or identity card, PIN certificate, VAT certificate for business entities and single business permit for businesses.

The witness added that this tender attracted 12 bidders Naen being one of them. His role as the user was to confirm whether the land was suitable. They visited Naen land which was located between Kitengela and Athi-River and others in Isinya, Kangundo road, along Magadi road and Konza. He added that they visited land for Naen twice. They had not done a trial hole in the first visit as they were supposed to do.

On the second visit, they did four holes and none of the areas of the holes was suitable for burial. Three of the holes had 2.5 feet black cotton soil and another one had 3 feet black cotton soil and another 2 feet of murrum soil. He concluded that the land was not suitable for burial because in the black cotton soil one can only

excavate the grave during dry season and the soil would have cracks which would allow the smell of the bodies to come out and the soil was not good when it comes to bodies' position.

The witness added that the report was supposed to be taken to the tender committee by the secretary and the chairperson but it was never taken to the tender committee. He stated further that the bidder in question scored 10, on proximity to Nairobi, 5 on the title deed, 5 on the tenure, zero on accessibility and zero on water and electricity. There is no way the land could be used for burial. He concluded that in the Evaluation Committee, they did not recommend anyone but he saw a letter recommending Naen and that he was not part of it.

In cross examination, the witness told the court that he was appointed as a member of the committee by the Deputy Town Clerk which committee had a role of visiting the sites and opening the tenders. When he went to visit Naen land for the first and second time, he was accompanied by the defendant and others. He added that he was the one who requested alternative site through Medical Officer of Health.

He added that all the bids scored zero on soil profile as they were looking for either red or loam soil profile. He alleged that he used his eye to measure the depth and that they did not carry out soil sampling. He stated further that he documented his findings awaiting their next meeting which never happened and if it happened, he was not there. He claimed that he went to the office of the Medical Officer of Health to complain after he discovered that the land had been bought.

Pressed further, the witness added that he didn't know who awarded the points since he did not give his report and he didn't know what criteria they used. He stated further that there was no parallel Evaluation Committee. He also didn't know who owned the land when they visited but they were dealing with someone called Maina Chege. He was also accompanied by officers from legal and survey office in identifying beacons. He completed by stating that the conclusion and report by the chairperson and the secretary came as a surprise.

Mr. Edward Omotti Nyangau an advocate of the High Court of Kenya since December, 1996 practising in the name and style of E.N.O & Associates was the fourth witness. He stated that his law firm was on 26-11-2008 instructed by the then Nairobi City Council in a transaction to purchase parcel of land known as LR No. 14759 situated at South of Athi River Machakos District. The Council was the purchaser and the purchase price was 283,200,000/= which was subject to a tender. The lawyers for the seller were Odero Osiemo and Co. Advocates, P.C. Onduso and Company Advocates and Alphonse Mutinda and Co. Advocates. He proceeded to draw the agreement dated 19-12-2008 for sale according to his client's instructions. The transaction was at some point concluded and transfer registered to the Nairobi City Council.

He confirmed that his law firm received a total of Kshs. 283,000,000/= directly from the ministry of finance on behalf of the Council to be held as stakeholder pending completion. He added that at the end of the transaction and registration of transfer, Kshs 281,300,000/= was remitted to the seller's advocates. This sum was less Kshs 1,700,000/= which had been paid to the seller's advocates earlier against a professional undertaking as they needed the amount to deal with transactions related to obtaining documents. He produced

a bankers cheque for Kshs 281,300,000/= that was issued by his law firm's banker in favour of the seller's advocates.

After completion and release of the purchase price, his law firm received Ksh. 13,000,000/= from the firm of Odero Osiemo and Company Advocates which was one of the lawyers for the seller. The witness released the said amount to defendant who had issued instructions to Odero Osiemo & Company Advocates to transfer the cash to his firm's bank account. He produced a banking slip and money transfer transmission note for the Kshs 13,000,000.00 as exhibits.

When he was cross-examined by the counsel for the defendant, the witness told the court that his firm handled some briefs for the defendant as its client but could not recall handling conveyancing matters for her. The instructions to act for the Council came from the legal department of the council vide letter received on 26/11/2008.

He stated further that the firm prepared agreement of sale, did due diligence of the title, prepared the transfer instrument, oversaw payment of taxes to the government, subdivision of the land and eventually procured title deed in favour of the client. The seller was Henry Musyoki Kilonzi and the buyer was Nairobi City Council. He could not recall who won the tender but the sale agreement showed the seller was Henry Musyoki Kilonzi.

The acreage was 110 acres which was to be curved from the larger parcel. He confirmed that the land was at the end registered to the Nairobi City Council

with the registration of the transfer being undertaken at the lands registry by Alphonse Mutinda as they had agreed so.

He was referred to the banking slip from National Bank of Kenya and said that it had customer as Odero Osiemo & Company Advocates who transferred the funds to his account on 23-02-2009 but he was unable to see his law firm's name on the slips. He added that he did not discuss or correspond with Odero Osiemo on these funds and the verbal information about the funds came from the defendant. The witness said that he had no idea why the defendant did not receive the money from Odero Osiemo & Co. Advocates but insisted that the defendant gave instructions that he would receive money on her behalf. He added that the funds were remitted to the defendant most of it in cash at different times on different days. She executed acknowledgement after the receipt of the full amount.

The witness added that the money paid to the defendant was separate from the conveyance and there was no direct connection between the money and the conveyancing. He claimed that he did not know what the transaction was about but the document showed it was in relation LR No. 14759/2. He denied that he breached his client's confidentiality.

PW5 was one Jacob Oduor a forensic document examiner who stated that he had 17 years' experience as a document examiner. He in his evidence relied on a forensic report dated 22-02-2011 made by the late Antipas Nyanchwa who was a forensic document examiner in Directorate of Criminal Investigations. He stated that he knew the late Antipas Nyanchwa in person and they used to work in the same laboratory at DCI headquarters. He knew his handwriting

and signature and he confirmed that the signature in the report belonged to him (Antipas). He confirmed that he knew the methodology and procedures used to make the report.

He added that the report was based on exhibits memo dated 13/9/2010. The summary of the report was that; the signature on one of the two agreements dated 19-12-2008 was not those of Henry Musyoki Kilonzi while in the other agreement of the same date and transfer instrument were the same and those of Henry Musyoki Kilonzi and signatures on the acknowledgment of receipt of Kshs 13,000,000.00 dated 29-04-2009 and signed on 30-04-2009 belonged to the defendant. He produced the report, memo, and the acknowledgment and specimen signatures as exhibits.

He was subjected to cross examination and stated that he did not work on the report and the documents subjected to the examination were dated between 2008 and 2009 and they were obtained from the Ministry of Local Government and the City Council of Nairobi. He admitted that the report and documents were forwarded 2 years after the acts in question but he denied that there was possibility of tampering with the documents before they got to them. He added that there was no evidence of manipulation of signatures.

The plaintiff presented the 6<sup>th</sup> witness one Pius Nyange Maithya a registered valuer working with the plaintiff. I recorded a statement in this matter. He testified that on 8-05-2009, he was instructed by his colleague one Tabu Lwanga to carry out open market valuation of a parcel of land identified as L.R. No. 14759/2.

He told the court that the land measuring 119 acres was located off Athi River Namanga road by 9 kilometers. The subject land was an undeveloped parcel which was basically as grazing land and did not have any development. He added that he noticed some holes which had been dug on the land and upon enquiry, he was told that they were trial pits dug to determine the depth of the top soil. Observing the depth using the same trial pits, he found that they ranged from 0 feet to 3 feet.

He then conducted a survey and enquiry of land values of the area and upon analysis, he formed an opinion that the open market value at the time of inspection was Ksh. 30,000,000/= for the whole 119 acres. Upon completion of the report, he submitted it to his boss for use by the investigating officer. He produced the report as an exhibit.

He confirmed in cross examination that he prepared the report under instructions from his boss who had been requested by the investigation officer one Mr. Tabu Lwanga. At the time of his report, the land was owned by the City Council of Nairobi. According to him, the value of the land was Kshs 252,000/= per acre and was approximately 40 kilometers from Nairobi.

He added that, he compared with indication of prices within that area and enquired from the person who had sold the land one Mr. Kilonzi who had also sold an adjacent land of 10 acres at 400,000/= per acre. He however admitted that another valuer can get a different value but he was not aware whether there was another valuation.

The plaintiff's last witness was one Kipsang Sambai an Assistant Director in EACC and a Regional Manager South Rift Region based in Nakuru. He was part of the team which investigated this case. He confirmed that he and his investigations team recorded statements from the witnesses who testified before him among others.

He added that the finding of the investigations was that the land purchased by the Council was not suitable for a cemetery purposes. He added that the purported bidder was not eligible for the award because he did not own the land and the purported valuation that gave the land value of 325,150,000/= was a false document as it did not emanate from the state department of lands. According to him, this letter was introduced in the matter by the defendant.

He added that they also established that the true value of the land was Kshs 30,000,000/= and that the defendant received an amount of Ksh. 13,000,000/= being part of the proceeds of the sale. He testified further that it was also established that although the value of the land was indicated as Kshs 283,000,000/= which was the amount paid by the Ministry of Local Government, the registered owner was paid Ksh. 110,000,000/=.

The witness identified a letter dated 31/3/2009 by the then Kenya Anti-Corruption Commission which was requesting for original correspondence file in respect of the land and another one dated 1/4/2009 forwarding a list of documents which letters he produced as exhibits. The witness also produced the advertisement for expression of interest for the sale of a land. He also identified and produced a tender signed by Maina Chege designated as director of Naen. The witness added that their investigations found that Henry

Musyoki Kilonzi did not bid and that Naen which was awarded the tender did not own the land and it therefore did not qualify.

In a nutshell, the witness summarised the evidence produced and adduced by the other witnesses and produced a number of the exhibits which had been identified by these witnesses. One of these documents is an agreement for sale of LR 14759 Machakos dated 19/12/2008 between Henry Musyoki Kilonzi and Naen Rech Limited drawn by Alphonse Mutinda and Company advocates which has the consideration amount as Kshs 110,000,000/= and another one dated the same day between Henry Musyoki Kilonzi and City Council of Nairobi in respect of 120 acres in the same LR 14759 drawn by E.N. Omotii & Co. Advocates. These agreements were done after the tender. The witness added that their findings in respect of the two agreements were that the former was the genuine one signed by the true owner Henry Musyoki Kilonzi.

He added that the money was released by the Ministry of Local Government and transfer of the land effected in favour of the Council. The money was paid to an account in Bank of African in the name of three legal firms, that; is Odero Osiemo & Co., P.C. Onduso & Co. and Alphonse Mutinda & Co. The witness produced exhibits to that effect which included a local cheque receipt for Kshs 281,300,000/=, a statement of account indicating credit of Kshs 281,300,000/=, debit of Kshs 117,000,000/= and confirmation of transfer from the account of Odero, P.C Onduso and Alphonse Mutinda to a National Bank account of Odero Osiemo & Co. He added that exhibit '13b' which was an acknowledgment of receipt of 13,000,000/= by the defendant from the firm of E.N Omotii & Co. Advocates was signed by the defendant.

He further testified that he recorded the statement of Henry Musyoki Kilonzi the vendor and that of the defendant and in her statement, the defendant confirmed that she participated in the Evaluation Committee as its chairperson. He stated further that the defendant was an accused person in anti-corruption case number 20 of 2010 where they were convicted. He produced proceedings and the judgment in respect of the case as exhibits 29(a).

In cross examination, the witness maintained that he was present when Henry Musyoki Kilonzi and the defendant recorded their statements. Pressed further, the witness stated that the defendant admitted that she got Kshs 7.5 million which she was willing to pay back. He added that there were many cases involving this transaction some of which were appealed and he could not tell who was acquitted on appeal neither could he recall whether the defendant was called as a state witness in any of those cases.

He admitted that there was no record of a bank transfer in respect of Kshs 13,000,000.00 allegedly given to the defendant but Mr. Omotti confirmed that he released the money to the defendant although there was no entry showing that the money left Mr. Omotii's account.

He added that the tender was floated in the normal manner and there was a successful bidder who was paid. There has never been complaint that Mr. Kilonzi was never paid but the main complaint was about exaggeration of the value and embezzlement of money.

He admitted that they did not ask the Ministry of Lands to give a valuation as they had their own valuers but they asked the ministry to confirm whether they had done the valuation which they denied. He stated further that, Mr. Kilonzi confirmed that he received Kshs 110 million but there was no documentation to that effect. He added that Henry Kilonzi executed both agreements with different considerations and that the defendant was not a party to any of the two agreements. There were no charges preferred against Henry Kilonzi and they treated Osiemo as a witness. The witness added that he was not aware that the defendant filed a case in the High Court seeking to protect herself from testifying in any case.

### ***Defendant's case***

The defendant called one Emmanuel Karisa Kenga a forensic document examiner as her only witness. She did not testify herself. Emmanuel told the court that he was a forensic document examiner with more than 30 years in the field having trained locally as a document examiner in DCI laboratory. He added that he was currently doing private investigations of documents which cover disputed signatures.

He stated that on 29/10/2025, he received instructions from Mr. Macharia Mwangi, the defendant's advocate to examine documents marked as A17 (letter dated 4-11-2008 purportedly done by the defendant), A19 (acknowledgment produced by the plaintiff as exhibits 13b) and D1 to D2 and specimen signatures from defendant with mandate to compare the signature in the questioned documents with the specimen signature. He did as requested and after the examination, he could not find any agreement between the specimen and the exhibits meaning that the defendant did not execute the

documents. He prepared a report dated 29/10/2025 which produced as an exhibit.

The witness testified in cross examination that he did not look at the report of Antipas Nyanchwa which was produced as plaintiff's exhibit 14 and he did not know its contents. He confirmed that he knew Antipas having worked with him at the CID headquarters in 2008/2009. He added that he did not know the defendant. The defendant gave him her signatures at the office of her advocate but he did not check her signature before 2008. He insisted that his report was professionally done and it was 100 per cent certain and accurate but he could not speak to the opinion of Mr. Antipas.

### ***Analysis and determination***

I have gone through the evidence including the exhibits in this matter and submissions of the parties. From the same, it is clear to me that there is no dispute that the Council called for expression of interest for sale of land; that the land was intended for use as a cemetery; that bids for the same were submitted by various entities and the tender finally awarded to Naen at a price of a sum of Kshs 283,000,000.00; that the land was eventually transferred to the Council and that the purchase price was paid to the advocates for the seller. It is also not in dispute that the land was owned and registered to Henry Musyoki Kilonzi and that the defendant was the chairperson of the Technical Evaluation Committee which allegedly recommended award of the tender to the said company.

Having evaluated the evidence and the submissions of the parties, it is my opinion that this court is called to determine the following issues;

- a. Whether the award of the tender was irregular.
- b. Whether the defendant can be held responsible for the irregularity of any.
- c. Whether the defendant received Kshs 13,000,000.00 from the vendor's advocates and if so, whether the same was an act of corruption or unjust enrichment and if so, whether it should be restituted to the government.

As rightly submitted by the defendant, the burden of proof in the main suit rested on the plaintiff. Similarly, the defendant bore the burden of proving her counterclaim. That is what the law demands under the provisions of section 107 of the Evidence Act which places the burden of proof on the person who desires any court to give a judgment as to any legal right dependent on the existence of facts that he asserts. The Court of Appeal restated this position in *Ndiritu (suing as Administrator for the Estate of George Ndiritu Kariamburi- Deceased) v Ropkoi & another [2004] KECA 65 (KLR)* by holding that;

*‘As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides:*

***“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

On the first issue, the plaintiff has submitted that the award of the tender was irregular as per the particulars of fraud pleaded in its plaint. It has been held that the standard of proof in matters of fraud must be higher than the balance

of probabilities but below proof beyond reasonable doubt. Honourable Justice Mwangi Njoroge held in ***Kaburu (Suing as the Guardian Ad Litem and Heir of the Estate of Isaia Mabellini) v Mabellini & others [2026] KEELC 1577 (KLR)*** that;

*‘Proof of fraud is on a standard higher than that of ordinary claims. In the case of Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR the court held as follows:*

*“As was stated in R. G. Patel Vs Lalji Makanji (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities.”*

The same position was held in ***In re Estate of Harjit Singh Brah alias Harjit Singh Nihal (Deceased) [2023] KEHC 25531 (KLR)*** where the court stated that;

*‘From the forgoing precedents, it is settled law that the allegation of fraud is a serious allegation that must be strictly pleaded and proved. The burden of proof is on the person alleging and the standard of proof is higher than that which is required in civil cases, which is on a balance of probability, and lower than the one in criminal cases, which is beyond reasonable doubt.’*

The plaintiff has averred that the proof of fraud is demonstrated by the fact that the winner of the bid in question did not meet the mandatory requirements of the tender and was not qualified to execute the tender contract. Some of

these mandatory requirements were among others that; the land should have been registered to the person submitting the bid, the land should have been accessible through an all-weather road and not more than one kilometers off a classified road, the land should have been easily accessible to water and electricity power supply and suitable for purpose of a cemetery. The defendant has not in her submissions or testimony many any attempt to rebut this position.

The plaintiff's witnesses particularly PW1 and PW7 were emphatic and categorical that the bidder was not the registered owner of the land. This fact is not disputable. The winner of the bid was Naen yet there was no agreement between Naen Rech Limited and the Council. The land belonged to Henry Musyoki Kilonzi who signed the transfer to the Council and agreement between him and Naen Rech Limited. PW5 and PW7 testified that Henry Musyoki Kilonzi did not sign the agreement allegedly between him and the Council. It was also shown that the amount paid to Henry Musyoki Kilonzi as consideration for the land was Kshs 110,000,000.00 and not 283,000,000.00.

The plaintiff also produced evidence through PW1 and PW3 that the land was not suitable for the purpose it was being bought. PW3 whom was from the suer unit produced a memo which shows that he had given an opinion in protest that the land was not suitable for a cemetery.

There was also evidence that the purported valuation of land at Kshs 325,150,000.00 did not come from the Ministry of Lands and it was a forgery. PW2 denied that the letter emanated from their offices and the document examiner's report passed it as a forgery. Another thing that casts doubts on

this letter is that it predated the alleged date of valuation. Of more importance is that the same was said to have been forwarded and facilitated by the defendant.

The minutes for the Evaluation Committee meeting held on 14-10-2008 and produced as exhibit 4 purported that the meeting came out with a recommendation of a winning bidder. This was however denied by PW1 who told the court that the meeting did not come up with a suitable bidder. He went on to produce a memo which protested the contents of the said minutes. I am inclined to believe the plaintiff's witness because if indeed there was an agreed bidder on this date, there would not have been need for site visits and digging of holes to ascertain the suitability of the land.

Naen offered to the Council land it did not own. There was a letter written by Alphonse Mutinda & Co. Advocates purporting that Henry Musyoki Kilonzi had appointed one Maina Chege as his agent. This is a contrary to the fact that the tender documents invited bidders who were owners of the land. If indeed the company had been appointed an agent, he would have negotiated as such and not as a representative of Naen who was a bidder. Again, the two sale agreements dated 19-1-2008 do not make any reference to the issue of the agency.

Assuming that there was the alleged agency, one would be interested to know why the purchase price was split between the owner of the land and several other people who had nothing to do with the sale. The owner of the land received Kshs 110,000,000.00 whereas the Council paid Kshs 283,000,000.00 leaving a question as to who was the beneficiary of the difference of Kshs

173,000,000.00. Considering the circumstances surrounding this transaction, I form the opinion that the difference of Kshs 173,000,000.00 went to the pockets of people who had supplied or transferred nothing to the Council.

Further the plaintiff's exhibit 29 are proceedings in anti-corruption case number 20 of 2010 in which the defendant who was the 3<sup>rd</sup> accused was charged convicted of an offence of knowingly giving misleading documents to principal contrary to section 41(2) as read with section 48 of Ant-Corruption and Economic Crimes Act. The misleading documents which were subject of the criminal case were the same minutes for the Evaluation Committee which purportedly recommended award of the land in question in this matter. There is no evidence that the defendant appealed this decision and I have no reason to find otherwise.

The statutory requirements for public procurement are not flowers, cosmetics or beatification of the process. They must be followed and where a tender is not responsive, as was in this case, the procuring entity is under a legal obligation to not proceed further. The procurement of the land should have stopped after the meeting of the Evaluation Committee failed to come out with a suitable bidder and any subsequent attempt to sanitize or close the loopholes or gaps was an illegality. I seek guidance in holding of Justice J.M. Mativo (as he then was) in ***Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S. (interested party); National Irrigation Board Ex Parte [2020] KEHC 9232 (KLR)*** where he held that;

*'It is beyond argument that our procurement law provides for compliance with tender conditions "in all respects". On a literal*

*interpretation of the definition of an "acceptable tender" in the act, therefore, it would appear that procuring public entities "must" exclude tenders that fail to comply with the exact requirements of the tender conditions. The legislature does not appear to afford procuring entities any discretion in the matter nor does the Respondent herein or this court have any discretion on such matters.'*

The totality of all the above is that the process was marred by glaring inconsistencies, irregularities and breach of what was provided in the tender documents. The documents submitted in support of the bid and those used to evaluate the process were not genuine or were forged. That alone is sufficient proof of fraud. A party does need to prove all the particulars of fraud. Proof of even one particular is enough to find in favour of the plaintiff on this issue. I think I have said enough of the issue of irregularity.

I move to the second issue which is whether the defendant should be held liable for the irregularities. The defendant was the head of legal department of the Council which was ordinarily expected to guide and execute the legal agenda of the Council. The basics of a tender of this nature like the ownership status, value and suitability of the land for the purpose it was being acquired were so elementary. Any reasonable and prudent lawyer like the defendant who had risen through the ladder to become a director of the department would not fail to carry out such basic enquiries.

The defendant was in addition the chairperson of the Technical Evaluation Committee. She was or must have been aware that the committee had not agreed on any winner. For her to go ahead and progress a transaction with

such glaring and obvious flaws, she must have been motivated by factors other than public interest. In my view, she was either reckless or deliberate in ensuring that the deal went through as a result of which the public lost money and was left with land which was not useful to it. In the circumstances, I hold that she was part of the scheme and she must be held liable for the loss therein.

On whether the defendant should retribute the public for the sum claimed, it is my holding that she should. She held a position of public of trust and carried responsibility of putting the interest of the public in priority to her interests or comfort. A public officer who oversees embezzlement or misappropriation of public funds or resources must be held liable for any loss arising therefrom.

Plaintiff's fourth witness testified that he paid the defendant the said amount which had been transferred to his firm's account by the firm of Osiemo Odera & Co. Advocates on instructions of the defendant. He produced exhibit 13 which was an acknowledgement of receipt of the money. The acknowledgment was proved to have been signed by the defendant. The report of the document examiner produced by PW5 confirmed that the defendant signed this acknowledgment.

The defendant argues that PW5 used photocopies instead of original documents and as such his report cannot be authentic. She however has not demonstrated that the use of the photocopies resulted to an error. The expert witnesses including the defendant's own witness stated that use of photocopies in examination could give correct results. Further, it is notable that the defendant's own witness actually stated that he also used photocopies.

The defendant chose not to testify. The only witness she called was a document examiner who alleged that the signature appearing on the plaintiff's exhibit 13b was not hers contrary to the report produced by the plaintiff. I do not believe this piece of the defendant's witness' testimony. He was given the defendant's sample signature in the defendant's advocate's office. This was on 29-10-2025 which was six days before he testified and after the plaintiff had closed its case. This of course means that the report was made with this case in mind. I also note that the witness did not in anyway discredited the report of Antipas Nyanchwa.

In addition the above, the advocate who dealt with the transaction confirmed that he paid the money to the defendant. Since the defendant did not testify to rebut these facts, I find that the report by her witness was manufactured and meant for purposes of her defence and I dismiss it. In view if this, I find and hold that the defendant received the Kshsh 13,000,000.00 form the proceeds of the sale of the land.

The defendant has submitted that there was no proof that she received the sum because PW4 did not produce his statement of account showing that he had withdrawn the money from his bank or withdrawal records or vouchers or any financial transactions document. In my view, this argument is not merited because the witness was not on trial and his statement was not in issue. The acknowledgment of receipt of the money was enough proof of receipt of the sum.

The defendant has not adduced evidence to demonstrate what this Kshs 13,000,000.00 was for. She was at the center of this transaction and she

obviously moved and guided the flawed process. She stood to gain from the transaction and the fact that money originated from advocates acting under her instructions and the acknowledgment indicated that it was in respect of the land, I must, without a different explanation, take it that the money was a reward for her role in the transaction. This money belonged to the public and as such it should be ploughed back to the public wallet.

Finally, the defendant elected not to prosecute her counterclaim and I need not take time in analyzing its merits. It remains a pleading which has not been supported by evidence. Pleadings which are not supported by evidence remain mere allegations and are sure candidates for dismissal.

Having said the above, it is my finding that the plaintiff's suit succeeds as prayed and the counterclaim fails. My final orders are as follows;

- a. Judgment is entered for the plaintiff against the defendant for Kshs 13,000,000.00.
- b. The above sum shall attract interest at court rates from the date of filing this suit until payment in full.
- c. The defendant's counterclaim is hereby dismissed.
- d. The defendant shall pay the costs of the suit and the counter-claim.

Dated signed and delivered at Nairobi this **24<sup>th</sup>** day of **March** 2026.

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of Miss Murugi holding brief for Miss Maina for the plaintiff and Mr. Macharia for the defendant.