Coast Development Authority v Endebess Development Co Ltd (Civil Appeal E003 of 2020) [2023] KECA 440 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 440 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E003 OF 2020

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

APRIL 14, 2023

BETWEEN

COAST DEVELOPMENT AUTHORITY .... APPELLANT

AND

ENDEBESS DEVELOPMENT CO LTD .... RESPONDENT

(Being an appeal from the judgement and order of Honorable Lady Justice D.O. Chepkwony delivered on 9th June, 2020 in Mombasa HCCC No. 11 of 2017)

JUDGMENT

1. The genesis of this appeal is suit filed by the Respondent herein against the Appellant in which the Respondent, claimed from the Appellant Kshs 62,000,000.00 with interest at the rate of 10% per annum from April 14, 2013 till payment in full. The Respondent also claimed costs and interest thereon at court rates.

2. According to the Respondent, in 2012 both the Appellant and the Respondent were involved in block cutting business in Soyosoyo area in Kilifi County. Towards this end the Respondent purchased block cutting machines and accessories. In June/July 2012, the Appellant approached the Respondent with a request for the lease of the Respondent's said machineries and accessories in order to increase the Appellant's production capacity, a request which the Respondent acceded to and a lease agreement dated July 10, 2012 was thereafter signed. In that agreement, it was agreed that the Appellant would pay the monthly rental charges from the proceeds of the business.

3. Due to good business generated by the said machines, in April, 2013, the Appellant approached the Respondent with a proposal to purchase the said machines and accessories which proposal was accepted by the Respondent and the parties agreed on the purchase price of Kshs 62,000,000.00. According to the Respondent, the said contract was approved by the Appellant's tender committee

on March 6, 2014. By the time of the said agreement for sale, the said equipment were, by virtue of the earlier lease agreement, in possession and use of the Appellant.

4. The purchase price, according to the plaint was to be paid in monthly installments of Kshs 5,000,000.00 on or before 10th of every month with effect from April, 2013 from the proceeds of the sale of the blocks and in default the Appellant would be charged 10%. However, the appellant never honoured its obligations and never made any payment on the ground of lack of budgetary allocation and a slump in the block cutting business. This, according to the Respondent was, despite the fact that the Appellant requested for Kshs 66,424,673.00 in its 2013/2014 – 2014/2015 budget allocation from the Ministry of Devolution & Planning. Further, the Respondent learnt from the Report filed by the Appellant that the Appellant generated gross income of Kshs 179,365,944 from the block cutting business from 2011 to 2016.

5. According to the Respondent, in various correspondences exchanged between the parties including the letter dated August 16, 2016, the Appellant acknowledged its indebtedness to the Respondent and sought for time to source for funds. Instead of doing so, the Appellant unilaterally purported to change the terms of the said contract by proposing, on September 14, 2016, to pay Kshs 22,681,000.00 which, in the Appellant's view, was the value of the assorted machines. This proposal was rejected by the Respondent whose position was that by then the value of the said equipment had depreciated due to tear and wear arising from their use by the Appellant. It was disclosed that despite the Attorney General's advice that the said amount be paid, the Appellant failed to do so.

6. However, upon being cross-examined, Michael Magero, who testified on behalf of the Respondent, admitted that the agreement did not disclose who signed it on behalf of the Respondent but insisted that it was signed by him in his capacity as the Respondent's General Manager with authority to transact on behalf of the Respondent. He also admitted that the agreement was not sealed and that it was signed on a Sunday which according to him was a working day since the machines were operating 24/7. The said agreement, it was admitted, was not stamped by an advocate. In his view, the Appellant must have been getting some income since prior to the agreement for sale, the Appellant made payments in respect of the lease.

7. On the part of the Appellant, a written statement of defence was filed whose contents were also captured in the evidence of Dr Mohamed Keynan Heizan, its Managing Director. According to the evidence, the parties purportedly entered into a purchase agreement on the April 14, 2013 by which the Respondent offered to sell machines and accessories to the Defendant through a letter of offer dated April 10, 2013 for Kshs 62,000,000. It was however his position that the purchase agreement was never tabled before the Appellant's tender committee for ratification hence the legal procedure for procurement was not undertaken. He further stated that the alleged execution of the Purchase Agreement was conducted without due regard to procurement guidelines which rendered it voidable in law. In addition, the Purchase Agreement documents lacked the company's seal as is required hence the Purchase Agreement did not follow due process and law.

8. It was the Appellant's position that upon demand of payment by the Respondent the matter was referred to the parent ministry, which advised on a valuation report for the machines which report returned a value of Kshs 22,681,000 as opposed to the Kshs 62,000,000 purchase price. According to the Appellant, the Board of Directors did not approve the sale.

9. It was further stated that the Appellant is Government body and due to public policy reasons cannot commit taxpayers money without following due process. It was averred that the Appellant's actions in using all means to get excessive payment are suspect and invites further scrutiny.

10. It was however disclosed that there was a "without prejudice" letter by the Appellant to the Respondent explaining the issues with funding that the Appellant faced. That, however, was not an explicit acknowledgement of debt and cannot be used as evidence in the proceedings. The Appellant denied that it tried to unilaterally alter the purchase price. While denying that it had refused or neglected to pay monies to the Respondent, it was the Appellant's position that it was only insisting that for public policy reasons the Purchase Agreement be investigated and intimately scrutinized before any further steps are taken. While admitting that the tender committee recommended that the tender be valued, he maintained that this did not amount to their concession of the agreement.

11. During the hearing the said witness noted that the signatories to the lease agreement were not the accounting officers of the Appellant and whereas such agreement ought to have been signed by the Appellant under a seal, it was by a letter. He confirmed that the Appellant paid the Respondent a total of Kshs 29,394,834.00 in respect of the lease but that in the financial year 2012-2013, the project did not make any profit but instead made a loss of Kshs 35,915,000/- contrary to the term of the agreement that the payment would be made on 50:50 percent of the profit. According to the witness, as no profit was realized from the inception of the project, even the said payments were made contrary to the lease agreement.

12. The witness confirmed that at the time of the transaction he was not the Managing Director having taken over the office on May 13, 2016 but admitted that the equipment were, by then, at the Appellant's site and were in use by the Appellant before they became obsolete in 2016. Upon his taking over, he forwarded all the documentation to the Principal Secretary of the parent ministry for verification and also sought legal advice from the Attorney General. The Attorney General advised that valuation be done by an independent valuer, a recommendation which was adopted by the Appellant's Tender Committee. As a result, the Inspectorate of State Corporations undertook the said valuation and reported that though it was the discretion of the Appellant, the Appellant should pursue the former Managing Director who made the payments.

13. The second defence witness, Violet Indiazi, the Appellant's head of procurement, confirmed that subsequent to the lease agreement, the parties executed a sale agreement dated April 14, 2013. According to her though the lease/sale agreement was to be captured as lease of machines in 2012-2013, this was not done. It was her evidence that though it is her department that ought to state the type of procurement to be undertaken for any item, the subject matter was not brought to the attention of the said department.

14. It was her evidence that, in this case, the method was direct procurement contrary to the guidelines of the procurement law.

15. In her judgement, the learned trial Judge held that since under Order 2 rule 4 of the *Civil Procedure* Rules, the Appellant ought to have pleaded limitation and it did not do so, hence she could not consider that defence. She found that the two parties entered into a sale agreement dated April 14, 2013 for sale of the assorted machines and that the Appellant was in possession of the said machines since 2012 and employed their use in its business of stone cutting; that since the letter of offer dated April 10, 2013 was clear that the Respondent offered to sell the subject machines to the Appellant for a consideration of Kshs.62,000,000/= which was accepted when the parties executed the said sale agreement, the argument by the Appellant that there were no prior negotiations was misconceived. This is due to the fact that there was no doubt that the contract was signed by the Appellant's former managing director on satisfaction that the machines were still in a working condition and that it was not shown that the said director lacked the authority to sign the subject sale agreement. It was the Court's view that it could only enforce what the parties agreed and not what seemed fair after the

valuation which was undertaken three years later, otherwise court would have been guilty of rewriting the contract.

16. As regards the contravention of the procurement laws in execution of the contract, the court found that the Appellant had a legal remedy against its former Managing Director if he neglected his duties.

17. It was based on those findings that the Court found the case merited, entered Judgment against the Defendant in the sum of Kshs. 62,000,000/- with interest thereon at the agreed rate of 10% per annum as from April 14, 2013 until payment in full as well as the costs of the suit.

18. That judgement aggrieved the Appellant who has lodged this appeal in which it relies on the following grounds:

    1. That the learned judge erred in law and in fact by failing to consider the Appellant's Defence but considered the Respondent claim in its entirety.

    2. That the learned Judge erred in law by dismissing the Preliminary objection raised by the Appellant on the suit being time barred, the suit having been filed on February 7, 2017, cause of action arose on April 14, 2013.

    3. That the learned judge misdirected herself and erred in law and in fact by failing to take into account that the Appellant's procurement processes were flouted rendering the contract null and void ab initio.

    4. That the learned judge failed to take into account well established principles of law relating to law of contracts, the *Coast Development Authority Act*, Cap 449 and *Public Procurement* Act relating to the tendering processes, purchase and execution of documents by the Appellant.

    5. That the learned judge and erred in law and in fact by failing to consider the Appellant's tender committee had not approved the purchase as at the date of the Agreement.

    6. That the learned judge misdirected herself and erred in law and in fact by failing to consider valuation was never done prior to the purchase.

    7. That the learned judge totally failed to appreciate the Appellant's entire case.

19. The virtual hearing before us proceeded on the basis of the written submissions which were highlighted by learned counsel Mr Abdullahi Yusuf who appeared with Mr Gongo for the Appellant and Mr Mulani who appeared with Mr Onyancha for the Respondent.

20. On behalf of the Appellant, it was submitted that the learned trial Judge erred in law by dismissing the preliminary objection raised by the Appellant on the suit being time barred and relied on Section 3(2) of *Public Authorities Limitation* of Act. It was contended that an issue of jurisdiction can be taken by the court suo moto or on application by a party. In support of this submission, the Appellant cited the decision of this Court in *John K. Malembi v Trufosa Cheredi Mudembei & 2 Others* [2019] eKLR, the decision of the Supreme Court in *Republic v Karisa Chengo & 2 Others* [2017] eKLR and *Francis Macharia Karanja & 6 Others v Virginia Muthomi Karanja* [2020] eKLR.

21. It was further submitted that the trial Court did not consider the Appellant's case which enumerated the many incurable irregularities and illegalities such as want of legal contractual capacity to enter into a contract since the Respondent is not registered with the registrar of companies; lack of Appellant's procurement plan to procure the said machines; lack of approval by the Appellant's Board of Directors; no budgetary allocations made for the machines; mode of payment; lack of capacity by the person who executed the agreement on behalf of the Appellant; execution of the agreement on a Sunday, a

non working day and that the Respondents were not competitively awarded the tender to supply the machines.

22. According to the Appellant, the provisions of the *Public Procurement and Disposal* Act, 2005 and *Public Procurement and Disposal* Regulations, 2006 dealing with direct procurement were not followed and, in this case, there was no justification to resort to direct procurement of the Machines. Reliance was placed on *Ethics & Anti-Corruption Commission v Vulcan Lab Equipment Ltd & Another* [2020] eKLR.

23. It was contended that since Section 27 of the *Public Procurement and Disposal* Act places the duty to comply with the provisions of the procurement laws on all the parties involved in the procurement process, the Respondent cannot be excused for not complying with the procurement laws and cannot benefit therefrom. This submission was based on *Blue Sea Shopping Mall Ltd v City Council of Nairobi 3 Others* [2015] eKLR and *Pius Kimaiyo Langat v Co-Operative Bank of Kenya Ltd* [2017] eKLR.

24. It was further submitted that the subject sale agreement neither disclosed who executed it on behalf of the Appellant nor was the Appellant's common seal affixed to it. Further, the evidence was that it was never signed by the Appellant's accounting officers nor by the Appellant's former Managing Director. In this regard the Appellant relied on the decision of *Omaiko Momwamu v John Ole Klusu* [2016] eKLR and in arguing that the learned trial judge erred in both law and facts in enforcing a contract that was not properly executed as per the procurements laws.

25. On behalf of the Respondent, it was submitted that limitation was not pleaded and never arose at the hearing but was raised for the first time in the submissions contrary to Order 2 Rule 4(1) of the *Civil Procedure Rules* 2010. This denied the Respondent the opportunity to reply to the same. In support of its submission the Respondent relied on *James K. Kamau v Nairobi City Council* [2018] eKLR. In the Respondent's view, the instant case is distinguishable from the rule prescribed in *Odd Jobs v Mubia* (1970) EA, and that the authorities cited by the Appellant relate to cases in which the Court determines, on its own motion, its own competency to hear and determine the dispute before it in the first instance and not limitation. In this regard the Respondent relied on *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR.

26. According to the Respondent, Section 3(2) of the *Public Authorities Limitation* Act does not offer refuge to the Appellant, a body corporate with perpetual succession and the ability to sue and be sued. In support of this contention, the Respondent relied on *Kenya Revenue Authority v Habimana Sued Hemed & another* [2015] eKLR and *Intamba Freights S.A v Kenya Revenue Authority & 3 others* [2018] eKLR.

27. As regards section 4(1) of the *Limitation of Action* Act, it was submitted that the said provision did not apply since the cause of action crystallized on April 14, 2013, and section 4(1) of the *Limitation of Action* Act provides for a six-year limitation period for causes of action founded on contract and which would run from April 14, 2013 to April 15, 2019. The Respondent's suit having been filed on February 7, 2017 was within the six-year limitation period.

28. It was submitted that in any case by its conduct and communication, specifically the letters dated August 16, 2016 and September 14, 2016 the Appellant admitted its indebtedness and sought to renegotiate the contract price, thereby impliedly extending the statutory limitation.

29. As regards the allegations that the Sale Agreement failed to comply with the provisions of the *Law of Contract* Act, the *Coast Development Act* and the *Public Procurement and Asset Disposal Act* (PPADA) of 2005, it was submitted that the issue of the Respondent's capacity to execute the Sale Agreement did not arise at the time of the execution of the sale agreement and was neither pleaded nor evidence led

evidence led and submissions made thereon. It was therefore submitted that the raising of the point for the first time on appeal was contrary to rule 107 of the *Court of Appeal* Rules and based the submission on of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR.

30. As regards the non compliance with *Law of Contract* Act and the *Coast Development* Act, it was submitted that pursuant to Section 6(1) of the CDA as read with Section 34 of the repealed *Companies* Act which was then in force, the seal of the company was not mandatory during the execution of the sale agreement dated April 14, 2013. According to the Respondent, the Appellant did not prove the sale agreement dated April 14, 2013 required the affixation of the Appellant's common seal and was not one of the documents excepted under section 6(2) of the *CDA*. Since in this appeal, the finding by the High Court that the former Managing Director of the Appellant had the authority to execute the sale agreement on behalf of the Appellant is not being challenged, the failure of the Appellant in affixing its common seal on the Sale Agreement dated April 14, 2013 did not invalidate the agreement. In support of this submission, the Respondent relied on *Nakuru Industries Limited v Vinod Shah & 2 others*[2016] eKLR and *Mrao Ltd v First American Bank* (CA) [2003] KLR 125

31. On the valuation, it was submitted that the valuation report from the then Ministry of Transport, Infrastructure Housing & Urban Development indicated the original cost of the assorted block cutting machines as Kshs. 72,648,228/= which was lower than the contract price of Kshs. 62,000,000/=. However, it was the Appellant's sole responsibility to carry out the said valuation since it was already in possession of and using the said assorted Block Cutting Machines.

32. On the compliance or alleged non-compliance of the sale agreement with the provisions of the *PPADA* of 2005 and the regulations thereunder, it was submitted that Appellant executed the Sale Agreement dated April 14, 2013 on the heels of previously executing the lease agreement which lease was never and has never been challenged by the Appellant. Since the Respondent was not aware of the internal procedures of the Appellant, it was assumed that the Appellant had complied with all its internal controls and procedures and therefore the Respondent had no business whatsoever in launching an inquiry on whether or not the Appellant had duly complied with the provisions of the *Public Procurement and Disposal* Act and the accompanying regulations. In this regard, the Respondent relied on the Turquand rule set out in the case of *Royal British Bank v Turquand* (1856) 6 E & B 327 and *East African Safari Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR.

33. It was submitted that the Appellant is barred from reneging on the sale agreement dated April 14, 2013 by common law estoppel by to the effect that there was a representation that having acquired title to the assorted Block Cutting Machines, the Appellant longer wished to continue leasing them; that the Appellant had requested funding from the Exchequer to clear the purchase price due to the Respondent, to the parent Ministry Headquarters; that the purchase price for the assorted Block Cutting Machines was due and owing; that they were seeking to have the purchase price of the assorted Block Cutting Machines reviewed and renegotiated downwards; and that upon seeking advice from the Attorney General, the Appellant was advised to settle the purchase price due and owing to the Respondent. In support of this submission, the Respondent relied on the case of *Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited* [2017] eKLR.

34. The Court was urged to dismiss the appeal with costs.

Analysis And Determination

35. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

36. From the grounds of appeal, we have identified the following issues for determination:

    1. Whether the suit was time barred by limitation of time.
    2. Whether the Respondent had the legal capacity to institute the proceedings before the High Court.
    3. Whether the contract was rendered null and void on the grounds that the Appellant's procurement processes were flouted.
    4. Whether in the execution of the contractual documents, the principles of law relating to law of contracts, the *Coast Development Authority* Act, Cap449 and *Public Procurement* Act relating to the tendering processes, purchase and execution of documents by the Appellant were flouted.
    5. Whether the contract was approved by the Appellant's tender committee.
    6. Whether valuation was done prior to the purchase.

37. On limitation, the parties are agreed that the issue of limitation was neither pleaded nor evidence led thereon and was raised for the first time in the submissions of the Appellant. Order 2 rule 4(1) of the *Civil Procedure* Rules provides as hereunder:

> A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> a. which he alleges makes any claim or defence of the opposite party not maintainable;
>
> b. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> c. which raises issues of fact not arising out of the preceding pleading.

38. It is therefore clear that limitation as a defence is required to be specifically pleaded by a party relying on it. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. See *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR.

39. This Court emphasized the importance of pleadings in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR in which an article by Sir

Jack Jacob entitled “The Present Importance of Pleadings” was quoted with approval and in which it was stated that:-

> “ As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

40. It has been held that to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. See *Esso Petroleum Co. Ltd v Southport Corporation* [1956] AC 218 at 238 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*[2013] eKLR.

41. In this case, limitation is expressly identified under Order 2 rule 4(1) of the *Civil Procedure* Rules as a defence that must be pleaded. Even if that defence was not expressly set out in that rule, the rule requires that any fact showing illegality which makes any claim or defence of the opposite party not maintainable; or which, if not specifically pleaded, might take the opposite party by surprise; or which raises issues of fact not arising out of the preceding pleading must be pleaded.

42. It must be noted that limitation as a defence, unlike other defences where the Court is absolutely and expressly barred from dealing with a matter hence lacking jurisdcition, is subject to certain exceptions. Section 23(3) of the *Limitation of Actions* Act, Cap 22 Laws of Kenya provides that:

> Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment

43. In other words, a right to action which would otherwise be barred on account of limitation is revived upon its acknowledgement by the person liable thereof. Therefore, to raise a defence of limitation at the tail end of the hearing and in submissions would have the effect of depriving the Respondent of the opportunity to adduce evidence showing that there were facts that revived the cause of action or excepted the case from being statute barred. In this case the manner in which the defence was raised in the submissions amounted to ambush and was meant to take the Respondent by surprise. It is in this light that we understand the holding by this Court in *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR where this Court held that Order 6 Rule 4(1) and (2) [now Order 2 rule 4(1)] of the *Civil Procedure* Rules requires a person relying on the provision of a statute such as

limitation to specifically plead the statute on whose provisions he relies to defeat the Appellant's claim and that a plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud, mistake long before such issues are raised. The Court further held that a party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded since a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.

44. The Appellant ought to have put the Respondent on notice that it was going to rely on the said defence so that the issue of the admissibility of the letters relied upon by the Respondent as bringing the cases within the exceptions or reviving the cause of action could have been properly addressed and determined. The effect of relying on that defence at that stage was to deny the Respondent an opportunity of justifying its position that the matter was not caught up by limitation of actions. It follows that it was not open to the Appellant to raise such an important issue in the submissions when the same was not pleaded and the trial court was perfectly entitled to ignore the same. We so find.

45. Even if the defence had been pleaded, we find that the Appellant would not have benefited from the provisions of Section 3(2) of *Public Authorities Limitation* of Act as it is not an arm of the government. We gather support for this finding from the decision of this Court in *Kenya Revenue Authority v Habimana Sued Hemed & another* [2015] eKLR where it was held that:

> "According to the Judge, and we agree with him, the appellant is a body corporate with capacity to sue and be sued, and it has its own corporate seal different from that of the Government of Kenya. If therefore it had capacity to sue and be sued, why would it want to drag the Attorney General into its proceedings every time there is an alleged breach of the law on its part...We hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act. There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued."

46. The next issue that was raised before us is the issue of capacity of the Respondent. We must point out that the said issue was not expressly set out as a ground of objection in the Appellant's memorandum of appeal. Rule 107 of the *Court of Appeal* Rules, 2022 expressly bars a party from arguing that the decision of the High Court be reversed or varied on a ground not specified in the memorandum of appeal. That issue was also not raised before the High Court and, before us save for its mention in passing, was not expounded upon by the Appellant. Accordingly, we find that nothing turns upon that issue.

47. The next issue we intend to deal with is whether the contract was rendered null and void on the grounds that the Appellant's procurement processes were flouted. The arguments by the Appellant were that the trial Court did not consider the Appellant's case which enumerated the many incurable irregularities and illegalities such as lack of Appellant's procurement plan to procure the said machines; lack of approval by the Appellant's Board of Directors; no budgetary allocations made for the machines; mode of payment; lack of capacity by the person who executed the agreement on behalf of the Appellant; and the execution of the agreement on a Sunday, a non working day.

48. In order to deal with these issues, it is important to understand that the sale agreement which is the subject of this appeal was a transaction that was entered into subsequent to a lease agreement that was entered into by the parties herein. It is not in dispute that the said lease agreement was performed. It

is also not in dispute that the machines which were the subject of the lease agreement were the same machines that were the subject of the agreement for sale dated 14th April, 2013. Further, at the time of the entry into the latter agreement, the said machines were in possession of and were being used by the Appellant.

49. Therefore, the agreement dated 14th April, 2013 must be understood from the point that the parties herein were already in an agreement involving the same subject matter. It has not been alleged that the signatories of the two agreements on the part of the Appellant were different. The learned trial judge, upon considering the evidence found that the agreement was signed by the Appellant's former Managing Director. The learned trial judge considered these arguments and rightly in our view rejected the same in light of the relationship existing between the parties herein prior to the entering into the agreement for sale dated 14th April 2013 which was only a transfer of the machines which were already in use by the Appellants. Appellant ought to have known the condition of the machines they were contracting to buy since they were the ones using them and if there was any valuation to be done, it was upon them to do so before executing the contract of sale.

50. As regards the submissions of non-execution of the contract by the Appellant's Managing Director, the person whose signature appeared on the agreement was not called to repudiate the same. The said Managing Director was similarly not called to repudiate that signature. The issue of the contract having been signed on a Sunday was adequately answered by PW1 who stated that the machines were being used 24/7.

51. According to the Appellant the said agreement breached sections 74 and 75 of the *Public Procurement and Disposal* Act as well as Regulation 62 of the *Public Procurement* Regulations 2005 as regards direct procurement. It was contended that the circumstances of the case did not warrant direct procurement. It is clear that the said sections and regulation are by their nature internal inbuilt mechanisms for ensuring that the provisions of Article 227(1) of the *Constitution* are complied with in public procurements. That Article enjoins a State organ or any other public entity, when it contracts for goods or services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective. A reading of the said provisions however reveals that compliance therewith is a matter for the procuring entity. The Appellant while appreciating this relied on Section 27 of the *Public Procurement and Disposal* Act 2005 which provides that:

> Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.

52. We appreciate the noble intention of the Legislature in enacting provisions intended to safeguard the public by putting in place mechanisms that are intended to the eliminate the possibility of collusion between public officers and unscrupulous suppliers of goods and services to defraud the public. In our view, these inbuilt measures are not meant to insulate public entities from meeting their obligations to suppliers of goods and services when such goods have not been supplied or services enjoyed or are overpriced. While we agree that a supplier of goods and services who either intentionally or negligently fails to take appropriate steps to confirm if the transaction in which it is entering into with a public entity is in accordance with the law, each case must be decided based on its circumstances and the extent to which a supplier is to go in ensuring this is done must also depend on the circumstances of the case. To expect a supplier to sit in the Boardroom of a public entity in order to be satisfied that the tendering process is undertaken in accordance with the laid down procedures of the public entity would be requiring too much from the supplier. The result of such stringent measures may well lead to suppliers avoiding to do business with public entities to the detriment of the public for which the said provisions are meant to protect.

53. We therefore associate ourselves with the position adopted by this Court in *East African Safari Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR that unless the engaging party was aware of fraud and/or mischief on a Director's part, the engaging party has no authority to engage in a meticulous examination of the compliance of the Company with regulations and procedures. In this case the parties to the transaction were not strangers but were parties who had an existing business relationship in respect of the same machines which were the subject of the sale agreement.

54. By a letter dated September 28, 2016, the Appellant herein informed the Respondent that the parent ministry undertook a valuation of the machines and equipment the subject of this suit and the Appellant requested the Respondent to confirm if the Respondent was agreeable to the said valuation which placed the value of the machines and equipment in the sum of Kshs 22,681,000.00. That request, according to the letter, was meant to enable the Appellant process the payment of the pending bills. Based on the said report, the Appellant wrote a letter dated September 14, 2016 to the Respondent requesting for a meeting to discuss the said agreement with a view to reducing the sale price of the machines.

55. The Appellant also sought the opinion of the Attorney General, the chief government legal adviser, as regards the Appellant's liability to the Respondent. In his opinion dated January 9, 2017, the Solicitor General, after citing the relevant legal provisions opined that this was a matter in which summary judgement could be entered against the Appellant if a claim were to be filed in court by the Respondent and that in order to avoid such scenario, it was prudent for the Appellant to liaise with the parent ministry to pay up the claim in order to avoid escalation of further costs and interest. The Appellant did not seem to have taken this advice seriously.

56. We must make it clear that the provisions of the *Public Procurement and Disposals* Act and the Regulations made thereunder ought to be scrupulously followed by both the procuring entity and the supplier. Where the procurement is shrouded in mystery that has or is likely to subject the public to a loss, the Court will not uphold such a transaction. However, Equity will not permit a statute or indeed the law to be a cloak for fraud or improper conduct. In this case, the Appellant's position seems rather ambiguous. On one hand it insists that it ought not to pay for the machines and its accessories at all while on other hand, it submits that it only seeks for time to confirm the value of the machines and the accessories. That is not the conduct of a party who genuinely believes in its course and wants this court to go along with it.

57. It was further contended that the learned Judge failed to take into account well established principles of law relating to the law contracts, the Coast Development Act relating to tendering processes, purchase and execution of documents by the Appellant. Regulation 7 of The *Public Procurement and Disposal* Regulations, 2006 provides that the accounting officer of a procuring entity is responsible for signing contracts for the procurement and disposal activities on behalf of the procuring entity for contracts entered into in accordance with the *Coast Development Authority* Act and Regulations thereunder. Section 6 of the *Coast Development Authority* Act provides that the common seal of the Authority is to be authenticated by the signature of the managing director and such other person as may be generally or specifically authorized by the Authority. In this case, the Managing Director who was present at the time of the transaction was never called to testify and since it was the Appellant contesting execution, it was upon it to avail evidence in support of its contention that the agreement was never signed by the authorized officer.

58. As regards lack of the Appellant's seal, as rightly submitted on behalf of the Respondent, the Appellant failed to prove that it was required in the circumstances of this case. This is so because Section 6(2) of the *Coast Development* Act provides that all documents, other than those required by law to be

under seal, made by, and all decisions of, the Authority may be signed under the hand of the managing director. In this case no attempt was made to show that the agreement, the subject of this appeal, was required by law to be under seal.

59. We have considered the issues raised in this appeal and we find no justification for interfering with the decision of the learned trial judge. This was not a case in which the parties were strangers to each other but one where the parties had an existing lease transaction which was upgraded to a sale agreement. By the time of the said sale the machineries and accessories the subject of the sale were in possession of and use by the Respondent pursuant to an existing lease agreement whose legality was never challenged. The Appellant invites us to hold that since it never made any profit, it should be released from its obligations. As was held by the predecessor to this Court in *Nurdin Bandali v Lombank Tanganyika Limited* [1963] EA 304, there is no general principle of equity which justifies the court in relieving a party to any bargain if, in the event, it operates hardly against him. "Unconscionable", it was held, must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other. The courts of equity never undertook to serve as a general adjuster of men's bargains. The law as we understand it is that the duty of the Court is to enforce or legitimize what the parties agreed upon between themselves. It is no power of the courts to enforce what it thinks ought to have been fairly agreed between the parties and that is the essence of contractual relations. Parties bargain for their interests and benefits and therefore the court cannot alienate or allocate a person a right it did not bargain for because maybe he/she bargained poorly.

60. Whereas the Appellant cited Article 227(1) of the *Constitution* in support of its case, pursuant to Article 10(1)(a) of the *Constitution* this Court, being a State Organ, is bound by the national values and principles of governance when applying and interpreting the law including the *Public Procurement and Disposal* Act. One of the said values and principles under Article 10(2)(b) of the *Constitution* is equity and courts of equity never allow a party to derive an advantage from his own wrongdoing. This Court cannot allow the Appellant to keep the machineries and accessories it bought from the Respondent and to deny the Respondent the agreed purchase price between the Appellant and the Respondent at the same time.

61. In the circumstances of this case, it is our view and we find that the Respondent cannot be held responsible for the alleged failure by the Appellant's officers to adhere to the relevant statutory and regulatory provisions.

62. In the premises we find no merit in this appeal which we hereby dismiss with costs to the Respondent.

63. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR