



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, G. B. M. KARIUKI & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 305 OF 2013**

**BETWEEN**

**PROF. JAMES OLE KİYAPI PS MINISTRY OF MEDICAL SERVICES.....1<sup>ST</sup> APPELLANT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DOL INTERNATIONAL LTD. .... 1<sup>ST</sup> RESPONDENT**

**KENYA ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 249 OF 2013**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> APPELLANT**

**AND**

**DOL INTERNATIONAL LTD. .... 1<sup>ST</sup>  
RESPONDENT**

**PROF. JAMES OLE KİYAPI PS MINISTRY OF MEDICAL SERVICES ..... 2<sup>ND</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Appeals from the Judgment of the High Court of Kenya at Nairobi (Mutava, J.) dated 18<sup>th</sup> February,*

2013 and delivered on 21<sup>st</sup> February, 2013

in

**H. C. C. No. 267 of 2009)**

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**JUDGMENT OF THE COURT**

1. This judgment is in respect of Civil Appeals Nos. 305 & 249 of 2013 as consolidated by an order of this Court made on 21<sup>st</sup> July, 2014. Prof. James Ole Kiyapi sued in his capacity as the then PS Ministry of Medical Services, the Attorney General and Kenya Anti-Corruption Commission will herein after be referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively while Dol International will be referred to as the respondent.

2. Following an open tender for the supply of medical equipment to the 1<sup>st</sup> appellant, the 1<sup>st</sup> appellant and the respondent entered into several contractual transactions vide Local Purchase Orders (LPOs) between the years 2005-2006 and of relevance to this appeal are:-

- a. A contract for the supply of X-Ray machines vide LPO No. 0061967 at the contract price of Kshs.123,400,000/=.
- b. A contract for the supply of X-Ray film envelope vide LPO No. 0061880 at the contract price of Kshs.17,897,700/=.
- c. A contract for the supply of sutures vide LPO No. 0061843 at the contract price of Kshs.40,300,000/=.

3. The respondent in part performance of its contractual obligations sourced and supplied some of the equipment to the 1<sup>st</sup> appellant. However, before the respondent completed its obligations under the above mentioned LPOs , the 1<sup>st</sup> appellant vide a letter dated 19<sup>th</sup> April, 2006 cancelled LPO No. 0061843 pending investigations by the 3<sup>rd</sup> appellant over the tendering process. Apparently, the 3<sup>rd</sup> appellant had received an anonymous complaint over irregularities in the award of tenders to the respondent. According to the 3<sup>rd</sup> appellant, its initial investigations revealed some irregularities hence it advised the 1<sup>st</sup> appellant to halt any dealings or payments to the respondent pending further investigations. It is on this basis that the 1<sup>st</sup> appellant cancelled the above mentioned LPO. From the record not only did the 1<sup>st</sup> appellant halt dealings in the cancelled LPO but it also declined to accept any supplies or make any payments to the respondent in respect of the other LPOs.

4. Faced with the foregoing, the respondent's director, Mr. Shadrack Mwit, shuttled between the 1<sup>st</sup> and 3<sup>rd</sup> appellants' trying to resolve the issue. However, when it seemed that no solution was forthcoming the respondent filed suit on 21<sup>st</sup> April, 2009 against the 1<sup>st</sup> and 2<sup>nd</sup> appellants seeking *inter alia* the contract sum as well as damages for loss incurred due to cancellation of the contract.

5. Meanwhile, the 3<sup>rd</sup> respondent concluded its investigations and found that the respondent through its director, Mr. Shadrack Mwit, had manipulated the tendering process and connived with the 1<sup>st</sup> appellant's officers in order to secure the contracts in question. Following the 3<sup>rd</sup> appellant's recommendations, Mr. Shadrack Mwit and the 1<sup>st</sup> appellant's officers were then charged with offences relating to fraud and corruption.

6. Subsequently, the 3<sup>rd</sup> appellant pursuant to its application was joined as a defendant in the High Court suit. The 1<sup>st</sup> and 2<sup>nd</sup> appellants in their joint statement of defence averred that the 1<sup>st</sup> appellant entered

into the contracts in question with the honest belief that the tendering process was above board. In their respective statements of defence, the three appellants maintained that the contracts were void and invalid *ab initio* having been obtained through fraud and deceit by the respondent. The 1<sup>st</sup> appellant also counterclaimed for refund of sums paid to the respondent on account of the said contracts. However, the 1<sup>st</sup> and 2<sup>nd</sup> appellants' position with regard to the contracts changed as will be demonstrated later in this judgment.

7. On 22<sup>nd</sup> July, 2010 the respondent's director and the 1<sup>st</sup> appellant's officers were eventually acquitted of the charges against them. Owing to the subject matter of the dealings between the parties herein, Parliament through the Public Accounts Committee and its departmental committee on health delved in the matter and came up with a joint report. The same was adopted by Parliament on 14<sup>th</sup> July, 2010 with its tenor and effect being that the impugned contracts resume. Pursuant to the 2<sup>nd</sup> appellant's advice, the 1<sup>st</sup> appellant by a letter dated 25<sup>th</sup> August, 2010 communicated its intention to continue with the contracts and thereafter accepted equipment supplied by the respondent. While the suit was still pending, the 1<sup>st</sup> appellant settled its accounts with the respondent by paying the contractual sums. At the hearing of the suit, the respondent indicated that it wished to pursue its claim for what it called consequential damages due to the cancellation of the contracts. Under this head the respondent's claim was as follows:

- a. ***Losses on account of performance bonds issued pursuant to the contracts - Kshs.18,104,000/=.***
- b. ***Interest accrued on sums spent by the plaintiff (respondent) to purchase the goods and which were borrowed from commercial banks for a period of 3 years - Kshs.488,310,244/=.***
- c. ***Warehouse expenses both in Kenya and overseas - Kshs.32,215,780/=.***
- d. ***Loss of profit which the plaintiff would have made through trading opportunities with other parties which the plaintiff lost as a result of detention of its business capital for a period of 3 years - Kshs.190,650,624.84/=.***
- e. ***Other miscellaneous losses - Kshs.6,734,000/=.***

8. In support of the respondent's claim, Mr. Patrick Sagwa Kisia, a quantity surveyor, specializing in contract management, gave evidence in respect of the tabulated damages. Mr. Collins Oganga Oncheku, the then 1<sup>st</sup> appellant's acting principal accounts controller, testified that the cancellation of the contracts was an act of due diligence on the 1<sup>st</sup> appellant's part following the 3<sup>rd</sup> appellant's recommendations. Further, Mr. Fredrick Ndonye, the then head of the 1<sup>st</sup> appellant's procurement department, testified that the performance of the contracts in question were continued following directions and advice by Parliament and the 2<sup>nd</sup> appellant respectively. It is instructive to note that the 3<sup>rd</sup> appellant's evidence was mainly on the allegations of fraud and collusion on the part of the respondent and the 1<sup>st</sup> appellant's officers.

9. The trial court framed the following issues as arising for determination:-

- i. ***Whether the plaintiff (respondent) and MOH (1<sup>st</sup> appellant) entered into valid contracts for the supply of X-ray machines, X-ray film envelopes and other medical equipment as particularized in the Plaintiff.***
- ii. ***Whether or not the contracts between the plaintiff and MOH were vitiated by fraud and or illegality.***
- iii. ***Whether cancellation of the contracts, refusal to accept deliveries and delay in payments by MOH on the instigation of KACC was justified.***
- iv. ***Subject to 3, whether the plaintiff suffered loss and damage as a consequence; whether the***

***plaintiff is entitled to compensation and, if any, the quantum of damages payable; who should bear the costs of the suit.***

10. By a judgment dated 18<sup>th</sup> February, 2013 the trial court found in favour of the respondent and awarded damages to the tune of Kshs.712,025,015.30/= against the 1<sup>st</sup> and 2<sup>nd</sup> appellants. The three appellants were also condemned to pay the costs of the suit.

11. It is that decision which provoked the two appeals before us wherein the 1<sup>st</sup> and 2<sup>nd</sup> appellants' complained that the learned Judge erred in law and fact by -

- a. ***Failing to take into account the evidence tendered in respect of whether or not the tenders in question were tainted with fraud;***
- b. ***Failing to appreciate the different standards of proof in criminal and civil proceedings and that a criminal case was not necessarily a bar to the prosecution of a civil case;***
- c. ***Failing to appreciate the principle of stare decisis;***
- d. ***Finding that the settlement of the principal claim by the 1<sup>st</sup> appellant was an admission that the respondent ought to have been paid on time hence the appellants were estopped from raising the issues of fraud and illegality of the contracts;***
- e. ***Finding that the respondent's claim for consequential damages was never addressed by the appellants;***
- f. ***Relying on the evidence of the respondent's witness who was not qualified to testify in respect of tabulation of the damages sought;***
- g. ***Awarding the damages sought without the requisite proof;***
- h. ***Awarding VAT at 16% notwithstanding that the same was not pleaded by the respondent.***

12. In addition to the foregoing, the 3<sup>rd</sup> appellant complained -

- a. ***Failing to find that its defence was against the whole suit;***
- b. ***Failing to consider its evidence with regard to the particulars of fraud and collusion between the respondent and the 1<sup>st</sup> appellant's officers;***
- c. ***Finding that it was an irrelevant party whose evidence was non- consequential to the suit;***
- d. ***Condemning it to pay costs whereas the respondent had not prayed for the same and further that it was defending the suit in the interest of the public.***

13. The appeal before us was prosecuted by way of written submissions as well as oral highlights. Mr. K. Onyiso appeared for the 1<sup>st</sup> and 2<sup>nd</sup> appellants' while Mr. B. Murei appeared together with R. Jemutai for the 3<sup>rd</sup> appellant. The respondent was represented by Mr. J. O. Arwa.

14. It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> appellants' that the respondent's claim was premised on alleged loss and damage it suffered as a consequence of suspension of the contracts, that is, failure by the 1<sup>st</sup> appellant to pay the contractual dues and to accept delivery of the remaining equipment. The 1<sup>st</sup> and 2<sup>nd</sup> appellants' argued the appeal under four global heads, namely,

- a. Whether the contracts were obtained through fraud, deceit, connivance and misrepresentation

committed by the respondent and its agents;

- b. Whether criminal prosecutions, report of the parliamentary watchdog committee and Public Procurement Oversight Authority (PPOA) had a bidding legal effect on the trial court as regards matters of fraud and corruption;
- c. Whether the suspension of the contracts were justified; and
- d. Whether the special damages had been strictly pleaded and proved.

15. Under the first head, the appellants argued that the trial Judge failed to consider the totality of the evidence on record with regard to the particulars of fraud and illegality. According to the appellants, the trial Judge only reviewed the evidence of one of the 3<sup>rd</sup> appellant's witnesses, Mr. Soita Wasike, and disregarded the evidence of the other witnesses called by the 3<sup>rd</sup> appellant whose evidence if taken together would have proved that the tendering process was marred with fraud. In particular, the trial Judge ignored the unchallenged evidence to the effect that neither was the respondent's director registered as a pharmacist nor was the respondent registered to deal with pharmaceuticals. Mr. Onyiso submitted that the fact that the 1<sup>st</sup> appellant paid the entire contractual sum did not validate the contracts in question.

16. On the second issue, the 1<sup>st</sup> and 2<sup>nd</sup> appellants' faulted the trial Judge's finding that the decisions rendered by the criminal courts, the Public Procurement Oversight Authority (PPOA) and the Public Accounts Committee of Parliament were conclusive to the effect that the contracts in question were not vitiated by fraud. It was submitted that the finding raised questions of whether the doctrine of *stare decisis* was applicable to decisions of PPOA, reports of Parliament and whether criminal cases have a bearing on the civil cases. Relying on the decision of the Supreme Court in **Jasbir Singh Rai & 3 Others -vs- Tarclochan Singh Rai & 4 Others (2013) eKLR** and **section 193 A** of the Criminal Procedure Code the appellants' argued that doctrine was only applicable to decisions made by courts of law.

17. On the third issue, the appellants submitted that the elements of fraud and collusion having been established, the contracts in question were voidable at the instance of the 1<sup>st</sup> appellant. The appellants' further argued that being public bodies they were mandated to investigate allegations of fraud and corruption which had come to the fore hence the suspension of the contracts was not only legal but justified.

18. On the fourth head, the appellants' position was that the contracts having been vitiated by fraud the respondent was not entitled to any damages. However, in the alternative, the appellants' submitted that the trial Judge erred in awarding the damages which were too remote and had not been strictly proved.

19. According to the 3<sup>rd</sup> appellant, the trial Judge made a premature finding on liability without hearing the parties concerned contrary to the law. The same was evidenced by the fact that when the respondent raised a preliminary objection to the effect that the 3<sup>rd</sup> appellant should not be allowed to tender evidence since there was no claim against it, the trial Judge held that the 3<sup>rd</sup> appellant was a busy body whose evidence was irrelevant. The 3<sup>rd</sup> appellant submitted that the learned Judge further made sweeping findings, the main one being that the only outstanding issue was quantification of damages hence the evidence on fraud and corruption was of no use. The 3<sup>rd</sup> appellant contended that the issue of illegality, fraud and collusion on the part of the respondent was relevant in as far as the determination of whether there were valid reasons to terminate or suspend the contracts in question was concerned.

20. The 3<sup>rd</sup> appellant submitted that the conduct of the trial Judge breached its right to a fair hearing in the proceedings which it was enjoined as a party and not as an observer; the interest of the appellant was to demonstrate that there were valid reasons for the cancellation/suspension of the contracts. The fact that the trial Judge heard the 3<sup>rd</sup> appellant's witnesses following consent by the parties did not remedy the situation, since the trial Judge stated in his judgment that the appellant's evidence was of no value. The 3<sup>rd</sup> appellant also faulted the trial Judge for condemning it to pay costs.

21. It was submitted on behalf of the 3<sup>rd</sup> appellant that the acquittal of the respondent's director did not bar a case being proved against the said director and respondent in a civil case. The 3<sup>rd</sup> appellant contended that the trial Judge abdicated his responsibility of evaluating the evidence on record by holding that he was bound by the decisions of the criminal court. In this regard the 3<sup>rd</sup> appellant cited the decision of this Court in **Central Bank of Kenya -vs- Kenya Akiba Microfinance Ltd. & 14 Others (2012) eKLR.**

22. The 3<sup>rd</sup> appellant also challenged the amendment of the Plaint in respect of the damages sought by the respondent as being illegal. The trial Judge was faulted for awarding damages which were not strictly proved. In the alternative, the 3<sup>rd</sup> appellant argued that where there is proof of breach of contract, the award of damages ought not to give rise to unjust enrichment as in this case the award of damages of Kshs.712,025,015.30/= was almost four times higher than the principal amount under the contracts.

23. The 3<sup>rd</sup> appellant maintained that the cancellation and/or suspension of the contracts was justified considering the credible evidence of corruption. The onus lay with the respondent to prove that the suspension and/or cancellation was wrongful and without basis notwithstanding the fact that the 1<sup>st</sup> appellant had paid the principal sum.

24. It was the respondent's case that the 3<sup>rd</sup> appellant lacked *locus standi* to institute an appeal against the whole decision of the trial court and ought to have confined its appeal to the order against costs; as far as the respondent was concerned the 3<sup>rd</sup> appellant had no interest in the proceedings; its joinder forced the respondent to sue or maintain suit against the said appellant contrary to the respondent's will. The respondent maintained that the 3<sup>rd</sup> appellant should not have been joined as a party; the 3<sup>rd</sup> appellant's defence was a nullity and consequently the evidence purported to have been tendered in proof of the defence was of no legal consequence.

25. The respondent argued that the legality of the contracts in question were determined by the criminal proceedings and pursuant to **section 44** of the Evidence Act the decisions in the criminal cases were judgments in *rem* therefore conclusive of the findings therein. The evidence tendered at the trial court merely raised suspicion but did not prove the allegations of fraud and collusion. In the respondent's view, the trial court was precluded by **sections 43 and 44** of the Evidence Act from considering the validity or otherwise of the contracts the same having been determined in the criminal proceedings. Furthermore, what was in issue before the trial court was whether the 1<sup>st</sup> appellant was to pay consequential damages to the respondent and not whether the contracts were enforceable. In any event, even if the alleged irregularities could render the contracts illegal the same could not affect the recoverability of consequential losses arising therefrom as long as the conduct of the 1<sup>st</sup> appellant led the respondent to incur losses. To buttress this position, the respondent relied on the English cases of **Shelley -vs- Paddock (1980) QB 348 and Saunders -vs- Edwards (1987) 1WLR 116.**

26. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> appellants position on the contracts kept changing and that they should not be allowed to approbate and reprobate at the same time with regard to the validity of the contracts. On one hand, the 1<sup>st</sup> and 2<sup>nd</sup> appellants' position was that the subject contracts were valid and that is why the 1<sup>st</sup> appellant honoured the same by accepting deliveries and making payment thereunder. On the other hand, the appellants' position when it came to the respondent's claim for consequential damages was that the contracts were allegedly tainted with illegality.

27. In maintaining that the suspension and/or cancellation of the contracts was not justified, the respondent submitted that the 1<sup>st</sup> appellant was not bound or justified in complying with the 3<sup>rd</sup> appellant's recommendations because firstly, the recommendations were beyond the 3<sup>rd</sup> appellant's mandate under the parent statute; secondly, the instructions were given prematurely before the conclusion of investigations; thirdly, the allegations of fraud related to contracts that had long been concluded and had no bearing on the pending contracts.

28. On the amendment of the Plaint, it was contended that the same was allowed with the consent of the

parties and the same had not been raised as a ground of appeal in the memorandum of appeal.

29. The respondent, in defining consequential losses, relied on an article by Andrew Tettenborn, ***'Consequential Damages in Contract? – The Poor Relation, 42 Loy. L.A.L Rev. 177 (2008)***. It was submitted that losses which were derived naturally from the breach of a contract like storage costs, labour costs and insurance expenses incurred by the respondent are direct losses, while losses which are not directly derived from the breach but from unique circumstances of the respondent like loss of profit are consequential losses. The determinant of whether a particular category of loss or damage is direct or consequential depends on whether it is derived naturally or directly from the breach or from the unique personal circumstances of the claimant. The respondent's claim comprised of three distinct categories of damages, namely, direct damages, that is, storage costs both in Kenya and Japan, labour costs, insurance costs and claims for extension of performance bonds; consequential (special damages), that is, claims for loss of profit and cost of finance and lastly, statutory damages, that is, claims on interest on delayed payments under **section 48** of the Public Procurement and Disposals Act. The respondent submitted that the claim for damages was never traversed by the appellants hence they were deemed to have been admitted; further the damages awarded by the trial Judge were in conformity with the law.

30. We have considered the record, submissions, authorities supplied by the parties as well as the law. Being a first appeal we are cognizant of our primary role to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions bearing in mind we neither saw nor heard the witnesses. This much was restated by this Court in ***Musera -vs- Mwechelesi & Another (2007) KLR 159*** ;

***“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”***

31. In accordance with the above principles, we find that the appeal turns on the following issues:-

***(a) Whether the 3<sup>rd</sup> appellant was properly joined as a party in the suit and whether the 3<sup>rd</sup> appellant was entitled to appeal against the decision of the trial court.***

***(b) Whether the trial court erred in allowing the amendment of the plaint particularly with regard to the damages sought by the respondent.***

***(c) Whether the respondent was entitled to the damages granted by the trial court.***

***(d) Whether the trial court erred in condemning the 3<sup>rd</sup> appellant to pay costs of the suit.***

**Locus standi:**

32. From the record, it is clear that the 3<sup>rd</sup> appellant was joined in the proceedings on 7<sup>th</sup> May, 2009 as a defendant pursuant to its own application. It is also clear that the respondent neither filed an application to set aside the joinder nor filed an appeal against the same. The respondent's dissatisfaction with the joinder only surfaced during the trial when it raised an objection to the 3<sup>rd</sup> appellant giving evidence. Despite the trial Judge upholding the objection, the 3<sup>rd</sup> appellant was however allowed to give evidence with the consent of the parties. That being the case and guided by the decision of this Court in ***Agricultural Finance Co-operation -vs- Julia Muthanje (2013) eKLR***, we find that the respondent cannot at this juncture raise the issue of the appropriateness of the 3<sup>rd</sup> appellant's joinder in the suit.

33. On the *locus standi* of the 3<sup>rd</sup> appellant in the appeal before us, we understand the respondent's

argument to be that the 3<sup>rd</sup> respondent lacked legal standing to institute an appeal against the whole decision of the trial court and ought to have only appealed against the order of costs. *Locus standi* is defined in the *Oxford Dictionary of Law, 5<sup>th</sup> Ed.* as ‘*the right to bring an action or challenge some decision?*. It is also defined in *Black’s Law Dictionary, 9<sup>th</sup> Ed.* as ‘*the right to bring an action or to be heard in a given forum.*’ It is trite that a party who is aggrieved by a judgment or ruling of a trial court has a right of appeal. This Court while considering who an aggrieved party is in *Kenya Commercial Bank Limited -vs- Benjoh Amalgamated Limited & Another [2015] eKLR* expressed itself as follows;

**“Who then is an aggrieved party? Black’s Law Dictionary 8<sup>th</sup> Ed. 2004, at page 205 defines aggrieved as:**

**„a person or entity having legal rights that are adversely affected having been harmed by an infringement of legal rights.?”**

**Aggrieved party is defined at page 3548 as:**

**„A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.”**

34. It is not in dispute that the 3<sup>rd</sup> appellant participated in the proceedings at the trial court. In our view the issue of costs coupled with the 3<sup>rd</sup> appellant’s contention that it was aggrieved by the trial Judge’s decision to ignore the evidence it adduced entitled the 3<sup>rd</sup> appellant to file and prosecute its appeal before us. In the American decision of *Culton -vs- Culton, 398 S.E 2d 323*, Supreme Court of North Carolina, filed December 5, 1990, it was stated that:

**“Only a „party aggrieved? may appeal from an order or judgment of the trial division. An aggrieved party is one whose rights have been directly and injuriously affected by the action of the Court.”**

#### **Amendments:**

35. By an oral application the respondent with the consent of the parties was allowed to amend figures in respect of the damages sought. We note that none of the appellants’ challenged the amendments as a ground in their respective memorandums of appeal. Consequently, we cannot entertain this issue. In *Stallion Insurance Company Ltd -vs- Ignazio Messina & Another (2007) eKLR* this Court stated whilst emphasizing **Rule 101**, the predecessor to the current **Rule 104** of the Court of Appeal Rules expressed that, at the hearing of an appeal a party without leave of the court could not argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal.

#### **Damages:**

36. The respondent’s claim for damages was anchored on losses it allegedly incurred due to cancellation/suspension of the contracts. In our considered view whether or not the respondent was entitled to damages turned on whether the cancellation of the contracts in question was justified. Pursuant to **sections 107 & 109** of the Evidence Act the onus was with the respondent to prove that the suspension was not justified.

37. In holding that the respondent was entitled to damages, the trial Judge found that the cancellation in question was not justified because there were valid contracts between the 1<sup>st</sup> appellant and the respondent which were not vitiated by fraud or illegality. In doing so, the trial Judge expressed himself as follows;

**“But I need not trouble myself devouring into the mammoth evidence placed before me relating to whether or not the tenders in question was tainted with fraud and/or illegality. I find it superfluous to have been urged to regurgitate into analysis of the said**

***block of evidence relating to the investigations and outcome of the criminal aspects of the tenders in question because upon conclusion of the investigations, criminal proceedings were commenced against Dol international Limited, Dr. Shadrack Mwiti and four MOH officials in the Anti- Corruption Court being Chief Magistrates Court ACC No. 15 of 2009. In a ruling delivered on 22<sup>nd</sup> June, 2010.... the Anti-Corruption Court having considered the evidence placed before it in support of the allegations of fraud, collusion and corruption in respect of the tenders returned a verdict of no case to answer against the accused persons.....***

***A second criminal case Chief Magistrate's Criminal Case No. 16 of 2009 involving Dr. Mwiti and 2 Others also ruled in their favour, the trial court finding that they had no case to answer.....***

***The evidence tendered in the criminal proceedings aforesaid is the same evidence that KACC placed before me. Having been so aptly dealt with by the Anti- Corruption Court, I am left with no doubt in my mind that the tenders in question were not vitiated by fraud or illegality for the trial court dealt deeply with the said criminal aspects found comprehensively that the accused persons had no case to answer.***

***In addition to the aforesaid conclusions reached by two trial courts in the criminal proceedings, evidence was placed before me that the same concerns in relation to the procurement concerning this matter were considered by the Parliamentary Public Accounts Committee as well as its Departmental Committee on Health and in a joint report tendered before the house on 14<sup>th</sup> July, 2010, the two committees found that the said procurement was above board.***

***Not to mention that the awards of the tenders had also been challenged before the Public Procurement Complaints Review Board. The appeal against the award of the tenders to the plaintiff had been dismissed by the Public Procurement Oversight Appeals Board ...***

***The upshot of the foregoing is that the issue of whether or not the award of the tenders as well as whether the validity of the contracts was vitiated by illegality must be answered in the negative. Such contracts in my view remained valid having weathered the test of the PPOA, the criminal proceedings and the scrutiny of the relevant committees of parliament. The unanimity of the three watchdogs leave this court with full persuasion that the present proceedings in pursuit of consequential loss cannot be defeated on the claims of illegality of the underlying contracts.”***

38. For the reasons that follow, we find that the learned Judge misdirected himself while considering the issue. Firstly, the learned Judge's position was that the determination of whether the suspension was justified depended on whether there existed contracts which were not vitiated by fraud or irregularities. Secondly, proceeding on that basis he found that the validity of the contracts had already been considered and determined conclusively by PPOA, the criminal proceedings and Parliament. Thirdly, he found that the evidence by the 3<sup>rd</sup> respondent was of no value and disregarded the same.

39. In our respectful view, the learned Judge ought to have interrogated whether the reasons advanced for the suspension and its pendency were reasonable taking into account the prevailing circumstances.

40. It is not in dispute that the 3<sup>rd</sup> appellant received an anonymous complaint regarding irregularities and fraud over the award of tenders to the respondent. The 3<sup>rd</sup> appellant carried out investigations pursuant to its mandate under ***section 7 (1) (repealed with the establishment of the Ethics and Anti-Corruption Commission Act No. 22 of 2011)*** of the Anti-Corruption and Economic Crimes Act, 2003 which provided in part as follows:-

***“7 (1) The Commission shall have the following functions -***

- a. ***to investigate any matter that, in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur -***
  - i. ***conduct constituting corruption or economic crime;***
  - ii. ***conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;***
- b. ***to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;....”***

41. After preliminary investigations were conducted, the 3<sup>rd</sup> appellant found some irregularities which warranted further investigation. It is at that point that the 3<sup>rd</sup> appellant requested the 1<sup>st</sup> appellant to halt any dealings with the respondent pending further investigations. The respondent maintained that the 1<sup>st</sup> appellant was not bound to follow the recommendation which was beyond the 3<sup>rd</sup> appellant's mandate. We disagree with that line of submission because following rampant corruption in the country, Parliament enacted the Anti- Corruption and Economic Crimes Act as one avenue of dealing, reducing and ultimately eradicating corruption particularly in public institutions so as to safeguard public funds and property. To promote the objectives of the Act and to give effect to the mandate of the 3<sup>rd</sup> appellant, Parliament in its wisdom enacted ***section 6 (2) & 12 (1) (repealed with the establishment of the Ethics and Anti-Corruption Commission Act No. 22 of 2011)*** which provided;

***“6 (2) The Commission shall have all the powers necessary or expedient for the performance of its functions.”***

***“12 (1) The Commission may in the performance of its functions work in co-operation with any other persons or bodies it may think appropriate, and it shall be the duty of any such person or body to afford the Commission every co-operation.”***

It is instructive to note that the above provisions have been reproduced in the Ethics and Anti-Corruption Act, 2011. Therefore, the 3<sup>rd</sup> appellant was empowered to issue the recommendation it did and equally, the 1<sup>st</sup> appellant as a public body had an obligation to co-operate with the 3<sup>rd</sup> appellant.

42. Whether the recommendation and subsequent suspension of the contracts was justified, the learned Judge ought to have considered the reasons advanced for the same. In this regard, we find that the learned Judge erred in rebuffing the evidence tendered by the 3<sup>rd</sup> appellant on the ground that the allegations of fraud and collusion had been conclusively determined in other arenas.

43. It is clear from the record that before the tenders in question were awarded to the respondent, a claim before the Public Procurement Complaints Review Board was filed and dismissed. It is not clear what the basis of the claim before the review board was. Be that as it may, we find that the finding therein did not bar the 3<sup>rd</sup> appellant from conducting the investigations in question. In this regard we place reliance on ***section 10 (repealed with the establishment of the Ethics and Anti-Corruption Commission Act No. 22 of 2011)*** of the Anti-Corruption & Economic Crimes Act, 2003 which provided;

***“In the performance of their functions, the Commission and the Director shall not be subject to the direction or control of any other person or authority...”***

44. With regard to the criminal proceedings and the recommendations by Parliament, we find that the same occurred after the suspension in question was in place. Therefore, we find that the same could not be a basis of determining the reasonability or otherwise of the suspension. Even assuming that the proceedings were commenced and concluded before the suspension, the decisions therein could not be binding on the trial court in as far as the issue of the reasonableness of the suspension was concerned. This is because firstly, the burden of proof in criminal and civil matters is different and further the

criminal proceedings were not concerned with the reasonableness or otherwise of the suspension. In Central Bank of Kenya -vs- Kenya Akiba Microfinance Ltd & 14 Others [2013] eKLR, this Court held,

***“The other misdirection, in our view, was the elevation of the decision of the Principal Magistrate in the Criminal case against Directors of Akiba to the level of decisiveness of the civil case pending before the High Court between Akiba and 15 defendants who had a right to be heard on their defences on record. As correctly surmised by the Court in the Kisii Farmers case (supra), the standard of proof in both cases differs and the utility of the Criminal case decision was to establish the acquittal of the accused persons in that case and not to forestall further discussions on relevant issues pending in civil proceedings.”***

Secondly, the recommendations by Parliament could also not bind the trial court.

45. Based on the foregoing, it was imperative for the learned Judge to have considered the evidence tendered by the 3<sup>rd</sup> appellant not necessarily with aim of establishing fraud or corruption on the part of the respondent but with the aim of establishing whether the circumstances justified the suspension.

46. Therefore, did the respondent prove that the suspension was not justified? We do not think he did so because as per the evidence on record, registration documents, official stamps belonging to other companies that had participated in the tendering process and confidential communication from the 1<sup>st</sup> appellant’s officers were recovered from the respondent’s premises. There was also proof that neither was the 1<sup>st</sup> respondent’s director registered as a pharmacist nor was the respondent registered to deal with pharmaceuticals by the Pharmacy and Poisons Board. In our view these were reasonable grounds for suspension of the contracts and to initiate further investigation.

47. We say so because the 1<sup>st</sup> appellant being a public body charged with the duty of managing public funds was mandated to ensure all processes and/or transactions to wit public finances were expended above board and therefore, acted reasonably by adopting the 3<sup>rd</sup> appellant’s recommendations. Faced with the choice between halting the contracts in question pending the finalization of investigations and continuing with the contracts with the risk of misappropriating public funds, we are of the view that the halting of the contracts was the lesser of the two evils. We find that there was no malice or ill will on the part of the 1<sup>st</sup> appellant as there are several correspondences on record from the 1<sup>st</sup> appellant to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants seeking advice on the contracts in question, a clear demonstration of due diligence on the 1<sup>st</sup> appellant’s part. We also note that following the acquittals on 22<sup>nd</sup> June, 2010 and the recommendations by Parliament on 14<sup>th</sup> July, 2010, the 1<sup>st</sup> appellant sought the 2<sup>nd</sup> appellant’s advice on the issue; the 2<sup>nd</sup> appellant advised the 1<sup>st</sup> appellant by a letter dated 17<sup>th</sup> August, 2010 to continue with the contracts which it promptly did by a letter dated 25<sup>th</sup> August, 2010.

48. In as much as the respondent might have incurred loss during the period of suspension of the contract, we find that we cannot impute any wrongdoing on the part of the 1<sup>st</sup> appellant who at all material times acted diligently and cautiously to preserve and protect public funds. This is a case of *damnum sine injuria* which is defined by *Black's Law Dictionary 9<sup>th</sup> Ed.* as ‘*loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy?*’. See also *McGregor on Damages, 16<sup>th</sup> Ed at Para 7.*

49. It is trite that before damages can be recovered there must be a wrong committed and in the absence of such wrong on the part of the 1<sup>st</sup> and 2<sup>nd</sup> appellants we find that the respondent failed to prove that the suspension in question was not justified and by extension its entitlement to the damages sought. Consequently, this brings the issue of damages to a close.

#### **Costs:**

50. Costs is a matter within the discretion of the trial Judge and the basic rule is that costs should follow

the event. **Section 27 (1)** of the Civil Procedure Act provides,

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

51. It is also a well settled principle that costs should follow the event and should not be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. See the Supreme Court’s decision in Jasbir Singh Rai & 3 Others -vs- Tariochan Singh Rai & Others (2014) eKLR. *Halsbury’s Law of England, 4<sup>th</sup> Ed. (2010) Vol. 10 at para 16* states,

***“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”*** Emphasis added.

52. The 3<sup>rd</sup> appellant faulted the learned Judge for condemning it to pay costs on the grounds that the respondent had not claimed for costs against it and further that it was defending the suit in public interest. As succinctly observed by the Supreme Court in Jasbir Singh Rai case (supra),

***“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In Amoni Thomas Amfry and Another v. The Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in Harun Mwau and Others v. Attorney-General and Others, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:***

***“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”***

Emphasis added.

53. In this case, the 3<sup>rd</sup> appellant applied to be joined as a defendant because of allegations of corruption and fraudulent dealings with regard to the subject matter of the suit. The 3<sup>rd</sup> appellant at the time was investigating the allegations pursuant to its mandate as a body charged with investigating and combating corruption. It is clear that the 3<sup>rd</sup> appellant’s participation was primarily on a public interest basis as

opposed to personal gain. We, therefore, find that in those circumstances the trial court ought not to have condemned the 3<sup>rd</sup> appellant to pay costs.

**Conclusion:**

54. Based on the foregoing, we find that the appeals herein have merit and are consequently allowed. The judgment of the High Court dated 18<sup>th</sup> February, 2013 is hereby set aside and substituted with an order dismissing the respondent's claim with no orders as to costs taking into account the circumstances surrounding the matter. We also direct each party to bear its own costs in this appeal.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**