Sealink Holdings Limited & another v Chief Registrar of the Judiciary & 2 others (Environment & Land Case 474 of 2016) [2024] KEELC 370 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 370 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 474 OF 2016

MD MWANGI, J

JANUARY 25, 2024

BETWEEN

SEALINK HOLDINGS LIMITED .... 1ST PLAINTIFF

SENTRIUM CONTRACTS LIMITED .... 2ND PLAINTIFF

AND

CHIEF REGISTRAR OF THE JUDICIARY .... 1ST DEFENDANT

THE JUDICARY .... 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL .... 3RD DEFENDANT

JUDGMENT

Background

1. The genesis of this case is a tender advertisement by the Judiciary in the Daily Nation Newspaper of Tuesday, October 2, 2012. The Judiciary which has been sued as the 2nd Defendant in this matter, through the office of the Chief Registrar of the Judiciary (sued as the 1st Defendant), advertised the tender No. JUD/12/2012-2013, for lease of office premises. The tender called upon interested and eligible candidates willing to enter into a contract for the lease of office premises to submit bids.

2. The minimum office space required was stated to be approximately 40,000 Sq. feet, located within a radius of 2-3 KM from the Milimani Law Courts, Upper Hill. The other requirements were set out in the tender documents which were available for inspection at the offices of the Judiciary's Supply Chain Management.

3. The advertisement further specified that the price quoted (by the tenderer) was to be 'net' – inclusive of all taxes and delivery costs and was to remain valid for a period of 120 days from the closing date of the tender. The closing date was stated as 24th October, 2012 at 10.00 hours. Tenders were to be

opened immediately thereafter in the presence of the tenderers or their representatives, who were at liberty to attend.

4. The tender documents comprised of:

    i. Instruction to tenderers

    ii. General conditions of the contract

    iii. Special condition of the contract

    iv. Schedule of regulations

    v. Service specifications

    vi. Form of tender

    vii. Price schedule

    viii. Contract forms

    ix. Confidential business questionnaire form

The Plaintiff's case

5. The Plaintiff's case is stated in their amended plaint of 18th March, 2019, filed in court on 4th April, 2019.

6. The 1st Plaintiff pleads that it successfully submitted a tender through its Estate Agents Messrs. Knight Frank Kenya Ltd for the aforesaid lease of premises offering its newly developed property situate on the parcel of land known as L.R. No. 209/19114, Nairobi, (hereinafter referred to as 'the suit property') and was consequently issued with a notification of award dated 26th September, 2012 by the 1st and 2nd Defendants. Subsequently, a 'Head of Terms' was executed between it and the 1st and 2nd Defendants on 29th November, 2012 and 3rd December, 2012, respectively. The 1st and 2nd Defendants agreed to enter into a formal agreement.

7. It was, according to the Plaintiffs, a term of the Head of Terms dated 3rd December, 2012 that the 1st Plaintiff would facilitate the partitioning of the leased premises by employing the 2nd Plaintiff Contractor but the costs of partitioning of the leased premises to suit the purposes for which they were required by the Judiciary would be met by the 1st and 2nd Defendants.

8. Eventually, a lease agreement was entered into between the 1st Plaintiff and the 2nd Defendant dated 22nd April, 2013 registered in the land Titles Registry as I.R. No. 116868/8 on 17th September, 2013. The lease was for the suit property also known as 'Elgon Place' for a period of ten (10) years from 1st January, 2013 to 31st December, 2022. The rent was payable in advance quarterly in United States Dollars (USD) whereas service charge was payable in Kenya Shillings, at the initial rate of Kshs 957,800/- per month. The suit property was to host offices of the Judiciary. The Plaintiffs assert that it was a condition of the lease that in the event of delay in payment of the lease within 7 days of its due date, the 1st Plaintiff was entitled to charge interest at the compound rate of 2% per month recoverable with the arrears of rent. The lease had an arbitration clause.

9. The Plaintiffs state that the suit property was specifically completed and partitioned for use as court rooms and auxiliary offices for Judges and Court officials and contained all necessary facilities attendant thereto. The 2nd Defendant took possession of the suit property on or about the 1st January, 2013.

10. The 1st Plaintiff further asserts that it procured the 2nd Plaintiff, who was its main contractor and who had constructed the suit property, to undertake fit outs and partitions on the suit property to the Defendant's required use at the 2nd Defendant's costs. The agreed contract sum for the fit outs and partitions was Kshs 188,059,723/-. The Plaintiffs signed 2 agreements between themselves for the said works. The Plaintiff insists that the said works was for and on behalf of the 1st and 2nd Defendants. The 2nd Plaintiff was therefore to receive instructions with respect to the works directly from the 1st and 2nd Defendants and their consultants. It is alleged that the 2nd Defendant appointed architects and quantity surveyors for the fit outs and partition works to design and advise it on the works undertaken by the 2nd Defendant on the suit property. The Plaintiffs allege that the 2nd Defendant indeed appointed Messrs. Samuel Kigunda and Stephen K. Muriithi of JKUAT Enterprises as its consultants for the purposes of the fit outs and partition works.

11. The Plaintiffs aver that by an addendum dated 4th March, 2013, entered into pursuant to provisions of the Head of Terms, the 1st Plaintiff and the 2nd Defendant agreed and committed that the 2nd Defendant would settle the invoices raised by the 2nd Plaintiff. The invoices were to be transmitted through the 1st Plaintiff to the 2nd Defendant. The 2nd Defendant on its part would pay the invoices through the 1st Plaintiff for onward transmission to the 2nd Plaintiff.

12. It is the Plaintiff's case that pursuant to the specific terms, custom and usage of building contracts, the 1st and 2nd Defendants are liable to the 2nd Plaintiff for the works certified by the 2nd Defendant's consultants and that the said amounts are recoverable summarily as a civil debt which is also subject of a lien on the property in favour of the 2nd Plaintiff.

13. The Plaintiffs state that both the lease agreement and the addendum were duly performed and pursuant thereto, a final account was issued in the sum of Kshs 179,259,944.56 and a certificate of practical completion issued by the 1st and 2nd Defendants' architects and consultants, Messrs. JKUAT Enterprises Ltd dated 5th August, 2013. In spite of the completion, the Plaintiffs assert that the 1st and 2nd Defendants have committed diverse breaches of the fit out and partitioning agreement necessitating the filing of this suit. The particulars of breach are specified as failing to pay rent, service and interests due in time or at all and failing to settle the 2nd Plaintiff's invoices on account of fit outs and partition works.

14. The Plaintiffs have tabulated the amounts due and owing on account of fit out and partitioning works as at 31st January, 2019, inclusive of interest as Kshs 89,915,490.08; the rent arrears due as USD 6,041,505.80 and service charge due and owing as Kshs 91958,981.53 respectively. The 2nd Defendant had retained possession to the said date, 31st January, 2019.

15. The 1st Plaintiff states that on or about 23rd May, 2014, the 1st and 2nd Defendants herein wrote to its agent, Knight Frank Kenya Ltd purporting to give the 1st Plaintiff two (2) months' notice to terminate the lease over the suit property. However, the 1st Plaintiff avers that the said notice was unlawful and a breach of the contract between it and the 2nd Defendant for the reason that the lease was a long-term lease of 10 years without a termination clause, prior to its expiry. Secondly, the 1st Plaintiff further alleges that the fit outs and partition works had significantly changed the nature and structures of the suit property so much that it would be impossible to restore it to its original state in two months. The notice too ignored the fact that the 2nd Defendant required to surrender the lease over the suit property.

16. The 1st Plaintiff states that it communicated its refusal to the termination notice issued by the 1st and 2nd Defendants. The 1st and 2nd Plaintiffs state that despite the issuance of the notice to terminate the lease, the 2nd Defendant retained legal and physical possession of the suit property and its installations, fit outs

and partitions works and items remained in situ. It is further alleged that the 1st and 2nd Defendants' failure to settle the outstanding contract sums for the fit outs and partitions led to the 2nd Plaintiff having a contractor's lien over the suit property. This, according to the Plaintiffs meant that the 1st and 2nd Defendants purported termination of the suit property was not only ineffective but inconsistent with the position of the ground.

17. The Plaintiffs assert that by its conduct of yielding possession on 31st January, 2019, the 2nd Defendant in essence acknowledged that it had been in possession over the suit property and consequently, it is liable for the Plaintiffs claim for rent arrears and for unpaid contract sum on account of fit outs and partition works with interest. The Plaintiffs further reiterate that the 1st and 2nd Defendants are liable, not only for the rent arrears but also for the costs of restoration of the suit property from a Court house to a standard Commercial building.

18. The Plaintiffs insist that the 1st and 2nd Defendants only ceded and yielded vacant possession of the suit property and handed over the keys to the 1st Plaintiff and its agent on the 31st January, 2019 pursuant to the Court order of 29th October, 2018. The Plaintiffs express their position that the 1st and 2nd Defendants therefore remained liable for rent, service charge and interest for the period up to 31st January, 2019 and continue to be liable until full restoration of the suit property from a Court House to a standard Commercial building and subsequent re-letting and or expiry of the lease on 31st December, 2022.

19. Despite yielding possession, the 1st and 2nd Defendants had refused, failed and or neglected to restore the suit property to its former standard tenantable condition therefore breaching the lease dated 22nd April, 2013. The Plaintiffs state that by a letter dated 28th October, 2015, the 1st and 2nd Defendants had promised to restore the suit property to its former state but they had not made good the promise. The Plaintiffs had the cost of restoration of the suit property assessed at Kshs 73,134,439/-.

20. The Plaintiffs' claim against the Defendants jointly is for:

    a. Judgment be entered in favour of the 1st Plaintiff against the 1st and 2nd Defendants jointly and severally for the sum of USD 6,041,505.80 together with interest at the rate of 2% per month from 1st February, 2019 until full payment.

    b. Judgment be entered in favour of the 1st Plaintiff against the 1st and 2nd Defendants jointly and severally for the sum of Kshs. 19,958,981.53 together with interest accruing at the rate of 2% per month from 1st February, 2019 until full payment.

    c. Judgment be entered for the Plaintiffs jointly and severally against the 1st Defendant jointly and severally for the additional sum of Kshs. 89,915,490.08 together with interest at the rate of 2% per annum from 1st February, 2019 until full payment.

    d. Judgment be entered for the 1st Plaintiff against the 1st and 2nd Defendants jointly and severally for the further sum of Kshs. 73,134,439 together with interest at the rate of 18.5% per annum from 14th February, 2019 until full payment.

    e. Judgment be entered for the 1st Plaintiff against the 1st and 2nd Defendants jointly and severally for the additional sum of USD 4,201,041.52 together with

interest at the rate of 2% per month from 1st February, 2019 until payment in full.

f. A declaration that the 1st and 2nd Defendants have breached the Lease Agreement dated 22nd April, 2013 and that the 1st and 2nd Defendants are liable for all the arrears, parking fees and service charge plus interest and taxes and interest from 1st February, 2019 until expiry of the Lease and or sooner payment for restoration costs and or restoration and re-letting of the teased premises wholly.

g. Costs of the suit

h. Interest at the lending rates of Barclays Bank of Kenya Limited.

i. Any other or further relief that the Honourable Court may deem fit to grant.

The 1st and 2nd Defendants' amended Defence and Counter-claim

21. The 1st and 2nd Defendants' response to the Plaintiffs' claim was by way of the amended statement of defence and counter-claim amended on 24th October, 2018 and filed in court on 25th October 2018.

22. The 1st and 2nd Defendants denied the Plaintiffs' claim against them in its entirety. They categorically affirmed that any contracts and or agreements concluded between the Plaintiffs and the 1st and 2nd Defendants were void ab initio for being in express contravention of the law and in particular reference to the alleged lease between the 1st and 2nd Defendants, the 1st and 2nd Defendants asserted that the same was concluded in breach of the Law.

23. The 1st and 2nd Defendants further denied being privy to the alleged agency relationship between the 1st and 2nd Plaintiffs and the alleged agreement for fit outs and partitioning works between the 1st and 2nd Plaintiffs. They assert that the nature of the alleged agreement being the one that was allegedly concluded on behalf of and for the benefit of the 2nd Defendant, ought to have been subjected to a competitive procurement process under the law. The 1st and 2nd Defendants therefore deny that they were bound on the terms and conditions therein whether implied or otherwise. The 1st and 2nd Defendants particularly deny that the 1st Defendant acted as the 2nd Defendant's agent in the alleged agreements.

24. The 1st and 2nd Defendants therefore deny that they are liable to pay the 2nd Plaintiff on account of works alleged to have been done by the 2nd Plaintiff on behalf of the 2nd Defendant and deny the particulars of breach putting the Plaintiffs to strict proof. In response to the claim by the Plaintiffs that the 1st and 2nd Defendants' failure to settle the amounts claimed by the 2nd Plaintiff necessitated the 2nd Plaintiff to place a lien over the property, the 1st and 2nd Defendants affirm that the same has not basis in Law for the reason that the alleged agreement for partitioning of the suit property was a contract between the 1st Plaintiff on the one hand and the 2nd Plaintiff on the other hand. They were therefore not privy to the agreement. Secondly, that there is no basis for any claim against the 1st and 2nd Defendants in respect of the amounts claimed for partitioning in view of the illegalities and irregularities in the tender process.

25. The 1st and 2nd Defendants reiterated that the 2nd Defendant being a public entity was under a legal obligation to ensure that the tender process was conducted in accordance with the Law and any ensuing award was made in accordance with the Law. Any party purporting to contract with the 2nd Defendant too was under a similar legal obligation too.

26. The 1st and 2nd Defendants denied that the 1st Plaintiff's agent, Knight and Frank Ltd was successful in the tender process leading to the award of the tender for the lease of the suit premises. They asserted that it submitted a tender that was materially at variance with the terms of the tender document. Amongst other things, Knight and Frank Ltd submitted its bid indicating that the rent and the car parking space were to be paid in US dollars while the tender document provided that prices were to be quoted in Kenya shillings. This, according to the 1st and 2nd Defendant rendered the tender submitted non-responsive. The subsequent notification of award therefore issued to Knight and Frank Ltd was void.

27. The 1st and 2nd Defendants challenged the Heads of Terms alleged to have been executed between the 1st Plaintiff and the Defendants on 29th November, 2012 and 3rd November, 2012 respectively since they were executed following an illegal and or irregular procurement process and were therefore void and of no legal effect. Further, that the Head of Terms dated 3rd December, 2012, which required the 1st Plaintiff to facilitate the partitioning of the suit property by employing the 2nd Plaintiff as a Contractor to undertake the partitioning and fit outs was illegal and or irregular as it was not subjected to a competitive procurement process as required under the Law.

28. Consequently, the 1st and 2nd Defendants aver that the registration of the lease in favour of the 2nd Defendant did not have any legal effect in view of the issues raised regarding the tender process and the subsequent award. Additionally, some terms of the lease were contrary to the terms of the tender document rendering the subsequent agreement/lease void. The 1st and 2nd Defendants particularly pointed out to clause 2.10 of the lease indicating that rent payments would be in US dollars contrary to the terms of the tender documents. The lease further was stated to be for a term of 10 years unlike the Head of Terms which provided for 6 years.

29. The 1st and 2nd Defendants while denying that the 2nd Defendant was in possession of the suit property stated that the purported lease between the 1st and the 2nd Defendant was terminated by the 1st Defendant on 23rd May, 2014 for reasons of irregularities and or illegalities relating to the procurement process and frustration of the lease agreement on account of radiation which made the demised premises unfit for occupation and or use.

30. Following the termination, the 1st and 2nd Defendants aver that they informed the 1st Plaintiff that the suit property was available for repossession. However, the 1st Plaintiff refused and or neglected to take over the premises.

31. In their counter-claim, the 1st and 2nd Defendants reiterated the contents of their amended statement of defence and further pleaded that the tendering process and the ensuing award which led to the conclusion of the alleged lease dated 22nd April, 2013 and registered on 17th September, 2013 was marred with irregularities, illegalities and fraud as particularized in the Counter-claim.

32. The 1st and 2nd Defendants further accused the Plaintiffs of unlawfully detaining the 2nd Defendant's fixtures and fittings including IT equipment and furniture.

33. The 1st and 2nd Defendant therefore sought against the Plaintiffs:

    a. A declaration that the notification of award issued to Knight and Frank Ltd by the 2nd Defendant on 26th September, 2012 in respect to tender No. JUD/12/2012-2013 by THE 2ND Defendant for the lease of office premises was illegal/null and void.

    b. The reimbursement of USD 156,849 being payment of rent for 3 months for 1st January, 2013 to 30th March, 2013.

c. Refund of the sum of Kshs 53,820,311.09 being the advanced payments made to the 2nd Plaintiff by the 2nd Defendant through the 1st Plaintiff.

d. A declaration that the lease dated 22nd April, 2013 and registered on 17th September, 2013 is illegal and therefore null and void.

e. Costs of this suit and Counter-claim.

34. The Attorney General participated in the proceedings but did not file any pleadings.

Hearing of the suit:

35. The case proceeded to full hearing. The Plaintiffs called a total of five (5) witnesses in support of their case. The 1st and 2nd Defendants called 2 witnesses. The 3rd Defendant did not call any witness.

Evidence Adduced on behalf of the Plaintiffs

36. PW1 was Kalpesh Rasikbhai Patel, a director of the 1st Plaintiff Company who is the proprietor of the suit property also known as 'Elgon place' on L.R. No. 209/19114 at Upper Hill, Nairobi. He adopted his witness statements dated 18th March, 2018 and 29th October, 2021 as his evidence in chief. Both statements form part of the court record and I will not therefore replicate them in this judgment. They essentially affirm the Plaintiff's pleadings.

37. PW1 testified that the 1st Plaintiff had engaged Knight and Frank Kenya Ltd (hereinafter referred to as 'Knight Frank' as its real Estate Manger. The 1st Plaintiff gave Knight & Frank the go-ahead to bid for the judiciary tender which as he understood it was for purposes of housing the Court of Appeal.

38. It was PW1's testimony that Knight & Frank Ltd participated in the tender process on behalf of the 1st Plaintiff and won the tender. Thereafter, the 1st Plaintiff and the 1st & 2nd Defendant entered into a lease agreement which was to run for a period of 10 years, 1st January, 2012 to 31st December, 2022. The nature of the agreement was that it was long term, due to the fact that it was a highly customized fit out for the Defendants including state of the art, court rooms and Chambers with ensuite bathrooms, lounges, libraries and holding cells in the basement.

39. PW1 affirmed that the charges payable were to be in US dollars because the 1st Plaintiff had secured the loan for putting up the building in US dollars. It was so agreed by the parties.

40. PW 1 asserted that the fit outs/partitions were to be carried out by the 2nd Plaintiff for the reason that they were the ones who had constructed the building. Due to the complexity of the fit outs, it seemed feasible to use the 2nd Defendant as he had the full schematics and designs of the building. The fit outs/partition works was supervised by the 1st and 2nd Defendants' consultants known as JKUAT Enterprises, who were architects and surveyors (quantity).

41. The Defendants took possession of the building upon completion around the month of March, 2013. By that time, the lease had been entered into and registered in the Lands office.

42. The 1st and 2nd Defendants even started paying rent and service charges in accordance with the lease agreements. However, after about 1 year, the 1st and 2nd Defendants discontinued payments of rent, service charges and the outstanding fit out charges and costs due to the 2nd Plaintiff. This informed the filing of this case and especially so after the 1st and 2nd Defendants purported to terminate the lease yet there was no provision for early termination/exit in the lease.

43. It was PW1s evidence that one of the reasons given by the 1st and 2nd Defendants for terminating the lease was an allegation of high radiation emission in the vicinity of the building as a result of Communication tower owned by Telkom Kenya. PW1 dismissed the allegation as baseless and not backed by any scientific evidence. The 1st Plaintiff engaged two leading radiation experts who conducted a full survey and assessment. The experts found out that the radiation levels were almost 300,000 times below acceptable limits. The building was therefore safe and habitable. The 1st Plaintiff had carried out a similar survey before constructing the building which arrived at a similar finding. The report by the experts was shared with the 1st and 2nd Defendants.

44. As the fit outs and partitions were being carried out, Judges of the Court of Appeal and Staff frequented the building to specify their particular requirements. At no time did any of them raise issue of the Communication tower.

45. The witness testified that the default by the 2nd Defendant in payment of rent caused the 1st Plaintiff to default in payment of the loan due to the bank causing the bank to advertise it for sale on 2 occasions. This has caused the 1st Plaintiff and its directors' severe distress and damaged their reputation in the business circles.

46. PW1 stated that they took possession of the building from the 1st and 2nd Defendants in October, 2018 following a Court Order. Nonetheless, the 1st Plaintiff was unable to reinstate it to its original form as the 1st and 2nd Defendants did not pay for the restoration costs. The building therefore remains unoccupied.

47. PW1 explained that prior to the filing of this suit, the Plaintiffs had attempted arbitration but the 1st and 2nd Defendants frustrated the efforts by failing to turn up on two occasions. There were further attempts to settle the matter amicably but the Defendants, according to the witness appeared uninterested on settling the matter. This was despite their communication in the letter of 23rd May, 2014 communicating that they were open to discussions and amicable settlement of the dispute.

48. In answer to questions raised on cross-examination, PW1 confirmed that the 1st Plaintiff's claim is based on the 'Heads of Terms' document duly executed between the 1st Plaintiff and the 1st and 2nd Defendants, the lease dated 22nd April, 2013, the Addendum dated 14th March, 2013, the agreement of 24th March, 2013 and the standard agreement of 24th March 2013 and the standard agreement and conditions of contract for building works.

49. PW1 confirmed that the eligibility criteria was at paragraph 2.1 of the tender document. Their bid was presented on their behalf by Knight and Frank Ltd. The contract form was signed by Knight and Frank Ltd & the Judiciary. The entire bid document submitted by Knight and Frank Ltd did not disclose it was on behalf of the 1st Plaintiff.

50. The witness agreed with the Advocate for the 1st and 2nd Defendants, Mr. Ngumbo that Clause 3.91 expressly provided that the tenderer was not to assign its obligations except with the prior consent of Judiciary. So, any obligations arising would be borne by the tenderer.

51. PW1 explained that the reason for submission of the tender in dollars in spite of the requirement for submission in Kenyan Shillings was because the 1st Plaintiff was servicing a loan from Barclays Bank in US dollars.

52. The witness confirmed received of some payments from the Judiciary amounting to Kshs 116,439,623.23. The money was made in Kenyan shillings. There was no dollar conversion rate agreed between the parties. The amounts were paid in the year 2013 and 2014.

53. The notification of award was dated 26th September, 2012. The witness termed the date erroneous. A corrected one was issued on 29th November,2012.

54. PW1 stated that he was not familiar with the tendering processes and procedures.

55. The notification provided that a written contract was to be signed in 14 days after the notification. PW1 however signed the Head of Terms document after 5 days.

56. PW1 too confirmed there were deviations between the Head of Terms and the bid. According to the tender document, the lease term was indicated to be for a period of 6 years, from the commencement date. The Head of Terms provided for service charge which had not been provided for in the tender document. Again, whereas the bid document had indicated that all prices quoted were to be inclusive of taxes, the Head of Terms document at clause 9 stated that the tenant was to be liable to pay on demand all VAT or other taxes leviable from time to time.

57. The Head of Terms provided for a three month rent deposit that was not provided for in the tender document. The deposit amounting to Kshs 21,265,464.86 was indeed paid by the 2nd Defendant to the 1st Plaintiff. The payments were made before the registration of the lease. The lease was registered on 17th September, 2013.

58. Regarding the partitioning of the building and fit outs, PW1, the main contractor, who is the 2nd Plaintiff was to do all the works. From the tender documents, partitioning was not one of the services being tendered for. PW1 stated that the 1st Plaintiff procured the partitioning and fit out works services on behalf of the Judiciary. That was why in his witness statement he stated that the fit out and partitioning works agreement was entered into by the 1st Plaintiff on behalf of the 1st and 2nd Defendants. He insisted that it was agreed from the onset that the 2nd Plaintiff was to carry out the fit outs and partitions in order to maintain the standard of the workmanship. There was therefore no tendering for fit out works. There was however no agreement between the 1st Plaintiff and the Judiciary that the 1st Plaintiff would be its agent in that aspect.

59. PW1 on further probing by the Advocate for the 1st and 2nd Defendants agreed that the 2nd Plaintiff was not the only entity or contractor who had the capacity to do fit out works. However, he was familiar with the design and set out of the building having been the main contractor. That was his only advantage over every other contractor. In the agreement signed between the 1st and 2nd Plaintiff, the 1st Plaintiff is defined as the employer. The Judiciary does not feature anywhere in that contract. It was the obligation of the employer under the contract to pay.

60. PW1 reiterated that the 2nd Plaintiff was not procured by the Judiciary but by the 1st Plaintiff. He stated that the allegation by Virji Arjan Kerai was not true on the assertion that the 2nd Plaintiff got engaged by the Judiciary. That was the reason why their payments were made through the 1st Plaintiff.

61. Questioned about the termination of the lease by the Judiciary, PW1 stated that one of the reasons cited by the Judiciary was procurement challenges but it was not specific on what the challenges were. The letter further mentioned currency and harmful radiation. The letter stated that the Law Society of Kenya had issued a directive to its members not to go to Elgon Place. It was a two (2) months' notice.

62. PW1 considered the notice from the Judiciary on negation of the terms and conditions of the lease. The 1st Plaintiff initiated arbitration to try and resolve the issues. There were also meetings between Knight and Frank Ltd and the Judiciary in an attempt to settle the issues though no minutes were written.

63. The Chief Registrar of the Judiciary had offered to give back the building to the 1st Plaintiff vide the letter of 23rd May, 2014. However, the 1st Plaintiff through its Property Agent vide a letter of 13th June, 2014 requested the judiciary to refrain from removing any properties from the building.

64. The 1st Plaintiff had made an application dated 10th May, 2016 seeking to take possession of the building. The reason was, according to PW1 an attempt to mitigate loss.

65. In response to questions from Ms. Ndundu, State counsel, PW1 admitted that the terms and conditions in the Head of Terms were the ones imported into the lease agreement. Though the Head of Terms provided for 6 years lease, the lease itself however provides for a term of 10 years. PW1 stated that he was not aware how the 10 years' term came to be while they had agreed for a 6 years' term in the Head of Terms. He had not come across any document requesting for variation of the term.

66. Over the safety concerns expressed by the 2nd Defendant, PW 1 confirmed that there was no joint expert assessment carried out, hence no report by the experts from both sides.

67. PW2 was one Cleophas Kipngetich Bor, a property manager with Knight Frank Kenya Ltd since the year 2009. He explained that Knight Frank was the property manager of the 1st Plaintiff since 2012.

68. PW2 elaborated that his role as the property manager was to ensure that the suit property was well maintained, to ensure rent payment, supervise services on the grounds including security, cleaning, and maintenance of all equipment and facilities like lifts, water pumps, generators etc., as well as general lease administration and managing the relationship between the Landlord and tenant.

69. PW2 was working under Ms. Margaret Mutiri who was the portfolio manager until 2015 when he took over from her. She eventually retired from the Company in 2019.

70. PW 2 adopted his witness statement dated 19th October, 2021 as his evidence in chief. It is part of the Plaintiffs' bundle, at page 383.

71. PW2 stated that the 1st and 2nd Defendants gave various reasons for purporting to terminate the lease with the 1st Plaintiff. The reasons included allegations of radiation levels being too high, non-availability of funds and the lease amount being quoted in foreign currency.

72. PW2 asserted that the 1st and 2nd Defendants had accepted the 1st Plaintiff's bid which had quoted the rent amount in foreign currency. He explained that the reason why the 1st Plaintiff had quoted the rent in foreign currency was because it had taken a loan to finance the construction of the suit property in foreign currency (specifically USD) and was paying it back in foreign currency.

73. In spite of the Judiciary purporting to terminate the lease in in 2014, the handing over only happened in the year 2019.

74. In regard to the claim that the suit property was unfit for human habitation, PW2 stated that the Judiciary claimed to have engaged experts from the Communication Commission of Kenya (CCK) and the University of Nairobi. The 1st Plaintiff together with Knight Frank requested for the report by the experts but none was forthcoming from the Judiciary.

75. On their part, they worked with the 1st Plaintiff to consult and engage experts on radiation. They engaged agents of NEMA, Mazingira Ltd and Roniel Enterprises to conduct studies and assess the possible effects of the telecommunication equipment near the building. The experts gave the suit property a clean bill of health stating that it was fit for human habitation. The witness testified that the expert reports were shared with the 1st and 2nd Defendants.

76. The witness testified that every effort was put to sort out the dispute over the lease of the suit property amicably. They requested for meetings with the Judiciary to try and resolve the issues but to no avail. Though PW2 did not personally attend the meetings, there were minutes prepared after the meetings.

77. In response to questions put across during Cross-examination by Mr. Kipkogei, PW2 stated that they submitted a bid on behalf of the 1st Plaintiff in response to the advertisement by the Judiciary. They submitted the bid as estate agents and representatives of the 1st Plaintiff.

78. The bid by Knight Frank was successful and they were informed that they had qualified by way of a notification erroneously dated 26th September, 2012 which was received in their offices on 3rd December, 2012. They notified the Judiciary about the error by way of an email.

79. The notification required the successful bidder to signify acceptance. PW2 confirmed that he had not seen any such acceptance of the terms of the bid from their end.

80. Subsequently, the lease document was to be signed by the Landlord, the 1st Plaintiff and the tenderer. Knight Frank was merely an agent of the Landlord. Accordingly, there was no lease signed between Knight Frank and the Judiciary.

81. According to the tender documents, the prices were to be "net inclusive of all taxes and delivery costs". The price was also to be quoted in Kenya Shillings and a tender security furnished. Knight Frank however quoted in USD in accordance with instructions from their client. Their bid was nonetheless accepted by the 1st and 2nd Defendants.

82. The Head of Terms document is dated 28th November, 2012. By then, the 1st Plaintiff had not received the notification of award. He termed the Head of Terms as a sort of an offer from Knight Frank to the Judiciary. It even had a provision that it was to be accepted within 14 days.

83. The Head of Terms documents made reference to the main contractor, the 2nd Plaintiff. The Judiciary accepted the Head of Terms and signed on 29th November, 2012. The Chief Registrar of the Judiciary signed on behalf of the Judiciary. PW2 opined that the Head of Terms did not materially alter the terms in the tender document.

84. PW2 agreed with the suggestion by the Advocate for the 1st and 2nd Defendants that a tender ought to have been floated for partitioning and fit outs works.

85. PW2 averred that the area offered for lease was 49,000 sq. feet 9,000 sq. feet more than was requested for in the tender advertisement. He stated that, that was agreed on between the parties since the Judiciary wanted to be the sole occupant of the suit property. He had no document to support the averment. He agreed that it was a deviation from the terms of the tender.

86. PW2 affirmed that they only took possession of the building from the 2nd Defendant on 31st January, 2019. They had objected earlier to the Judiciary moving out of the suit property without honouring the terms of the lease.

87. In response to questions by Ms. Ndundu, state counsel representing the office of the Attorney General, PW2 confirmed that the tender document had quoted the prices in form of Kenya Shillings and not USD. They did not produce any document authorizing them to quote prices in USD.

88. Further, PW2 confirmed that the term of the lease in the Head of Terms was to be 6 years but the lease was prepared for 10 years. PW 2 had not seen any document altering the term from 6 to 10 years.

89. In the lease document, there was no provision for payment of rent deposit yet the invoice at page 59 of the Plaintiffs' bundle was requesting for deposit of rent, security and parking fees. The Judiciary paid the deposit though.

90. In re-examination, PW2 affirmed that Clause 2.21 (conversion to single currency) provided that where other currency was used, the Judiciary would convert it into Kenya Shillings using the exchange rates provided by the Central Bank of Kenya. Again, in the schedule of requirements, the minimum lese period was to be negotiated. The space required in the tender document again was 40,000 Sq. feet.

91. PW3 was a director of the 2nd Plaintiff Company. He adopted his witness statement dated 18th March, 2019, as his evidence in chief. He explained that the contract amount for the fit outs and partitioning works was Kshs 170,259,944.56 inclusive of VAT. They were partially paid a sum of Kshs 116,439,632.31, leaving an outstanding balance of Kshs 53,820,311.09.

92. The amounts paid to them though coming from the 2nd Defendant was paid through the 1st Plaintiff, with whom they had a contract.

93. PW3 confirmed that the 2nd Plaintiff was the main contractor who had constructed the Elgon Place. After finalizing and handing over, the 1st Plaintiff asked them if they were interested in fit out/ partitioning works and they stated that they were interested. They tendered and were awarded the contract. The bill of quantities they used were prepared by JKUAT Enterprises who were consultants engaged by the 1st and 2nd Defendants.

94. In Cross-examination by Mr. Kipkogei, PW3 confirmed that the 2nd Plaintiff did not have a contract with the Judiciary. They only had one with the 1st Plaintiff.

95. The 2nd Plaintiff did not participate in the tendering process that had been advertised by the Judiciary. The only one he participated in was by the 1st Plaintiff.

96. The 2nd Plaintiff was not also a party in the Addendum (agreement on works). It was entered into by the 1st Plaintiff and the Judiciary. The Addendum referred to Clause 17 of the Head of Terms that provided that the main Contractor would undertake the partitioning works. PW3 only learnt about the Head of Terms when the dispute of payment arose. PW3 affirmed that he did not participate in any public tender. There was none. He came on board on the basis of Clause 17 in the Head of Terms document. He was however aware that every public procurement must be done in accordance with the Law.

97. The 2nd Plaintiff prepared the estimates presented by the 1st Plaintiff for restoration of the building. PW3 admitted that he is not a Quantity Surveyor. He did not base the estimates on a bill of quantities.

98. PW 3 agreed with the Advocate for the 1st and 2nd Defendants that his claim should, under the Law be against the 1st Plaintiff.

99. In re-examination by the Advocates for the 1st and 2nd Plaintiffs, PW 3 explained that the contract between the 1st and 2nd Plaintiffs was clear that payments were to come from the Judiciary. The Contract was categorical that the Judiciary had requested the Landlord (1st Plaintiff) to make alterations and erect partitions in the suit property. The Judiciary's architect was supervising the works on a day to day basis.

100. PW4, one Fredrick Opiyo Amuoki was a former employee of Knight Frank. He was at the material time, the agent assigned to the suit property. He stated that he was the one who had completed the tender documents and forwarded them to the Judiciary. He referred to himself as the link person.

101. After they were awarded the tender, PW4 testified that he negotiated the terms and conditions of lease and went ahead to prepare the Head of Terms document and had it signed by both parties. Thereafter, he forwarded it to the legal department of Knight and Frank for preparation of the lease. He stated that the Head of Terms was a snapshot of the agreement that was to be prepared by the legal team. The agreement was to be more exhaustive.

102. In response to Cross-examination by the Advocate for the 1st and 2nd Defendants, PW4 confirmed that he was the one who had submitted the tender on behalf of Knight Frank Kenya Ltd. The tender was evaluated and a notification of award was received on 3rd December, 2012 though erroneously dated 26th September, 2012. PW4 confirmed that the bid/tender did not indicate anywhere that it was on behalf of the 1st Plaintiff. He however explained that the tender advertisement allowed a Landlord or an agent of the Landlord to submit a bid. Knight Frank had a Contract with the 1st Plaintiff to be their sole agent in respect to the suit property.

103. It was PW4's testimony that upon them receiving the 'erroneous' notification of award, he wrote an email informing the Judiciary that the letter awarding them the contract was dated 26th September, 2012 and requesting its corrections. PW4 explained that he was satisfied that the email constituted sufficient acceptance.

104. By the time of receiving the notification, PW4 had already signed the 'Head of Terms' on 28th November, 2012. The Judiciary signed on 3rd December, 2012. In responding to questions by the State Counsel Ms. Kerubo, PW4 stated that he was the one who approved the financial and administrative aspects of the lease. The legal department handled the legal aspects of the lease.

105. PW 5 was Lawrence Ouma Oriko, a radiation expert, who stated that he was a certified measurement and verification professional, registered with the Association of Energy Engineers (USA). He had worked with various institutions that major in energy and environmental audits including Dream-Power Engineering, Libros Engineering services and Global Engineering Systems. He was at the moment engaged with Mazingira Ltd since 2012 on environmental consultancy/instrumentation. He was a director of Mercunx Energy Solutions Ltd.

106. He testified that in September, 2013, they were approached by Roniel Enterprises to conduct a detailed Electro-Magnetic Field measurement from a Base Transmission Station near Elgon House, the suit property. They did the assignment and submitted a report dated 23rd September, 2013. The report, according to PW 5 was also shared with the former Chief Justice Hon. Willy Mutunga.

107. PW5 who was the Head Engineer in the conduct of the assignment took all the measurements, undertook site analysis and compiled the report. His finding was that the radiation levels were within the allowable limits. This meant that the building was safe and fit for human habitation. He produced the report as an exhibit in this case.

108. Commenting about a report by another expert, Dr. Muthumbi, who had been commissioned by the Judiciary, PW5 stated that from the said report, the other expert had merely done a desktop research to establish and document the EME health standards. He did not conduct any audit because as he stated in his own report, he was denied access.

109. PW5 further noted that Dr. Muthumbi had merely made a recommendation that Elgon House should not be occupied until a comprehensive assessment had been undertaken to establish the radiation levels of cumulative non-ionizing radiation at various selected points/offices due to the presence of a huge number of antennas installed on masts/towers next to it.

110. Under Cross-Examination, PW5 confirmed that his report was not subjected to a review by experts from the Radiation Protection Board but it was actually submitted to the said Board.

111. PW5 further confirmed that he did not cross-check any Environmental Impact Assessment Reports that had been presented previously, neither did he look at any such report prepared before the setting up of the Base Transmission Station adjacent to the suit property.

Evidence on Behalf of the Defence

112. The Defendants (1st and 2nd) had initially informed court that they intended to call 3 witnesses. However, they only called 2 witnesses after their 3rd witness became unavailable. DW1 was the Director of Supply Chain Management of the Judiciary. He adopted his witness statement dated 21st October, 2021 as his evidence in Chief.

113. DW1 stated that there was no tender offered by the Judiciary for the partitioning and fit outs of the suit property. Not even a direct procurement was done. The witness asserted that there would have been no justification in law for use of direct procurement for the partitioning and fit outs works.

114. DW1 termed the Head of Terms document as an 'extraneous document' that could not vary the terms of the tender document. It was not even prepared by the Judiciary.

115. Responding to questions by Mr. Bundotich Advocate for the Plaintiffs, DW1 stated that the Law he had relied on in preparing his witness statement was the PPDA, 2005 and the 2006 regulations. In his statement, he had explained the professional way of doing procurement.

116. DW1 confirmed that the PPDA, 2005 had set up a Board to review awards of tenders. In this case, DW1 stated that he had not found any complaints raised against the award of the tender to the Plaintiffs by the Judiciary.

117. DW1 also confirmed a letter stating that the matter was under investigations by EACC. He had not however come across any report by EACC. Further that no officer of the Judiciary had been prosecuted or surcharged for any illegalities/irregularities as alleged in this case in the procurement process.

118. The 2nd Defence witness was the Registrar of the Court of Appeal, Mr. Moses K. Serem. He adopted his witness statement of 19th October, 2021 as his evidence in chief.

119. DW2 explained that Judges of Appeal visited the suit property in the year 2013 and raised concerns and fears of non-ionizing radiation from the masts adjacent the building. They suggested and recommended assessment to be carried out to confirm that the building was fit for human habitation. The then Chief Justice, Hon. Justice Willy Mutunga commissioned an inter-agency assessment by various bodies including the RPD and NEMA. The Communications Commission of Kenya was also involved.

120. The former CJ also instructed Dr. Muthumbi of Nairobi University to carry out an assessment independently. That is how the report dated 18th September, 2013 was generated. Dr. Muthumbi made recommendations that the building should not be occupied before assessment was done on critical points in the building. It was on that basis that the Judges declined to move into the building.

121. In response to questions by Mr. Bundotich, DW2 stated that the main fear of the Judges was non-ionizing radiation. He confirmed that Dr. Muthumbi's report did not provide any evidence of harmful non-ionizing radiation at Elgon House. What Dr. Muthumbi was essentially criticizing the report of the Communications Commission of Kenya which had given the building a clean bill of health. The former CJ, Hon. Willy Mutunga was the one who had commissioned the report by CCK.

Court’s Directions

122. At the close of the hearing of the case, the court directed parties to file written submissions. All the parties filed comprehensive submissions which now form part of the record of this court. I thank the parties for their detailed submissions. The court has had an opportunity to read and consider the submissions. On 11th October 2023, parties had occasion to highlight their submissions before the court.

Highlights of the Parties’ Submissions

123. Mr. Bundotich, the Advocate for the Plaintiffs in his highlights stated that the claim by the 2nd Plaintiff was for the balance of unpaid certified payment in respect of the contract for partitioning and fit outs awarded to it by the 2nd Defendant. The 2nd Defendant had made part payments. The allegations that the tender for partitioning and fit outs ought to have been awarded by open tender only arose after the filing of this suit. The 2nd Plaintiff was not notified in writing of an irregularity in the contract before the filing of the suit. The Plaintiffs therefore submitted that it was an afterthought. In any event, the Plaintiffs further submitted that that the Public Procurement and Disposal Act, (PPDA), 2005 allows direct procurement as an alternative mode of procurement and that there is no justifiable defence to bar the court from awarding judgment and interest on the balance of the certified sum owed by the 1st and 2nd Defendants to the 2nd Plaintiff.

124. Mr. Bundotich submitted further that the genesis of the 1st Plaintiff’s claim is the purported termination of lease by the 1st and 2nd Defendants through a letter dated 23rd May 2014 on grounds of procurement challenges and that the building was unfit for occupation because the radiation levels were beyond the acceptable human limits.

125. The 1st and 2nd Defendants however had not specified what the procurement challenges were. He also stated that the Law on procurement had mechanisms for faulting procurement processes with strict timelines and that one can only approach this court by way of an appeal from the Public Procurement Tribunal and not by way of a statement of Defence as the 1st and 2nd Defendants had done. He submitted that the other alternative that was available to the 1st and 2nd Defendants was to seek directions from the relevant Authority as per the Law applicable then. The Defence of procurement flaws is therefore not available to the Defendants. He also pointed out that though EACC had carried out investigations, the report of the outcome of the investigations had not availed to the court. In any event, no officer either from the 1st Defendant’s office or the tender evaluation committee or from the accounting office was faulted for the award of the tender.

126. Mr. Bundotich admitted that perhaps the only issue that the court ought to seriously consider was that of alleged radiation emission. However, on whether or not the levels were beyond the allowable limits, he stated that the 1st Plaintiff had called an expert who testified that even our mobile phones radiate more than the radiation levels around the suit property.

127. The learned counsel for the Plaintiffs submitted that there were no justifiable reasons therefore to terminate the lease between the 1st Plaintiff and the 2nd Defendant. Again, even though the 1st and 2nd Defendants had purported to have terminated the lease, they held onto the building until 31st January, 2019 despite their indication that they would move out in 2 months from the date of their termination notice.

128. Mr. Bundotich urged the court to find that rent was payable up to 31st January, 2019. Further that since the lease was to expire on 31st December, 2022 the rent payable up to that date is also payable

as there were no lawful grounds to terminate the lease. The 2nd Defendant has therefore breached the contract. He stated further that it was not possible for the 1st Plaintiff to mitigate its losses because the 1st Defendant failed to remove the fit outs for the specialized court rooms and or pay for the removal of the same to enable the 1st Plaintiff to mitigate its losses. The 1st Plaintiff could not have leased the building as it was.

129. Mr. Bundotich stated that they had filed their authorities to the effect that the defence of procedural flaws cannot be raised belatedly and that parties are bound by their contracts. He submitted that he 1st and 2nd Defendants are attempting to run away from their contract and that breach of lease amounts to a breach of contract. He urged the court to find in favour of the Plaintiffs. He stated that whereas the termination notice was issued in the year 2014, the 1st and 2nd Defendants never made any single attempt to mitigate the consequences by compensating the Plaintiffs.

130. Mr. Kipkogei, learned counsel for all the 1st and 2nd Defendants and also on behalf of the 3rd Defendant, on his part submitted on what he termed as the three (3) uncontested facts as follows:

131. The first issue was that none of the Plaintiffs had submitted a bid to render a service or sell goods or works to the institution of the Judiciary. On that on that point alone, the Plaintiffs' cases are built on quick sand. He submitted that the only avenue for any person to render a service, sell goods or perform works for a public entity in Kenya is through the procedure set out in the PPDA. What came out in evidence is that the 1st Plaintiff did not submit a bid. They allege that it was submitted on their behalf by a 3rd party who was not a party in these proceedings, and has no claim against the Judiciary. It was not disputed that the 1st Plaintiff did not participate in the procurement process; consequently, they do not have a bid that was evaluated nor a notification of award. It was then questionable how they could purport to lay a claim that is not grounded on any procurement process.

132. The second issue was that the 2nd Plaintiff also did not participate in any procurement process. The Defendants submitted that their entry into 'the saga' was pursuant to Clause 17 of a document unknown to Law (Head of Terms), where it was asserted that the 1st Plaintiff would appoint a Contractor to carry out the partitioning and fit outs works.

133. Undisputedly, there was no procurement process leading to the appointment of the 2nd Plaintiff as a Contractor for the Judiciary. There was no material evidence that was placed before the Court to demonstrate the alleged direct procurement. Even where direct procurement is resulted to, it leads to a notification of an award and a contract; none of these documents were submitted before the Court. Learned Counsel submitted that it was questionable how the 2nd Plaintiff could claim against the 1st and 2nd Defendants. The claim is built on quick sand as the Contract before he Court is between the 1st Plaintiff and the 2nd Plaintiff. Finally, that the 2nd Plaintiff should have claimed against the 1st Plaintiff, if at all.

134. The third issue was that the suit property was not occupied, neither by the persons nor the institutions it was targeted for. The Registrar of the Court of Appeal testified that the building was targeted for the Court but was not occupied for a single day for the reasons that in their view (the learned Judges of Appeal), the building was not safe for use by human beings. Consequently, it was submitted that the moment the building could not be used for the intended purposes, the contract was frustrated.

135. Counsel for the 1st and 2nd Defendants stated that they had submitted at length on the consequences of frustration as it discharges parties off their obligations arising therefrom.

136. Counsel urged the court to find that the lease was an illegal lease; that if there was any contract, it was frustrated and that any mode of procurement is acceptable but neither the 1st nor the 2nd Plaintiff

participated in any mode of procurement. He stated that Section 3 of the *Judicature Act* identifies the sources of Law; that the court cannot rely on doctrines of Common Law when there is an express provision in Statute Law; that Statutes rank higher than doctrines of Common Law and that the doctrines only come in to supplement when the statutes are silent.

137. Mr. Kipkogei stated further that absence of a tender document nullifies any purported contract that did not follow the lawful route. He stated that this dispute is not such dispute that is contemplated in the PPDA. It is not a dispute on a bid. In such a dispute, the only Respondent is a procurement entity. His position was that procurement entities cannot complain.

138. It was the Defendant's further submission that the moment the notice of termination was served, the property was available to the 1st Plaintiff. There was no evidence to confirm that the Defendants held unto the building.

139. On Mitigation of losses, counsel stated that it was the Plaintiffs who were to mitigate their losses. They ought to have taken possession of the property the moment they received the termination notice. He pointed out that they now make a claim higher than the value of the building and the fit outs and that this is due to their failure to mitigate losses.

140. Lastly, counsel stated that Article 227 of *the Constitution* of Kenya (2010) requires of Public entities to procure goods and services in a manner that's competitive, efficient and cost effective to ensure the process is fair, equitable and transparent. He stated further that this was a procurement that did not meet the tenets of *the Constitution* and the Act. He urged the Court to dismiss the suits by the Plaintiffs and allow the Counter-claim by the Defendants.

141. Mr. Bundotich in a rejoinder stated that the Law applicable was the PPDA, 2005. That it was questionable whether the 1st and 2nd Defendants explored the legal mechanisms under that Act, which according to him, they did not. He stated that before the award of the Contract, no award or query was raised; that the 1st and 2nd Plaintiffs are shifting the burden of proof to the Plaintiff. He stated that the only way to prove matters procurement is to submit procurement proceedings before the court which the Defendants have not done.

142. On frustration, counsel submitted that the Law is clear and that it would appear that the Defendants are approbating and reprobating at the same time. He wondered what their position really was whether there was a contract or not and the legal effect of the consent order dated 3rd October, 2018, adopted by court on 29th October, 2018 which has not been set aside.

Issues for Determination

143. It was pleaded that the lease agreement the subject matter of this case had an arbitration agreement. The Plaintiffs alleged that they were keen on pursuing arbitration and had indeed initiated arbitration but the 1st and 2nd Defendants frustrated the process by failing to co-operate. This is what forced them to file the suit before the court. The Defendants, upon being served with the summons to enter appearance did not object to the jurisdiction of the court. They went ahead to enter appearance and file a statement of Defence.

144. The legal position is that a party who wishes to take advantage of an arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference of the matter to arbitration. Where a party files a Defence as in this case, it submits itself to the jurisdiction of the court.

145. In the case of Adrec Ltd vs Nation Media Group Ltd (2017) eKLR, the Court of Appeal restated and re-affirmed the position that in a suit founded on a contract containing an arbitration clause, a Defendant ought to contemporaneously with his notice of appointment or appearance file an application for stay of proceedings and to refer the matter to arbitration. Otherwise by filing a statement of Defence the party submits itself to the jurisdiction of the court.

146. The issue of the existence of the arbitration clause and whether the matter should have been referred to arbitration is therefore a non-issue in this matter.

147. Having carefully considered the pleadings filed in this matter, the evidence adduced before the court and the submissions by the party, I am of the considered view that the issues for determination in this matter are;

a. Whether the Plaintiff's Claim against the 1st and 2nd Defendants for unpaid contract sums and interest amounting to Kshs 89,915,490.08 arising from the fit outs and partitioning works is valid and or Lawful.

b. Whether the 1st and 2nd Defendant Counter-claim against the Plaintiffs for Kshs. 53,820,311.09 being the advance payments made to the 2nd Plaintiff through the 1st Plaintiff is merited.

c. Whether the tender for the lease of the suit property by the 2nd Defendant was Lawfully and regularly awarded to the 1st Plaintiff and whether the subsequent contract was enforceable.

d. Whether the contract between the Plaintiffs and the 1st and 2nd Defendants, if at all, was frustrated.

e. Whether the 1st and 2nd Defendant Counter-claim against the Plaintiffs for reimbursement of USD 156,849, being payment of rent for three (3) months for 1st January 2013 to 830th March 3023 is valid.

f. Whether the Rent between the date of alleged termination of lease and the date that the 1st and 2nd Defendants vacated the suit property is payable.

g. Whether the Contracts between the Plaintiffs and the 1st and 2nd Defendants, if at all, were frustrated.

h. What orders should issue in regard to the costs of the suit and the Counter-claim.

Analysis and Determination.

A. Whether the Plaintiff's Claim against the 1st and 2nd Defendants for unpaid contract sums and interest amounting to Kshs 89,915,490.08 arising from the fit outs and partitioning works is valid and or Lawful.

148. I started this judgment by stating the genesis of this case to be the advertisement by the Judiciary for a tender for the lease of office premises. The advertisement was silent on partitioning and fit outs services. The tender document too, issued pursuant to the advertisement was silent on partitioning and fit outs works.

149. As clearly came out from the evidence adduced before the Court, the fits and partitioning works were carried out by the 2nd Plaintiff at the request of the 1st Plaintiff. The Plaintiffs in their amended plaint affirm that the fit outs and partitioning works were undertaken by the 2nd Plaintiff at the request and employment of the 1st Plaintiff on behalf of the 1st and 2nd Defendants. PW1 in his witness statement dated 20th March 2019 at paragraph 17 thereof stated that:

> " In terms of the Head of Terms entered into between the 1st and 2nd Defendants and the 1st Plaintiff, acting for and on behalf of the 1st and 2nd Defendants, the 1st and 2nd Defendants contracted the 2nd Plaintiff to undertake the fit-out partitions works at the leased premises on behalf of the 1st and 2nd Defendants."

150. PW1 repeated the averment in his testimony. In cross-examination by the 1st and 2nd Defendants' advocate, Mr. Gumbo, PW 1 while reiterating the above averments agreed that from the tender documents, partitioning and fit out works were not tendered for.

151. PW1 asserted that it was the 1st Plaintiff who procured the 2nd Plaintiff to do the fit out and partitioning works on behalf of the judiciary. The 1st Plaintiff subsequently entered into an agreement with the 2nd Plaintiff again on behalf of the Judiciary.

152. PW1 affirmed that it had been agreed from the onset, allegedly with the 1st and 2nd Defendants that the 2nd Plaintiff, who was the main contractor for the construction of the main building was to carry out the fit out and partitioning works in order to maintain the standard of the building. The Judiciary in accordance with the testimony of PW1 was however to pay for the said fit outs and partitioning works. This was provided for by the document referred to as the "Addendum" dated 14th March, 2013 signed pursuant to the Head of Terms. The document is at page 85 and 86 of the Plaintiff's bundle.

153. The Addendum, (Agreement) on works and partitioning of Elgon Place, L.R. No. 209/19114) was signed on behalf of the Judiciary by the Chief Registrar of the Judiciary, Gladys Boss Shollei, and a Mr. Nicholas Okemwa, Legal Counsel on 14th March, 2013. On behalf of Sealink Holdings Ltd, one KALPESH PATEL, director, signed on 12th March, 2013 in the presence of BOBBY JOHNSON.

154. The Addendum was signed pursuant to clause 17 of the Head of Terms signed between the Judiciary and Sealink Holdings Limited. In it, the Judiciary covenanted as follows:

   (i) To indemnify Sealink Holdings Ltd from any defects or liabilities that may arise from the workmanship of the contractor carrying out the erections partitions, fixtures or fittings in the building.

   (ii) To take up any tax liability that may befall Sealinks Holdings Ltd as a result of payment done to the contractor for works done above.

155. Sealink Holdings on its part covenanted as follows:To promptly raise invoices pertaining to the contractor to the Judiciary as and when they fall due.To remit payments from the Judiciary pertaining to the invoices above for works done in the building without undue delay to the contractor.

156. Clause 17 in the Head of Terms in part provided as follows:

> " The main contractor will undertake all partitioning/works including structured cabling and fitting at the tenant's cost. This will ensure that the standard and quality fit outs will be done in line with the rest of the development."

157. Article 227(1) of *the Constitution* of Kenya, obligates State Organs and any other Public entity(s) to procure and contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Sub-article 22 enjoins Parliament to prescribe a framework within which policies relating to Procurement and Asset Disposal shall be implemented.

158. At the material time, the legal framework was the Public Procurement and Disposal Act (PPDA) of 2005 and the 2006 Regulations. It is the statute that applied with respect to procurement by a public entity. I find it appropriate at this juncture to restate the purpose of the Act as stated under Section 2 thereof. Its purpose was to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entitles to achieve the objectives listed thereunder, namely;

    a. To maximize economy and efficiency;

    b. To promote competition and ensure that competitors are treated fairly;

    c. To promote the integrity and fairness of those procedures;

    d. To increase transparence and accountability in those procedures;

    e. To increase public confidence in those procedures;

    f. To facilitate the promotion of local industry and economic development.

159. The PPDA under Section 3 defined a 'Public Entity' to mean the Government or any department of the Government, the Courts, the Commissions, a local authority, a State Corporation, the Central Bank of Kenya, a Co-operative Society, a Public School, a Public University, a College or other educational institutions maintained or assisted out of public funds or an entity prescribed as a public entity.

160. No doubt, the Judiciary falls within the definition of a public entity and was bound by the provisions of the PPDA of 2005 then, as is bound by the Provisions of the current statute now. For greater certainty, Section 4 of the Act made provisions for procurements that were excluded from the Act and those with respect to which the Act applied. Section 4(3)(a) was categorical that the renting of premises except from government or a department of government were procurements with respect to which the Act applied. This means that the proposed leasing of the suit property, which was private property was a procurement that squarely fell within the scope of the PPDA.

161. Every public entity was enjoined under Section 27 of the PPDA, 2005 to ensure compliance with the Act, regulations and any directions of the Authority with respect to each of its procurements. The Accounting officer of a Public entity was the person primarily responsible for ensuring that the public entity fulfilled its obligations under subsection 1 or otherwise complied with the provisions of the Act, regulations and directions of the authority.

162. For the Judiciary, the primary responsibility of ensuring compliance with the provisions of the PPDA, was on the Chief Registrar of the Judiciary established under the Provisions of Article 161(2)(c) of *the Constitution*. The Chief Registrar of the Judiciary is the Chief Administrator and Accounting Officer of the Judiciary.

163. The PPDA, 2005 provided for various procurement procedures with open tendering being the preferred procedure. However, the Act under part VI made provision for alternative procurement procedures. The alternatives are what is referred to as restricted tendering and direct procurement.

However, Section 29(3) put pre-conditions which had to be met before alternative procurement procedure could be resulted to, namely:

a. The procuring entity obtains the written approval of its tender committee; and

b. The procuring entity records in writing the reasons for using the alternative procurement procedure.

164. In regard to the fit outs and partitioning works undertaken by the 2nd Plaintiff purportedly on behalf of the Judiciary, it is clear that the services of the 2nd Plaintiff were not procured in accordance with the provisions of Article 227 of *the Constitution* and the Public Procurement and Disposal Act, 2005. The engagement of the 2nd Plaintiff to carry out the works allegedly on behalf of the Judiciary, and for works that were to be paid for from Public funds was illegal.

165. Argument was put forth that the basis upon which the 2nd Plaintiff was engaged to carry out the partitioning and fit outs works was the document referred to as the Head of Terms that was executed by the 1st Plaintiff and the 1st and 2nd Defendants. The Judiciary purportedly recognized the Head of Terms and committed to honour it through the "Addendum" dated 14th March, 2013 signed pursuant to the Head of Terms. The document is at page 85 and 86 of the Plaintiff's bundle. This Addendum, (Agreement) on works and partitioning of Elgon Place, L.R. No. 209/19114) as I had already noted was signed on behalf of the Judiciary by the Chief Registrar of the Judiciary, Gladys Boss Shollei, and a Mr. Nicholas Okemwa, Legal Counsel on 14th March, 2013.

166. This addendum (agreement) and the clause in the head of terms that authorized the 1st Plaintiff to employ the 2nd Plaintiff for the fit outs and partitioning works without undergoing the procurement procedure is explicitly a violation of the law and *the Constitution*. They were agreements deliberately made to subvert or short-circuit the procurement law.

167. There was an attempt to make it appear as if the payments for the fit outs and partitioning works were to be paid to the 1st Plaintiff who already had a contract with the 2nd Defendant. It was provided that the invoices raised by the 2nd Defendant were to be forwarded through the 1st Defendant. The payments were to follow the same channel. The 1st Plaintiff was the 'go-between'.

168. Such agreements made with the clear intention of subverting the law cannot be enforced by a court of law. They are null and void. Such must be the fate of the document titled Head of Terms and the Addendum, (Agreement) on works and partitioning of Elgon Place, L.R. No. 209/19114) dated 14th March, 2013 and signed pursuant to the Head of Terms.

169. It was also submitted on behalf of the Plaintiffs that the Defendants could not raise the Defence of illegality and non-compliance with the public procurement and disposal law since they had not challenged the process of procurement and or award of the tender to the Plaintiffs under the mechanisms provided under the applicable law then, the PPDA, 2005.

170. This is not the first and certainly not the last time that this kind of argument is being advanced in a case of this nature. I certainly disagree with the argument for reasons well established in law.

171. In the case of Royal Media Services -vs- Independent Electoral and Boundaries Commission and 3 others [2019] eKLR the court pronounced itself in the following words:-

> "Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of Ex turpi causa non oritur action, that is from a dishonorable cause an action does not arise."

172. In the case of Kenya Pipeline Company Ltd –versus Glencore Energy (UK) Ltd [2015] eKLR, the court stated as follows:-

> "In STANDARD CHARTERED BANK V INTER COMS SERVICES LTD & 4 OTHERS (supra) this court.........accepted the submissions made that once an issue of breach of statute is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the courts fundamental role is to uphold the law. The court upheld and endorsed the old English case of Holman V Johnson (1775-1803) ALLER 98 where Chief Justice Mansfield stated:-
>
> The principle of public policy is this;
>
> Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

173. This court is a court of law. Once an issue of breach of statute or illegality is brought to its attention or is apparent in a matter before it, whether it is raised or not, the court will rise to the occasion and uphold the purpose and principles of *the Constitution*. The fundamental role of the court is to uphold *the Constitution* and the law.

174. Secondly, under Section 93(1) of the PPDA, 2005, it was not open for a procurement entity to lodge a complaint before the Board. The mechanism was established for bidders. The said section provided that, "any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed."

175. I must further point out that Section 27 (1) of the PPDA, 2005 also obligates contractors, suppliers and consultants to comply with all the provisions of the Act and regulations.

176. As the Court in the case of Noa Investment Limited -vs- County Government of Nyamira (2021) eKLR, stated:

> "The Plaintiff (a contractor) had a similar and equal responsibility to ensure that the procurement followed the law."

177. The Court in the above case pronounced that any procurement that is in violation of the Law and *the Constitution* is illegal. The Court further made reference to the decision in the case of Royal Media Services -vs- Independent Electoral and Boundaries Commission and 3 others [2019] eKLR and quoted extensively from the said case. I find it appropriate to rely on the same quotation here.

> "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 an

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

46. The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being overlooked. Non-compliance could easily be seen. For this reason, this Court is unwilling to hold that RMS should be excused from the flawed process. 47. But an argument had been made that not to allow the claim would be to hurt RMS and to allow IEBC to get away with services without paying for them. This Court is not unsympathetic to this argument yet there is a greater public good in a Court declining to enforce a transaction that is contrary to statute. Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of Ex turpi causa non oritur action, that is from a dishonorable cause an action does not arise. There may be good reason not to resolve such argument in favour of a contractor or supplier who is partly to blame or who is not entirely blameless. I reasoned as follows in Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards [2016] eKLR:-

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

works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.

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

178. I reiterate that the procurement of the fit out and Partitioning Works from the 2nd Plaintiff on behalf of the Judiciary by the 1st Plaintiff was illegal. The resultant contract is an illegal contract; though is the commitment given in the addendum/agreement on works and partitioning of Elgon Place L.R No. 209/19114 signed on 14th March, 2013 between the 1st Plaintiff and the 2nd Defendant.

B. Whether the 1st and 2nd Defendants' Counter-claim against the Plaintiffs for Kshs. 53,820,311.09 being the advance payments made to the 2nd Plaintiff through the 1st Plaintiff is merited.

179. The question then that begs answers is whether this court should recognize and give legal sanction to the agreement between the Plaintiffs purportedly for and on behalf of the 1st and 2nd Defendants referred to above.

180. I will answer that question with a Capital NO!

181. Article 3 of *the Constitution* obligates every person to respect, uphold and defend *the Constitution*.

182. Secondly, Article 10 of *the Constitution* requires all State Organs, State Officials, Public Officers, and all persons whenever any of them:-

a. Applies or interprets *the Constitution*;

b. Enacts, applies or interprets any law or

c. Makes or implements public policy decisions to be bound by the National values and principles of governance key among them for this purpose, integrity, transparency and accountability.

183. Thirdly, in exercising judicial authority, the courts of this country are enjoined to apply the principles enumerated under article 159 (2) (a) (e) of *the Constitution*. Sub-article (2) (e) is of great relevance here. This court is guided in answering the above question by the said sub-article, 'to ensure that the purpose and principles of *the Constitution* are protected and promoted.'

184. In the case of Kenya Pipeline Company Ltd –versus Glencore Energy (UK) Ltd (supra) the court the upheld and endorsed the old English case of HOLMAN v JOHNSON (1775-1803) ALLER 98, where Chief Justice Mansfield stated:-

" The principle of public policy is this;

Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country,

then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

185. In Kenya Airways Ltd vs Satwant Singh Flora (2013) eKLR, the court stated that,

> "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him."

186. This Court will not lend its aid to a party who founded his cause of action on an illegal act. The court will not be a partaker in the subversion of *the Constitution* and the Law.

187. The court will therefore dismiss the claim for the monies claimed arising from the fit out and partitioning works undertaken by the 2nd Plaintiff on the basis of illegality and non-compliance with the law of this country.

188. On the same note, whatever amounts were paid out of public funds to the 2nd Plaintiff as part payments by the 2nd Defendant through the first Plaintiff must be returned to the Public coffers. In that regard, the Counter claim by the 1st and 2nd Defendants claiming the refund of the sum of Kshs. 53,820,311.09 is allowed. The said amount should be paid back with interest at court rates from the date of filing of the Counter-claim until payment in full.

C. Whether the tender for the lease of the suit property by the 2nd Defendant was Lawfully and regularly awarded to the 1st Plaintiff and whether the subsequent contract was enforceable.

189. I will handle this issue alongside the 5th issue identified for determination, i.e. Whether the 1st and 2nd Defendant Counter-claim against the Plaintiffs for reimbursement of USD 156,849, being payment of rent for three (3) months for 1st January 2013 to 830th March 3023 is valid.

190. As I have already stated elsewhere in this judgment, the applicable Law at the material time was the Public Procurement and Disposal Act (PPDA), 2005 (now repealed) and the 2006 Regulations. The tender for the lease of office premises advertised by the Judiciary was what is referred to under part V of the PPDA, 2005, as an open tender. Part 5 of the Act sets out the requirements for open tendering.

191. The process of open tendering was supposed to begin with an invitation to tender which was supposed to include the details stipulated in section 51 of the Act. The details include:

    a. Name and address of the procuring entity;

    b. The tender number assigned to the procurement proceedings;

    c. A brief description of the goods, works or services being procured including the time limit for delivery or completion;

    d. An explanation of how to obtain the tender documents, including amount of any fee;

    e. An explanation of where and when tenders must be submitted and where and when the tenders will be opened; and

    f. A statement that those submitting tenders or their representatives may attend the opening of the tenders.

192. Part V also provides for preparation of tender documents. Section 52 requires that they contain enough information to allow fair competition among those who may wish to submit the tenders. It is also a requirement that the procuring entity takes such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders. This is majorly achieved by a publication of the invitation to tender in a newspaper(s) of nationwide circulation and which has been regularly published over the last 2 years before the date of the advertisement, and on the website of the procuring entity.

193. The process of opening of the tenders was also provided for in the Act which at the time was by a tender opening committee appointed by the accounting officer as provided for under Section 60 of the repealed Act. The process to be followed was stipulated in the same section.

194. Only responsive tenders were to proceed to the evaluation stage. A responsive tender was defined under Section 64 of the Act as that which conforms to all the mandatory requirements in the tender documents. Evaluation and comparison was to be done using the procedures and criteria set out in the tender documents. Section 66 (2) of the PPDA, 2005, emphasized that No Other Criteria Shall Be Used in evaluation and comparison of the responsive tenders. The successful tender shall be the tender with the lowest evaluated price.

195. The procuring entity was required to notify the successful tenderer before the expiry of the period during which tenders were supposed to remain valid that his tender had been accepted. Subsequently, the procuring entity and the successful tenderer were to enter into a written contract based on the tender documents. The contract was to be entered into within the period specified in the notification to the successful tenderer, but not until at least 14 days had lapsed following the giving of the notification.

196. The 1st and 2nd Defendants in response to the Plaintiffs claim alleged that the tender that was submitted on behalf of the 1st Plaintiff was materially at variance with the terms in the tender document. Essentially, the allegation by the 1st and 2nd Defendants was that the tender submitted by or on behalf of the 1st and 2nd Defendant was non-responsive.

197. The 2nd critical contestation by the 1st and 2nd Defendants was to the contract entered into following the procurement process. The contract, that was referred to as the 'Head of terms' was executed following an illegal and irregular procurement process, was non-compliant with the terms in the tender document and contained illegal provisions more particularly the requirement that the 1st Plaintiff was to employ the 2nd Plaintiff as a contractor for purposes of partitioning and fit outs without undergoing competitive process. It was the 1st and 2nd Defendant's case that the above irregularities and illegalities rendered the subsequent lease agreement between the parties null and void.

198. The Plaintiffs in their submissions categorically submitted that; No evidence was tendered by the Defendant to demonstrate that the 1st Plaintiff's bid and premises did not meet the criteria to be awarded the contract. No evidence was tendered to demonstrate that the said tender did not meet the requirements relating to the works or services being procured in accordance with the tender document. The procurement proceedings were not terminated before entering into a contract pursuant to Section 36(1) of the Act.

199. Further that no evidence was tendered on any inappropriate influence of the tenders against the Plaintiffs or their agents in breach of Section 38 of the Act. Additionally, no evidence was tendered to demonstrate that there was a corrupt practice in the said tender that would contravene Section 40 of the Act. No evidence was tendered to demonstrate that the 1st Plaintiff's bid was non-responsive or to demonstrate that the tender document did not meet the requirements under Section 52 of the Act.

200. The Plaintiffs in regard to the claims of irregularities and illegalities in the tender process further submitted that the PPDA, 2005 sets out the forum where disputes arising from procurement were to be determined namely, the Public Procurement Appeal and Review Board. The Plaintiffs argue that there was no evidence that any bidder contested the award of the tender either. The Plaintiffs' position was that it was not within this Court's jurisdiction to determine the allegations of illegalities and irregularity.

201. Even if the Court had the jurisdiction, from the totality of the evidence adduced, the procurement proceedings were above board.

202. On their part, the 1st and 2nd Defendants submitted that what the Judiciary and the 1st Plaintiff executed known as a 'Head of Terms' was executed before the lease Agreement (written contract) was executed. The Head of Terms upon which the 1st Plaintiff's case is based had not foundation in the tender document and was an outright illegality. That illegality went to the core of the contract and was not a minor aspect.

203. In regard to the Head of Terms agreement, the subsequent lease agreement and the partitioning and fit outs agreement, the 1st and 2nd Defendants' position was that the same were unlawful and illegal documents for the reasons that:

a. The 1st & 2nd Defendants were not privy to the alleged agency relationship between the 1st and 2nd Plaintiffs in tender No. JUD/12/2012-2013 in which Knight Frank submitted a bid and was awarded the bid as a registered estate agent. Knight Frank did not indicate that it was submitting the bid on behalf of the 1st Plaintiff.

b. Knight Frank despite receiving the notification of award for tender as the successful bidder did not submit a Notice of acceptance but instead provided a 'Head of Terms' document which was materially at variance with the terms of the tender document.

c. The 'Head of Terms' was an illegal document that was not contemplated in the tender document and was therefore void.

204. The 1st and 2nd Defendants submitted that owing to the cited irregularities and illegalities outlined, the resultant lease was null and void from the onset and therefore unenforceable.

205. The 3rd Defendant, who is the Attorney General submitted that there were illegalities during and after the tendering process. The 3rd Defendant zeroed in on the tender/contract price. It submitted that under clause 2.9 of the tender document, the tenderer was required to indicate the unit prices where applicable and total tender prices of services it was to provide under the contract. The price was to be quoted in Kenya shillings unless otherwise specified in the 'Appendix to instructions to Tenderers'.

206. The 3rd Defendant noted that the Appendix to instructions to Tenderers clause 2.10 was categorical that there were no other currencies allowed. Further, the general condition of the contract clause 3.8.1 stated that No variation in or modification to the terms of the contract was to be made except by written amendments signed by the parties. It is the 3rd Defendant's submissions that the tender proceeded to quote rent payable in USD, service charge in Kshs, and parking fees in USD in spite of the fact that no variation had been done in writing by both parties thereby making the resultant contract null and void ab initio.

207. The question that I must address is whether the tender submitted on behalf of the 1st Plaintiff was responsive in the sense of Section 64 of the PPDA, 2005. The Section defined a responsive tender as

that which conforms to all the mandatory requirements in the tender documents. That was the criteria upon which any bids submitted were to be evaluated against.

208. The 1st and 2nd Defendants in their Defence asserted that the tender submitted on behalf of the 1st Plaintiff was none-responsive. Amongst the many issues they have highlighted includes that fact that Knight Frank Kenya Ltd who purportedly submitted the successful bid had not disclosed in the tender document that they were doing so on behalf of the Plaintiff herein. PW2 testified that he was the one who had submitted the tender documents. He agreed that it was not disclosed anywhere in the document that the tender was being submitted on behalf of the 1st Plaintiff.

209. Consequently, and as a result of the non-disclosure, the notification of award was issued to Knight Frank Kenya Ltd.

210. The 1st and 2nd Defendants further state that neither the 1st Plaintiff nor Knight Frank Kenya Ltd, their supposed agents communicated acceptance of the award as mandatorily required in the tender documents. Instead, Knight Frank Kenya Ltd submitted a document referred to as a "Head of Terms".

211. PW2 in his testimony and in response to questions by the Advocate for the 1st and 2nd Defendants stated that the "Head of Terms" was an offer by Knight Frank Kenya Ltd to the Judiciary. It had to be accepted within 14 days, failing which they would proceed to look for another tenant.

212. I find this intriguing. The tenderer, who was responding to an invitation to tender by the Judiciary, the procuring entity literally turned the tables against the procuring entity. Rather than accept the terms of the tender, the tenderer made its own terms and modified the terms of the procuring entity in the tender document to suit it, and then presented to the Judiciary its own "offer" with a condition to 'take it or leave it in 14 days'.

213. It is Crystal Clear that the "Head of Terms" was prepared before the notification of award. It is dated 29th November, 2012. PW 2 testified that the notification of award was received in their offices on 3rd December, 2012.

214. It is in the Head of Terms that Knight Frank introduced the 1st Plaintiff herein. It was also in this document as discussed earlier where it was provided that the 1st Plaintiff was to employ the 2nd Plaintiff to carry out the fit outs and partitioning works, albeit without going through the public procurement process. This is a document which the court has already held was illegal, null and void for contravening explicit provisions of *the Constitution* and the Law.

215. The 1st and 2nd Defendants pointed out other deviations from the tender document including quoting the rent in USD dollars instead of Kenya shillings. The 1st and 2nd Defendants indicated that the tender document had required prices quoted to be 'net', inclusive of all taxes and delivery costs. Apparently, the prices by the 1st Plaintiff Knight Frank were not inclusive of VAT/Taxes.

216. It was also pointed out that the Judiciary had advertised for a space of 40,000 Sq. feet. What the 1st Plaintiff offered was 49,000 Sq. feet. There was a whopping 9,000 Sq. feet difference.

217. Having considered the evidence and the submissions by the parties on this specific issue, I am persuaded and agree wholly with the submissions by the Defendants that the bid submitted by the 1st Plaintiff materially deviated from the tender document. It was therefore non-responsive. The award to the 1st Plaintiff was therefore contrary to the provisions of the PPDA, 2005.

218. Surprisingly, the notification of the award was issued in the name of Knight Frank Kenya Ltd who until that point in time had not disclosed to the procuring entity that they had presented the tender on behalf of the 1st Plaintiff. They only introduced the 1st Plaintiff through the Head of Terms. The

1st and 2nd Defendants did not protest but accepted the Head of Terms, and executed it. The non-disclosure up to that stage would have been a valid ground for terminating any further engagements with the tenderer.

219. Be that as it may, the lease signed by the parties was premised to a great extent on the Head of Terms which I have noted deviated from the tender document.

220. In addition to the deviations highlighted above, the lease provided for service charge that was not in the tender document. It also introduced payment of rent deposit. It was on that basis that the sum of USD 156,849 was made to the 1st Plaintiff by the 1st and 2nd Defendants.

221. Section 68 of the PPDA, 2005 was categorical and framed in mandatory terms that the successful tenderer and the procuring entity were to enter into a written contract based on the tender documents. The Head of Terms document and the lease documents materially deviated from the tender document contrary to the clear provisions of the above section. This makes both of them illegal contracts, null and void.

222. I already stated that this Court and any other court for that matter shall not enforce an illegal contract. I need not say any more.

223. Consequently, the monies paid - USD 156,849, by the Judiciary to the 1st Plaintiff as rent for 3 months from 1st January, 2013 to 30th March, 2013 should be refunded as prayed for in the Counter-claim.

D. Whether the Contracts between the Plaintiffs and the 1st and 2nd Defendants, if at all, were frustrated.

224. The 1st and 2nd Defendants submitted that the lease agreement with the 1st Plaintiff was defeated by the doctrine of frustration. This was mainly due to the fact that the suit property was inhabitable. They cited concerns raised by the Judges of the Court of Appeal on non-ionizing radiation from telecommunication transmission masts adjacent to the suit property. They too cited a recommendation by one of the radiation experts, Dr. Muthumbi, that the building should not be occupied until comprehensive assessment had been undertaken to establish radiation levels of the cumulative non-ionizing radiation at various selected points/offices due to the presence of a large number of antennas installed on masts/towers next to the building.

225. From the side of the 1st and 2nd Defendants, the comprehensive assessment was never conducted to allay the fears of the learned Judges of Appeal and members of the Law Society who had been warned by their Society not to attend any court proceedings in the suit property. The 1st and 2nd Defendants therefore did not have basis to condemn the suit property as unfit and unsafe for occupation. The assessments that were recommended in the year 2013, ought to have been carried out before entering into any contract. Section 68(3) of the PPDA, 2005 provided that no contract is formed between the successful tenderer and the procuring entity until the written contract is entered into. The period between the issuance of the notification of award and the signing of the contract provided a 'grace period', so to speak, for the Judiciary to have satisfied itself on the suitability of the suit property.

226. In any event, the 1st Plaintiff commissioned assessments which were in agreement with the findings of the Communications Commission of Kenya (CCK) that the suit property was fit for human occupation. The Defendants did not offer any evidence to contradict the evidence of the expert presented by the Plaintiffs.

227. I disagree with the 1st and 2nd Defendants' submissions that the lease was frustrated. There was nothing unforeseeable to be said to have frustrated the performance of the contract. That is a Defence that would not be available to the Defendants in the circumstances of this case.

228. However, my earlier finding that the Contracts between the Parties herein were illegal, null and void ab initio holds.

229. A Contract that is void ab initio is a nullity. As Lord Deming stated in the case of Macfoy -vs- United Africa Co. Ltd [1961] 3 ALL E.R 1169,

> "If an act is void, then it is in Law a nullity. it is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. it is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

230. Having held that the lease agreement was void ab initio, what then was there for the 1st and 2nd Defendants to terminate?

E. Whether the Rent between the date of alleged termination of lease and the date that the 1st and 2nd Defendants vacated the suit property is payable.

231. Counsel for the Plaintiffs argued that rent should have been payable until the date the 1st and 2nd Defendants ceded possession following the Consent Order between the parties. While this argument would off course be defeated on the basis of the illegality of the Contract, the Plaintiff seems to have forgotten the testimony of their own witness, PW 1. PW1 in answering a question by the Advocate for the 1st and 2nd Defendants in cross-examination, admitted that the 1st and 2nd Defendants had offered to give back the suit property by their letter of 23rd May, 2014, written by the Chief Registrar of the Judiciary. The 1st Plaintiff however, through its property agent, Knight Frank Kenya Limited responded vide a letter dated 13th June, 2014 warning the 2nd Defendant to refrain from removing any properties from the building. It was the 1st Plaintiff who disallowed the 2nd Defendant from moving out of the suit property until the Consent order was adopted in Court.

Conclusion

232. The upshot of the above analysis is that:

a. The 1st and 2nd Plaintiffs' case against the Defendants is dismissed in its entirety.

b. The 1st and 2nd Defendants' Counter-Claim is allowed in the following terms:

i. A declaration be and is hereby issued that the notification of award issued to Knight and Frank Ltd by the 2nd Defendant on 26th September, 2012 in respect to tender No. JUD/12/2012-2013 by the 2nd Defendant for the lease of office premises was illegal/ null and void.

ii. A declaration be and is hereby made that the lease dated 22nd April, 2013 and registered on the title of the parcel of land known as L.R. No. 209/19114, Nairobi on 17th September, 2013 is illegal and therefore null and void.

iii. Judgment is entered in favour of the 1st and 2nd Defendants for the sum of USD 156,849 against the 1st Plaintiff (being payment of rent for 3 months for 1st January, 2013 to

30th March, 2013) with interest at court rates from the date of filing the counter-claim until payment in full.

iv. Judgment is entered in favour of the 1st and 2nd Defendants for the sum of Kshs 53,820,311.09 against the 2nd Plaintiff (being the advanced payments made to the 2nd Plaintiff by the 2nd Defendant through the 1st Plaintiff) with interest at court rates from the date of filing the counter-claim until payment in full.

c) The 1st and 2nd Defendants are awarded the costs of the suit and the counter-claim which shall be borne by the plaintiffs jointly and severally.

233 It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

M.D. MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:

MR. BUNDOTICH FOR THE PLAINTIFFS

MR. OCHOLA FOR THE 1ST AND 2ND DEFENDANTS

MS. NDUNDU FOR THE 3RD DEFENDANT

COURT ASSISTANT: YVETTE

M.D. MWANGI

JUDGE