



REPUBLIC OF KENYA



Ethics & Anti-Corruption Commission v Musyimi & 16 others (Anti-Corruption and Economic Crimes Civil Suit 29 of 2017) [2025] KEHC 11663 (KLR) (Anti-Corruption and Economic Crimes) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 29 OF 2017**

EN MAINA, J

JULY 31, 2025

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

CHARITY MUENI MUSYIMI 1ST DEFENDANT
SARAH MUSYIMI 2ND DEFENDANT
JOSEPHAT LANGO VAYA 3RD DEFENDANT
STEPHEN SANGA BARRAWAH 4TH DEFENDANT
CAPITAL SOLUTIONS LIMITED 5TH DEFENDANT
GEOTECT CONTRACTORS LIMITED 6TH DEFENDANT
ALEX KITHEKA MWONGELA 7TH DEFENDANT
ANDREW KITHI KOMBE 8TH DEFENDANT
SOPHIA MNYAMANYI MWANDAWIRO 9TH DEFENDANT
RAPHAEL KIOLI MUTISO 10TH DEFENDANT
BENJAMIN KAI CHILUMO 11TH DEFENDANT
RIZIKI MATANO CHONGA 12TH DEFENDANT
SILAS MOHAMED CHUBA MUNGA 13TH DEFENDANT
PAUL TIEDO MWAZO 14TH DEFENDANT
EQUITY BANK KENYA LIMITED 15TH DEFENDANT



NATIONAL BANK OF KENYA 16TH DEFENDANT

STIMA SACCO SOCIETY LIMITED 17TH DEFENDANT

JUDGMENT

1. The Commission instituted this suit vide an amended Plaint dated 1st November 2018 seeking the following orders;
 - a. A declaration that the acquisition of Kshs 8,724,137.95/= by the 1st Defendant on 01/07/2015 and 24/09/2015 respectively from the County Government of Kilifi in respect of Tender No KCG/392/2014/2015 for the procurement of for upgrading of data center and security upgrade of cyber room configuration was unconstitutional, fraudulent, unlawful and corruptly irregular.
 - b. A pecuniary claim of Kshs 22,675,778.00/= from the Defendants which at the time of filing the suit was been assessed as follows;
 - i. A pecuniary claim of Kshs 11,337,889.00/= [Kshs 8,724,137.95/= together with accrued interest of Kshs 2,613,751.70/=] (Calculated at interest rate of 14% on the corruptly acquired monetary assets of Kshs 8,724,137.95/= from 01/07/2015 to 01/07/2017)
 - ii. A pecuniary claim of Kshs 11,337,889.00/= together with accrued interest of Kshs 2,613,751.70/= (Calculated at interest rate of 14% on the corruptly acquired monetary assets of Kshs 8,724,137.95/= from 23/09/2015 to 23/09/2017)
 - c. In the alternative and without prejudice to prayer (b) a pecuniary claim against the 2nd, 3rd and 4th Defendants for Kshs 8,700,000/= together with prescribed interest from the date of unlawful acquisition.
 - d. A prohibitory injunction to restrain the 1st and 15th Defendants by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any way dealing with a sum of Kshs 481,387/= held in bank Account number 0450194xxxxxx in the name of Charity Mueni Musyimi at Equity Bank, Malindi Branch.
 - e. A Mandatory Injunction against the 15th Defendant to compel it to release Kshs 481,387 held in bank Account number 0450194xxxxxx in the name of Charity Mueni Musyimi at Equity Bank, Malindi Branch to the Plaintiff.
 - f. A prohibitory Injunction against the 2nd, 3rd, 4th, 5th and 15th Defendants by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any way dealing Kshs 320,775/= held in bank account number 0450294xxxxxx in the name of Capital Solutions Limited at Equity Bank, Malindi Branch.
 - g. A mandatory injunction against the 15th Defendant to compel it to release Kshs 320,775/= held in bank account number 0450294xxxxxx in the name of Capital Solutions Limited at Equity Bank, Malindi Branch to the Plaintiff.
 - h. A prohibitory Injunction against the 1st, 2nd, 5th and 16th Defendants by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any way dealing



Kshs 3,938,663/= held in bank account number 01285118xxxxxx in the name of Geotech Contractors Limited at National Bank, Port Way House Mombasa.

- i. A mandatory injunction against the 15th Defendant to compel it to release Kshs 3,938,663/= held in bank account number 01285118xxxxxx in the name of Geotech Contractors Limited at National Bank, Port Way House Mombasa to the Plaintiff.
- j. A prohibitory Injunction against the 2nd and 17th Defendants by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any way dealing Kshs 592,000.00/= held in Sacco account in the name of Sarah Musyimi-ID Number xxxxxxxx (Staff number BIA 11557) held at Stima Sacco Limited
- k. A mandatory injunction against the 17th Defendant to compel it to release Kshs 592,000.00/= held in Sacco account in the name of Sarah Musyimi-ID Number xxxxxxxx (Staff number BIA 11557) held at Stima Sacco Limited
- l. A prohibitory Injunction against the 3rd and 17th Defendants by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any way dealing with Kshs 2,081,937.00/= held in Sacco account in the name of Josephat Lango Vaya-ID Number xxxxxxxx(Staff number BIA 14603) held at Stima Sacco Limited
- m. A mandatory injunction against the 17th Defendant to compel it to release Kshs 2,081,937.00/= held in Sacco account in the name of Josephat Lango Vaya-ID Number xxxxxxxx(Staff number BIA 14603) held at Stima Sacco Limited
- n. Costs of and incidental to the suit.
- o. Interest at prescribed rates on (b) and (c) above from the date it was unlawfully acquired by the Defendants to the date the said funds are fully recovered from the Defendants.
- p. Any other or further relief that the court may deem fit to grant.

The Parties

2. The Commission is a body corporate established under Section 3 of the Ethics & Anti-Corruption Commission Act, 2011, pursuant to Article 79 of *the Constitution* of Kenya 2010. It is mandated to institute and conduct proceedings for the purpose of recovery or protection of public property.
3. The 1st, 3rd and 4th Defendants were the Directors of the 5th Defendant who held its beneficial interest at all times material to this case.
4. The 2nd Defendant was the Director of the 5th and 6th Defendants who held its beneficial interest at all times material to this case.
5. The 5th and 6th Defendants are Limited Liability Companies registered in Kenya under the *Companies Act*, Cap 486 carrying on business in Nairobi and which were awarded tenders by the County Government of Kilifi (hereinafter referred to as “the County”) and were alleged to have deposited funds into the Bank accounts held by the 15th and 16th Defendants.
6. The 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Defendants are employees of the County.
7. The 15th and 16th Defendants are Banks in which the suit accounts belonging to the Respondents are domiciled.



8. The Plaintiff was canvassed by way of viva voce evidence. Thereafter Learned Counsel for the parties summed up their cases by way of written submissions.

The Plaintiff's case

9. The Commission called a total of Seventeen (17) witnesses including employees of the County, officers from Equity Bank, officers from National Treasury, officers from Central Bank, an officer from the Registrar of Companies, a digital forensic analyst and a forensic document examiner.
10. The Plaintiff's case is that the payment voucher paid to Grand Top Solutions as well as the internal memo for the inspection and acceptance certificate dated 19th May, 2015 had forged signatures as PW9, Richard Mwasambu, the requisition officer according to the vouchers denied they were his. The county auditor indicated that Account no 1290163584518 was credited with Kshs 8,724,137.95 via RTGS on 1st July 2015 but was cancelled from the system on 30th June 2015 but it went through. Another transaction was initiated on 30th June 2015 to the same company and was paid on 23rd September 2015 for proposed upgrading of data center and security upgrade for cyber room configuration at the County. PW9 was only involved in Phase II.
11. Francis Mwatsuma Kiti, PW8, the legal Researcher, denied attending the tender committee meeting that was allegedly held on 24th June 2015. The meeting came after the award of 18th May 2015. The LSO number 0972393 dated 18th May 2015 was made before the acceptance letter dated 19th May 2015. The inspection of the project was done on 19th May 2015, the same day the offer was accepted by Grand Top Solutions meaning it was irregular. He adopted the minutes with 30 pages.
12. On the other hand, PW 11, Patience Umazi Tsimba, attended and adopted the one with 49 pages. She and PW 10, Daniel Mbaha Nguma confirmed that a tender committee meeting that was held on 24th June 2015 which they attended and where they deliberated the award of Kshs 9,200,000 to Grand Top Solutions for the proposed upgrading for cyber room. They said that the same was done through restricted tendering where ten (10) bidders were invited, four returned their bids and they settled on Grand Top Solutions. Not all the members were to sign the minutes so the minutes would still be valid if they did not have signatures of all members.
13. PW15, Judith Ngani Tsuma, The County director, Human Resource who confirmed that the 7th, 8th, 9th, 11th, 13th and 14th Defendant were employees of the County in different capacities.
14. From the National Treasury was PW2, Maureen Kimeli Chepkirui, who told the court that IFMIS is the system used by both County and National Government to manage public funds in County Government, National government. In this case Grand Top Solutions was one of the payees or beneficiaries. A requisition number 48 was raised in the system credited by a user known as Alex Kithuka and approved by Silas Juba Mohammed the same day. A report was raised on 30th June 2015 from their department vide purchase order No. 972393 raised by Julius Munga and approved by Benjamin Kai and Approver 2, Julius Mwaza. The same day, an invoice was raised in the system by Mr. Zain Zudi Nzai. She stated that the valuation was done by Gilbert Bayaa the same day and the payment done on 18th September 2015 by Gabriel Majalewa Mkare and invoice number 0972393 was paid for twice. The cancellation was done on 18th September 2015.
15. PW16, Leonard Kimutai Kipsanai confirmed that payment of Kshs 8,724,137.95 was made twice to Grand Top Solutions Account held by the 15th Defendant on 1st July 2015 and 23rd September 2015. The officers involved were Approver 1 Mutiso RKIB and name of Approver 2 was Raphael Kioli Mutiso. For the second payment, the Approver 1 was Mutiso RKIB and name of Approver 2



was Raphael Kioli Mutiso, for the 2nd transaction, the Approver 1 was Mwanzo PTIB and name of user was Paul Teido Mwazo. He made reference to letters from Kilifi County Government requesting for Internet Banking rights dated 30th June 2015 and received on 10th July 2015 with the names of Benjamin Kai Chilumo, Paul Teido Mwazo and Raphael Kioli Mutiso. There is also letter from Internet Banking assigning rights to Raphael Kioli Mutiso and another to Benjamin Kai Chilumo. The onboarding is the responsibility of the CEC Finance and they cannot stop a transaction even if a request were to be given to them.

16. It is not the duty of CBK to do due diligence of any payment in the IB system. That is the responsibility of the County Approvers and the commercial bank that is receiving the payment on behalf of the County clients. Credentials are communicated in two ways to ensure security and accountability. For CBK to know who approved a payment we ask for an audit trail which is what was produced.
17. According to PW13, Silas Mutunga Ngoka, in addition to what PW8 stated, he indicated that the letters stating the bank accounts as well as the forms of who has the rights of administration are usually delivered physically and received by CBK banking unit who maintain specimen signatures of officials who can give instructions on behalf of the County Governments. He contended that thorough verification is done before a user in IBS is created. The password is communicated via email and cell phone number. If a payment is passed by IFMIS the IBS cannot void it. If a payment is voided by IFMIS, the IBS will not know. The 9th Defendant was only granted rights as an inputter, which means she could view the system but she could not approve or make changes.
18. PW7, Moses Karema Mlewa, the ICT Manager told the court that there was upgrading of the Data Centre and Cyber ROM project which took place and he inspected the works and prepared the report. He confirmed that the works were done in two phases which were tendered separately. He was involved in the evaluation of the tenders which was done as per Evaluation Report dated 23rd March 2015. KCG/179/2014/2015 was in respect to upgrading phase and KCG 392/2014/2015, which is the second phase was tendered separately. He confirmed that he signed the reports.
19. PW6, Alex Kinyanjui, the ICT forensic investigator for the Plaintiff undertook a site visit at the County office accompanied by the Investigating Officer Mr. Lwanga and the ICT Director at Kilifi County one Moses Karema Mlewa where they found various components which are listed in the report and one item namely Cyber ROM Fireball CRI00ING which he took for a market survey and found that, taking the market pricing and all relevant duties and levies into consideration, the total cost came to Kshs. 693,764/73 and with 100% profit it would come to Kshs. 1,387,529/46 which price he confirmed from the manufacturer of Cyber ROM Firewall. According to him, the goods were not fully delivered, as he only found a cabinet and a rack, higher than the one in court. Same contained servers, a cabinet/rack containing network components and a cabinet containing CCTV equipment.
20. The Forensic document examiner was PW3, Jacob Oduor, who produced three reports. Report No. 1 is dated 26th September 2017 which was upon a request made by Tabu Lwanga of EACC Malindi who submitted documents for examination and had five requests. His finding was that the payment voucher was made by the same author, Mohamed Chuba; Alex Mwongela and Richard Muasambu did not sign the inspection and acceptance certificate however, Andrew Kombe signed the inspection and acceptance certificate.



i. Whether signature indicated by arrow in red ink on EXBA1 has made by the same author as in B2 and signature indicated in arrow in blue C2 and is finding was that they were made by same author – Raphael Mutiso.

21. As regards Report No. 2, the question was whether the Signature indicated by arrow in red in document A was by the same author as specimen signature in document marked B. His finding is that they were made by the same author.
22. In report No. 3 dated 8th August 2016, the question was whether signature in blue arrow on A1, A2 and A4 was by the same author as on B1. His findings were that they were made by the same author. That the signature on A3 was made by the same author as in B2. Alex Kombe signed both A3 and A5. He further found was that Julius Wambua did not sign the payment voucher. Lastly, that the handwriting on A2 and B8 were of the same author, that is Richard Mwasambu. The writing on the space provided for the date and names on the purchase requisition A2 and that of Sophie Mwandawiro is different. What was authored by Richard Mwasambu are the entries at the top.
23. PW4, Stephen Yego, a forensic document examiner working with EACC stated that on 19th October 2019 one Tabu Lwanga submitted the following exhibits through an exhibits memo form; A1 letter dated 17th August 2015 addressed to Director of IFMIS, A2 County Government of Kilifi purchase Requisition dated 22nd April, 2015, B1 specimen signatures of Paul Keido Mwaso, B2 specimen signatures and handwriting of Richard Mwasambu. The investigating officer sought to ascertain whether the signature indicated by an arrow in red on exhibit A1 and the specimen signatures on B1 were by the same author. PW4 stated that upon examination he concluded that that the signatures were not made by the same person. He found that the signature indicated by an arrow in blue on exhibit A2 and the specimen signatures on document B2 were not made by the same author. Thirdly, he found that the handwriting circled and indicated by an arrow in red on exhibit B2 and A2 and the specimen handwriting in B2 were not made by the same author. It was his testimony that Paul Teido Muanzo did not sign the letter dated 17th August 2015 and Richard Mwasamba did not sign the purchase Requisition.
24. PW5, Ivy Akinyi Scott, a forensic document examiner with the Plaintiff received documents on 6th November 2019 from Malindi EACC submitted by Tabu Lwanga seeking to ascertain whether signature marked with an arrow in pencil in A1 was made by same author as in B 2. He examined and compared the signatures and found they were by the same author, Julius Ndung'u Wambua. Secondly, she was to ascertain whether the signature indicated in the red arrow in A6 and A9 were made by the same author as in B12 and C6 to which they found that Sophie Mnyamanyi Mwandawiro signed the contract (A6) and the letter (A9). Thirdly, she found that the signature on A2, B12 and B6 were made by the same author, Sophie Mnyamanyi Mwandawiro who signed the purchase Requisition.
25. Signature indicated in red in A4 was made by the same author Benjamin Chiluma as B15. The signature marked in black in A4 was made by the same person as in B14, one Silas Mohamed Chumba Munga. It was found that the signature marked in pencil arrow in A4 was made by the same person as in B12 and known signature in C6. The signature indicated with blue in A7 and A8 were made by the same author as B5, the signature indicated by red ink on A7 and A8 were by the same person as in B16. Lastly, she stated that the signatures indicated in pencil on A8 and A7 were made by the same author as B16.
26. PW17, Regina Ng'ang'a and PW18, Tabu Kwanga who conducted investigations with other officers confirmed that two payments were made without any work being done. PW18 was of the opinion that first payment has no documents at all so it is out rightly irregular. The second payment is the one that was voided and paid by Majaliwa Mkare.



27. PW1 was the Operations Manager, who confirmed that upon request by officers of the Plaintiff for account opening documents and bank statement of account number 1290163584518, Kenyatta Avenue Branch Nairobi, they did investigations and found that on 1st July 2015 there is cheque of 8,724,137.95 from Kilifi County by RTGS; on 3rd July 2015 a withdrawal of 9,000,000/=. The account was opened by one Charity Mueni Musyimi.

The Defendants' Case

28. The 1-6th Defendants filed a statement of defence dated 13th February 2018, 7-10th and 13th Defendants' dated 8th March 2018, 11th Defendant's dated 20th April 2018, 12th Defendant's dated 15th December 2017, 14th Defendant's dated 29th December 2017, 16th Defendant's dated 13th April 2017, 17th Defendant's dated 10th November 2018. The 15th, 16th and 17th Defendants did not file responses to the Plaint.
29. The Defendants called a total of eleven (11) witnesses. DW1: Allan Kimata, the co-director of KODD solutions limited together with the late Dobbs Aggrey Mkolwe stated that he was engaged twice in two projects by the county; scope of work for Phase I was to create a back up solution – setting up a data Centre separate from the Kilifi Data Centre while the scope of work on phase II was installing and configuring a security system for the computers in Kilifi County – security upgrade. The late Dobbs was the operations Manager for both Phases and is the one who supervised the works.
30. DW2, was Stephen Sanga Barrawah, who testified that the 3rd Defendant who was the Manager in-charge of Operations in Grand Top Solutions stated that his duties included Procurement and Supply Chain Management and was working for Grand Top Solutions and not Grand Top Solutions Limited. He participated in filling the tender document. The notification to apply for pre-qualification was in print media which they picked and filled the documents for prequalification. The Procurement made a call to them informing Grand Top Solutions to go and participate in the tender and he went and picked the bid document, filled it and took the bid document back for consideration. After they were successful, he replied with an acceptance letter and they signed the contract.
31. He confirmed that both LSO's had the same tender number which was not strange as the tender was done in phases which they sub-contracted KODD Solutions because of the equipment in a subcontract dated 30th May 2015. After the works were done, they issued the County Government with an invoice dated 20th May 2015 before the works were inspected. He stated that the invoice was raised on 29th May 2015 so that he could marry the date of VAT returns for KRA purposes. He confirmed that Grand Top Solutions was paid Kshs.9,200,000/= for the work which was the entire amount for the tender.
32. It was his testimony that Grand Top solutions was invited in the same way as Phase I through a phone call to Charity Mueni Musyimi. KODD solutions raised an invoice of Kshs. 6.490,000/=. The LSO was signed but it was not appended in the right place. It was appended slightly above the word supplier by the late Charles Munga. It was contended that his tender is dated 8th July 2015 while that of the plaintiff is dated 18th May 2015. That the Terms of reference are from the tender document, word for word. Both phase I and II were fully completed and KODD was paid.
33. DW3, Sophia Mnyamanyi Mwandawiro, who had worked with the Kilifi County Government stated that she had worked there from 2013 and had a password to the IFMIS System. That the ICT Department made a request for upgrading of the cyber rom and a contract was signed with regard to the payment, the subject of this case she checked the budget to see if there were funds for that requisition and then signed the purchase requisition form. Thereafter, it went back to ICT and she did not know what happened to it. It is after that that the voucher comes back and it goes to the system.



34. She stated that her role was only checking the availability of funds. She also confirmed that she signed the two LSOs for this tender which was also executed by relevant ICT Officers and the LPO. The payment voucher on page 124 of the plaintiff's bundle has two signatures. One is for the Chief Officer ICT and the other is for the authorizer in internet banking. It was her testimony that Paul Teido had the duty to approve the payment in Internet Banking. She confirmed that they do not pay for services which have not been done.
35. DW4, Raphael Kioli Mutiso, who worked as a county employee from 1st October 2014 and retired on 30th June 2016 in Internet Banking as Approver 1 had the requisite password through the Central Bank. He denied being involved in IFMIS. He stated that after examination of the payment voucher that would be brought to him physically in a register, he would sign to acknowledge receipt and then log into the IBS and check if the voucher was there. If it was not there he would return it to IFMIS. If it is in the IBS, he would check if it has all the relevant documents and authorize it both electronically and manually. It would then automatically move to Approver 2 with the physical documents.
36. He indicated that he would not know if a voucher has been voided in the IFMIS unless he was told. He also indicated that he did not have access to the procurement file. He approved both payments and the amount was payable to the supplier was subject to withholding tax due to KRA. He confirmed that the AIE Holder in this case was the Chief officer ICT Department, Mohammed Chuba, the 13th Defendant. He contended that the voluminous nature of work that was there could not allow him to scrutinize every detail of each document and it is the EACC who pointed out the disparities he has mentioned in his statement.
37. DW5 ALEX MWONGELA, the ICT Officer at the County Government of Kilifi told the court that he did the first requisition which is what initiates the procurement process, by logging into IFMIS and populating of the requisition form. What prompted him to do so is that there was a manual/physical requisition form which had been approved and on that basis he filled the one in the system He stated that he inspected Phase I which entailed Data centre Co-location services and issued an inspection report together with the Director ICT (Moses Karema) and Chief officer (Mohamed Chuba). The data center was in his office and another in the cloud.
38. He further told the court that he was in the tender evaluation committee and he confirmed that Grand Top was awarded the tender. He could not remember if he inspected phase II. As regards phase I, he stated that the works were done to their satisfaction in accordance with the Terms of Reference (TOR) and were done in two phases and there was no complaint. On IFMIS he only requisitioned once. There was no irregularity in the award of the tender. The work was done and no money was lost.
39. DW6 WAS ANDREW KITHI KOMBE, a procurement officer at the County stated that in this procurement the role he played was opening of the tenders and secretary in the Tender committee. It was his testimony that since there were two phases they did one tender opening for each phase. There were two separate tenders and two contracts. Each tender had its own Tender Number in as much as the project was the same.
40. He denied signing the inspection and Acceptance certificate, that it was forged and should not have been used to pay Grand-Top solutions or anyone else. As per the minutes, the tender Number reads KCG/392/2014/2015 and the LSO also reads KCG/392/2014/2015. The tender number on the minutes and LSO are the same but the reference numbers in the letters of award is different. His testimony was that the irregularity on the tender number and the fact that the acceptance letter came after the LSO was an irregularity and for those reasons, the payment voucher should not have been used to make payment. He confirmed that he saw Top's bid documents for both phases and that prequalified



suppliers can be invited to bid through a phone call. It is done sometimes through a phone call or through a letter depending on the urgency of the works.

41. In cross examination by Mr. Saluny, Advocate, DW6 testified that two tenders were floated; the first one was configuration of the Cyber Rom Phase II; the tendering documentation was separate for the two tenders. The contractor was the same but they were doing two separate things although for the same project. He sat in the committee for both tenders. The Tender No. KCG/179/2014/2015 was for proposed upgrading of data center servers and security upgrade of Cyber Rom Configuration (Phase I) and Tender No. KCG/392/2014/2015 for proposed upgrading of Data Center was for Phase II. Grand Top was paid for the works they had done. DW7 denied being given any kick back or money and neither had he heard of anybody in the team having received any money or kickbacks.
42. He confirmed that he sat in two committees namely Tender Opening Committee and Tender Committee. The former's main duty is to write the names and addresses of the bidders who have bid, write their bid sums, sign the report and send it to the Accounting Officer together with the physical bids for appointment of a Tender Evaluation Committee. The latter does not deliberate on who to award the tender.
43. He stated that during preparation of the first minutes he realized that he had left out one of the agendas but he had already signed it with the chairman so he informed the chairman and they did another set of payments while leaving the first intact as it had already made some payments. All of these are minutes of the same meeting which we held on 24th June 2015. The second and third minutes came about because he had left out some agenda in the first set. If an agenda is missing in the minutes it could not go for payments as it could mean the agenda was not discussed. He stated that had he not done the second and third set of minutes then some departments would not have been able to make payments. There was nothing irregular in him making the other minutes. He denied conspiring with any of the defendants to defraud the county.
44. DW8, DAVID MAANGI KITUNGA testified on behalf of the 2nd Defendant who was abroad and not feeling well.
45. Paul Teido Mwazo who was the Assistant City Treasurer and whose duty was Approver 2 in the Internet Banking system stated that Grand Top Solutions was one of the suppliers to Kilifi County Government. He confirmed that on 23rd September 2015 he approved a payment for Kshs. 8,724,137.94 after he had confirmed that there was a purchase requisition, there was a purchase order, a delivery note and the supplier's invoice. According to the payment voucher, the gross is Kshs. 9,200,000/= VAT of 6% IS 475,862.06 leaving a net payment to Grand Top of Kshs. 8,724,137.94.
46. He indicated that it would be unprocedural for the documents to be brought to him first before they went to Approver 1 as he was supposed to use the special reference number for him to search for the documents in the system. In this case the special reference number 2827 was appearing on the right hand side of the voucher. He stated that there was no provision for voiding and if it was to be done it should have been done in the IFMIS. He denied being informed that the payment/approval had been voided. He also denied being given a share of the money that was paid to Grand Top on 23rd September 2015.
47. He stated that the LSO (EXBP.21) was dated 18th May 2015 and the inspection and Acceptance Certificate (EXBP.3) was dated 19th May 2015, one day after the LSO. Meaning that Grand Top was issued with an LSO and the next day the works had been done and inspected which according to him was possible. He denied making any payment with serial number 2453 and contended that the payment of 1st July 2015 was not made by myself. According to IFMIS audit trail, Approver 2 was Riziki Matano.



48. DW 9, Benjamin Kai Chilumo, who was employed by the County stated that there were few challenges with the payment system where it would allow payments to be made without budget lines and there was sharing of passwords which should not have happened. He admitted to authoring the letter/memo dated 18th December 2015 whose subject is “Audit of the Below the line Transactions” due to an inability of the system to detect such transactions. The audit was conducted and by a report is dated 1st February 2015 made by Keziah Wambui, there was a recommendation that a forensic audit be conducted as there was issues with IFMIS but it was not done. They wrote to the EACC for the whole system to be audited.
49. It was his position that the first payment was made on 1st July 2015 and the second payment on 23rd September 2015. For the second payment Approver 1 was Raphael Kioli Mutiso and Approver 2 Paul Teido. He admitted that his signature was in the first LSO dated 18th May 2015. That there is a requisition for Grand Top that was created by Alex Kitheka and approved by Silas Mohammed Chuba. It was auto created by Julius Munga and he approved it. The voucher has a unique reference number 2452. payment voucher relates to LSO No. 972393 which he paid and he confirmed that it had all the requisite documents. He admitted that at IFMIS he approved the purchase order/LSO; at 1B level he approved payment to the supplier and was Approver 2. He confirmed that Kilifi paid about Kshs. 18 million to Grand Top Solutions and there was no audit report saying that money should not have been paid or lost.
50. He told the court that he and his immediate boss, the CEC Finance were surprised that EACC was refusing to look at documents which could assist to verify if the payments were fake but they were quick to rush to the police to check whether the OB he had submitted was fake. He contended that the EACC officers did not appreciate that there were two different transactions. He denied having an intention to defraud the country.
51. DW10, Silas Mohamed Chuba Munga, who was that Chief Officer ICT Culture and social services for Kilifi County 2014-2018 stated that the statement recorded with the EACC was done under duress. He stated that the project was done in two phases and entailed two critical aspects; hardware aspect and software aspect. Phase I was basically dealing with hardware installation to wit the shelves/racks, fire equipment and emergency equipment, CCTV and fire suppression system. It also included a dedicated secure VPN – virtual Private Network and also a dedicated internet connection. The tendering for phase I was through the restricted method because of the specifications and also sensitivity and it needed to be done by people they knew were dedicated to that kind of work.
52. He testified that There were five firms who were invited for this tender. Tender opening was done first by a committee appointed by the then County Secretary consisting of Andrew Kombe, Liz Mganga and Richard Mwasambu for Tender No. KCG/179/2014/2015. The committee did its work and submitted a report for Phase I. Thereafter a tender evaluation committee was appointed who made a report and found Grand Top solutions responsive and was recommended for the award. After that, the report was presented to the tender committee at a meeting held on 13th May 2015 who approved and awarded the tender to Grand Top as per minute No. 21/33/2014/2015. A letter of Notification of Award dated 16th May 2015 authored by Owen Yaa Baya, County Secretary was sent to the winning bidder. Grand Top Solutions then wrote an acceptance letter in regard to Tender No. KCG/179/2014/2015 dated 17th May 2015. An LSO was then written which he signed together with the Chief Officer Finance and the Accountant.
53. As regards Tender No. KCG/392/2014/2015, he stated that the number was an error by the clerk who was writing the LSO but it was issued for phase I. There was also a contract signed by Owen Yaa Baya, County Secretary. He confirmed that the work was done and confirmed by a letter from Grand



- Top solution. You can tell because there was a letter from Grand Top Solutions indicating completion of the works. He said that Mr. Owen Baya appointed an Inspection team from the department and reported that work was done. Thereafter the contractor was paid.
54. With regard to the tender for phase II, the tender was No. KCG/392/2014/2015 dated March 2015, which number was indicated on the LSO. The technical specifications differ from those in the tender for phase I and the tender went through the same process as in Phase I; the Acceptance letter by Grand Top correctly quotes the tender number for Phase II. The contractor was issued with an LSO dated 24th July 2015. He was satisfied that the works tendered for in both phases were done.
55. It was his contention that a software cannot run in the absence of a hardware so there must be a hardware for a software to run and at some point the two projects overlap. Phase II begun before Phase I was completed. The reason they did not float the two tenders together is that they required to get the hardware first otherwise it would have been problematic if they got the software first. The County's estimate for both phases was about Kshs.25 million, Kshs.15 million for Phase I and Kshs. 10 million for Phase II. He approved because he was told there were funds by Sophie Mwandawiro who he says misled him.
56. He contended that he did not notice any irregularities on the documents attached to the payment voucher. If there are no funds, reallocation can occur during the supplementary budget or in case of an emergency. Re-allocation of funds is not forbidden. He stated that it was not peculiar to his department. He admitted to re-allocating the funds. There was no provision disallowing subcontracting. He confirmed that the work was done and the County still uses that Data Centre to-date. That the issue that was before court was never raised in the County.
57. DW11, Riziki Matano Choga, who was the Head of Supply denied being involved anywhere in the stages of the procurement process. She testified that there were two tenders for the same financial year 2014/2015, that they may have the same description but the works cannot be the same. According to her, it is not possible for two different LSOs to bear the same tender number. The effect could confuse the handlers of the files but ordinarily you can proceed with the project any way. She played the role of Approver 2 in IFMIS in regard to Phase I – Purchase orders which she did upon being satisfied by the purchase requisition, Tender committee minutes, Notifications of Award, Letter of Acceptance by the winning bidder, whether there was an agreement between the supplier and the employer and also whether a LPO was raised in regard to the tender. That it was on the strength of the Tender committee meeting minutes of 24th June 2015 that she approved the LSO in the IFMIS.
58. In column I on page 291 of the Plaintiff's bundle there is a requisition No. 48. It was created by Alex Kitheka Mwongela and approved by Silas Mohamed Chuba. Then there is a PO Number 0972393. She stated that Chilumo was Approver 1 of this LSO and she was Approver 2. That there was no effect of wrong contract number on the LSO as human is to error. She confirmed that she approved the payment for work which was done.
59. I have considered the submissions of the Plaintiff dated 17th April 2024, 7th to 10th Defendants' submissions dated 10th April 2025, 11th Defendant's submissions dated 7th July 2025 and the 12th Defendant's submissions dated 2nd July 2025. The 1st to 6th Defendants had not filed submissions as at the time of writing this judgment.

ANALYSIS AND DETERMINATION

60. The court has considered the evidence that has been placed before it and finds that the issues for determination are;



- a. Whether there were two tenders.
 - b. Whether the tender process was regular or not.
 - c. Whether the works were done as per the tender(s).
 - d. Whether there were two payments and if so, whether they were regular payments.
 - e. Whether the 1st to 6th Defendants were unjustly enriched by the payments made herein
 - f. Whether the 7th to 13th Defendants were negligent in participating and facilitating double payment under fictitious, fraudulent, unlawful and corrupt procurement of the tender(s)
 - g. Whether the Plaintiff is entitled to the orders sought.
61. It is a trite principle of law that he who alleges must prove. This is espoused in the *Evidence Act* under Sections 107, 109 and 112 which provide as follows;

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 on proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 112 on proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

62. The Court of Appeal in Nairobi Civil Appeal No. 452 of 2018 Pamela Aboo V. Assets Recovery Agency & Another, the Court of Appeal addressed this issue of the legal burden of proof and evidential/evidentiary burden of proof and stated as follows:

“The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial. Section 108 explains that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. “On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour. It is also elementary that in civil cases, the standard of proof required is on a balance of probabilities or on preponderance of evidence.



“A litigant who fails to discharge the evidential burden in a case carries the risk, he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not static; it keeps shifting between the parties throughout the trial.”

Issue (a) - Whether there were two tenders

63. In this case, the Plaintiff contends that there was one tender based on the tender number being the same however according to PW7, the project was done in two phases which were tendered separately. He was involved in the evaluation of the tenders which was done as per Evaluation Report dated 23rd March 2015. KCG/179/2014/2015 was in respect to upgrading phase and KCG 392/2014/2015, which is the second phase was tendered separately. He confirmed that he signed the reports.
64. It was the evidence of DW7 that Tender No. KCG/179/2014/2015 was for proposed upgrading of Data center servers and security upgrade of cyber Roam Configuration (Phase I) and Tender No. KCG/392/2014/2015 for proposed upgrading of Data Center is for phase II which was corroborated by DW5, DW9 and DW6, the ICT officer. From the 13th Defendant’s bundle is a bid document on page 4 dated 17th February 2015 and on page 103 is that for phase II is dated March 2015. In particular, DW6, the procurement officer testified that page 72 of the 13th defendants bundle relates to phase I and that the reference numbers in both letters are different.
65. At this point, it is not in doubt that there were two tenders, one for upgrading of the data centre and the other for the data center and security upgrade of cyber rom configuration (software).

Issue (b) - Whether the tender process was regular or not.

66. It was submitted that tender was a restricted tender. Article 227(1) of the Constitution states that: -
- “When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”
67. The County Government of Kilifi being a public entity, the law applicable in respect to procurement was the constitution and the Public Procurement and Asset Disposal Act (PPADA) of 2015 (now repealed), which stated as follows in Section 102:-
- “(1) An accounting officer of a procuring entity may use restricted tendering if any of the following conditions are satisfied—
- (a) competition for contract, because of the complex or specialized nature of the goods, works or services is restricted to prequalified tenderers resulting from the procedure under section 94;
 - (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; or
 - (c) if there is evidence to the effect that there are only a few known suppliers of the whole market of the goods, works or services;
 - (d) an advertisement is placed, where applicable, on the procuring entity website regarding the intention to procure through limited tender.



- (2) An accounting officer of a procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.”

68. DW1 testified that the Company testified that they were invited through a notice to apply in the print media, then through a phone call the 2nd Defendant was told to go and pick the tender documents. The tender invitation is dated February 2015 while the application of Grand Top Solutions is dated 11th May 2015. Section 45 (3) of the PPDA provides as follows;

“ All procurement processes shall be—

- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;
- (b) undertaken by a procuring entity as per the threshold matrix prescribed; and
- (c) undertaken in strict adherence to Article 227 of *the Constitution*.”

69. The Plaintiff contends that there was no advertisement and that most of the documents provided before this court were not availed at the investigation stage. I have considered the documents and there is no advertisement. The Defendants were also unable to explain whether there was an advertisement or not however according to the tender opening report, bids were received proposals from 4 firms and thereafter the tender evaluation committee which consisted of Moses Karema, Alex and Sophie sat down. This was corroborated by the evidence of DW7 and DW10 and the letter dated 17th March 2015 when the evaluation committee was appointed. The members awarded Grand Top Solutions limited and this was seen in the minutes dated 23rd March 2015 for phase I and on 9th June 2014 because they presented the lowest bids.

70. Section 45 (3) of the PPDA provides as follows:-

“ All procurement processes shall be—

- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;
- (b) undertaken by a procuring entity as per the threshold matrix prescribed; and
- (c) undertaken in strict adherence to Article 227 of *the Constitution*.”

71. Requisition for upgrading of data centre services was estimated at a cost of Kshs 3,900,000 and that of the second tender was estimated at Kshs 4,000,000. The requisition was requested by Richard on 22nd April 2015 and approved by Chumba, the accounting officer on 23rd April 2015. The budget was confirmed by Sophie on 23rd April 2015 who admitted to it in her evidence. The internal memo dated 10th May 2015 made reference to appointment of the tendering committee and the tender closed on 13th May 2015. The Plaintiff contends that DW9 should be held liable for restitution as she requisitioned before confirming actual availability of the funds.

72. For the 1st tender, the tender opening meeting was held on 13th May 2015 and the members approved the award of the tender to Grand Top Solutions Limited. There were minutes to this effect that were signed by Andrew Kombe, Liz Nganda and Richard Mwasambu who were then issued with a notification of award on 16th May 2015. The company wrote an acceptance letter dated 17th May 2015. There is a letter from the County dated 18th May 2015 for tender no KCG/392/2014/2015 from Owen Yaa Baya to the company for KSHS 9,200,000 and an LSO for Kshs 9,000,000.



73. There is a contract dated 18th May 2015 between the County and Grand Top Solutions Limited signed by Owen Yaa Baya and Serah Musyimi and witnessed by Esther Njambi DW2.
74. The acceptance letter from the county is dated 19th May 2015. On record is an invoice dated 20th May 2015 for Kshs 9,200,000 and a remittance advice dated 30th June 2015.
75. I therefore find that the procurement process was regular and was done in accordance with the PPDA, 2015 which was the applicable law at the time.

Issue (c) - Whether the works were done as per the tender(s)

76. The next question is to determine whether the works were done. According to the Plaintiff in its pleadings, the work was not done and therefore the payment was fraudulent. Thus there was a conspiracy of the 1st to 14th Defendants to defraud Kilifi County. However, PW7, Moses Karema Mlewa, the ICT Manager told the court that there was upgrading of the Data Centre and Cyber ROM project took place and he inspected the works and prepared the report to that effect. His evidence corroborated what a majority of the Defence witnesses said, that the works were done in two phases and inspection was done.
77. The testimony of PW6, Alex Kinyanjui, the ICT Forensic investigator, the goods were delivered not fully. Upon Inspection, they found various components which are listed in the report and one item namely Cyber ROM Fireball CRI00ING. In addition, the inspection and acceptance certificate dated 20th May 2015 indicates “32gb Ram – done, 1TB HDD-inserted, Cyber roam upgrade to 500 Users – done, Training of support staff – done.”
78. The inspection and acceptance report dated 20th May 2015 presented in evidence indicates a follows:-
“ 32GB Ram- done,
TB HDD- inserted,
Cyber roam Upgrade to 500 users- done,
Training of support staff-done.”
79. The said document has been signed by Richard, Mohamed and Andrew but only Mohammed admitted to signing it in his oral testimony. Andrew denied signing it and according to the forensic report, the signature of Richard was forged. DW5, Alex Mwongela denied signing the inspection and Acceptance certificate on Page 134 of the Plaintiff’s bundle but admitted to signing the one on page 100 of the 13th Defendant’s Bundle. However, the Requisition was requested by Richard on 22nd April 2014 approved by Chumba the accounting officer on 23rd April 2014. The budget was confirmed by Sophie on 23rd April 2014.
80. The court has also considered the completion report dated 17th June 2015 titled “project completion report, proposed upgrading of data center services and security upgrade of cyber roam configuration phase I.”
81. From the evidence of DW1, they sub contracted a company called KODD Solutions and from the contract provided, the terms were to supply installation and commissioning of data centre upgrading phase II (1) Hardware appliance, substitution license -3 years, logistics deployment, commissioning and maintenance. KODD Solutions raised an invoice of Kshs 6,700,000.



82. On record is a contract for proposed upgrading of data centre servers and upgrade for cyber roam configuration (phase II) dated 20th July 2015 with the same tender number signed by Owen Yaa and witnessed by Mohammed on behalf of the County and Charity and Philip Makoha on behalf of Grand Top Solutions. Thereafter a LSO was prepared on 24th July 2025 for Kshs 9,200,000 and an invoice from Grand Top Solutions was raised on 31st July 2015 for the same amount.
83. There is a second inspection report on record dated 3rd September 2015 signed by Mohamed, Moses and Richard which indicates as follows;
- “ Hardware Appliance-Cyber Rom Appliance provided
Subscription License- 3 years licence for 200 users provided
Logistics, deployment & Commissioning maintenance and support cost- project tested and commissioned.”
84. I rely on the finding of the Court of Appeal in the case of Centurion Engineers & Builders Limited v Kenya Bureau of Standards [2023] KECA 1289 (KLR) where the court stated as follows:-
- “ Consequently, we hold that the issue as raised by the respondent on the contravention of the PPDA is a mere afterthought aimed at avoiding liability to fulfil its contractual obligations. It is not disputed that the appellant indeed carried out and completed the additional works as instructed, and handed over the project to the respondent, who has since taken possession of the premises for its day-to-day business without paying the appellant the contractual sums due. We agree with the appellant that it is indeed entitled to the value for work done under the contract as mutually agreed upon by the parties.”
85. The standard of proof in civil matters is on a balance of probabilities. In this case there was no evidence to prove that the works were not done. Even the EACC’s expert witness was not certain or specific when that question was put to him. The County officials on the other hand were certain that the works were done and that the data centre is still in use to date. In effect therefore it can be said that the works were completed.

Issue (d) - Whether there were two payments and if so, whether they were regular payments.

86. Having found the work was done, then the company was entitled to payment. It is the evidence on record that the payment was done twice, that is not in contention. The first payment which was done on 1st July 2015 and the second payment done on 23rd September 2015 is corroborated by the evidence of PW8, PW13, PW16, DW2, DW9 and DW10.
87. PW16, Leonard Kimutai Kipsanai confirmed that payment of Kshs 8,724,137.95 was made twice to Grand Top Solutions Account held by the 15th Defendant on 1st July 2015 and 23rd September 2015. This was corroborated by PW2 who testified that report was raised on 30th June 15 from their department vide purchase order 972393 was raised by Julius Munga and was 1st approved by Benjamin Kai and 2nd Approver Julius Mwaza. The same day, an invoice was raised in the system by Mr. Zain Zudi Nzai. She stated that the valuation was done by Gilbert Bayaa the same day and the payment done on 18th September 2015 by Gabriel Majalewa Mkare and invoice number 0972393 was paid for twice.
88. In addition, there are two payment vouchers, one for Kshs 9,200,000 plus VAT and another for Kshs 8,724,137.95 going the evidence of the Plaintiff as well as the Defendants. The Approver was Raphael



Kioli Mutiso was the 10th Defendant and he admitted to making the approval and Approver II Paul Teido who also admitted to making the approval in court.

89. According to PW8, the cancellation was done on 18th September 2015 (see 1st screenshot at page 219). A report was raised on 30th June 2015 from their department vide purchase order 972393 was raised by Julius Munga and was 1st approved by Benjamin Kai and 2nd Approver Julius Mwaza. The same day, an invoice was raised in the system by Mr. Zain Zudi Nzai. She stated that the valuation was done by Gilbert Bayaa the same day and the payment done on 18th September 2015 by Gabriel Majalewa Mkare and invoice number 0972393 was paid for twice. There is therefore no doubt and indeed it was not disputed that there were two payments. As there were two phases the two payments were regular.

Issue (e) - Whether the Defendants were unjustly enriched by the payments made herein

90. The history, literature and principles of unjust enrichment was discussed in detail in the case of Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others [2003] KEHC 991 (KLR) where the court stated as follows;

“From the now abundantly available literature on the subject of restitution on account of unjust enrichment and in North America and the common law diaspora established judicial recognition and exposition, and a vibrant academic scholarship shown in esteemed monographs and stream of learned articles in world class journals and reviews whose citation is encouraged by the courts as helpful guides one sees that the law on unjust enrichment or unjust benefit is aimed at preventing a person from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. From these sources, it is possible to highlight, albeit in summary fashion for in this space of a judgment, some of the common unjust factors which the law recognizes as calling for restitution. You may call them grounds which form the basis of a restitutionary claim. At the moment I sample the following:

1. non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payor and payee;
2. voluntary conferment of benefit for total failure of consideration;
3. benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;
4. ultra vires demand;
5. abuse of a power entrusted to the Defendant by Parliament or by a contractual instrument such as a debenture or other agreement;
6. illegitimate use of self-help sanctions;
7. vindication of equitable title to property.

In short, on the part of the plaintiff there must be found, in truth, factors which negative the voluntary character of the transfer of benefit to the defendant. The plaintiff must be found to have had a qualified or vitiated intent that the Defendant should be enriched. On the side of the defendant, there must have been free acceptance of the transfer, in the sense that the Defendant had a choice whether to accept or reject, and had sufficient knowledge of the facts to make that choice a real one. The Defendant must



know that a benefit is being offered to him non-gratuitously, and having the opportunity to reject, elects to accept.”

91. The Plaintiff raised the issue of fraud in regard to the signature on the inspection and acceptance report which it is alleged was not signed. I am persuaded by the observation of the Court of Appeal in the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467 (KLR) that:

“The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

92. The same court in *Jose Estates Limited v Muthumu Farm Limited 2 others* 2019 KECA 224 (KLR) stated that:

“Given the seriousness of the allegations, the onus was on the 1st and 2nd respondents who alleged fraud to provide evidence in court that meets the standard of proof which was underscored by this Court in *Central Bank of Kenya Limited v Trust Bank Limited & 40 others* [1996] eKLR as being beyond that of a balance of probabilities but below beyond reasonable doubt. In that case, the Court rendered itself as follows: “The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.” In the instant appeal, the 1st respondent needed to not only plead and particularize the fraud as he did in the amended plaint but to also lay a basis by way of evidence upon which the court would make such a finding. The learned Judge did not specifically make a finding on the question but held that it would be wrong to allow the appellant and the 3rd respondent to be beneficiaries of the process which did not inspire confidence in its transparency before he proceeded to declare that the sale and transfer of the suit property to the appellant was null and void. It was not enough that the process failed to inspire confidence or that it was suspicious, evidence in support of the allegation of fraud had to be tendered. A transaction which does not inspire public confidence is not tantamount to fraud. The learned Judge was perfectly entitled to be suspicious of the transaction on the grounds he set out, but suspicion is not fraud.”

93. From the evidence on record, there was forgery of a signature but it is not clear who forged the said signature. Intention to defraud the County government of Kilifi was also not proved to the standard required to wit on a balance of probabilities.
94. The Plaintiff contends that the 1st -6th Defendants were the direct beneficiaries of Kshs 8,724,137.25 as they jointly and severally participated in the enterprise while the 7th to 14th Defendants abused the power entrusted to them by participating in the fraudulent scheme. It is trite law that fraud must be specifically pleaded and proven. In this case, the plaintiff has alleged that there was fraud but has not availed any evidence linking any of or all the Defendants to the alleged forgeries or fraud and has failed to provide any evidence that the documents produced by the Defendants were falsified, thereby failing to discharge its burden of proof regarding the allegations of fraud. It was submitted by the Plaintiff



that the minutes on page 131 were forgeries having being disowned by PW10 and PW11 and since they are the ones that were used to effect the payment, it was part of a scheme to defraud the county.

95. In the end, the court finds that whereas there may have been fraud the same was not strictly proved as required.

Issue (f) - Whether the Defendants were negligent in participating and facilitating double payments under fictitious, fraudulent, unlawful and corrupt procurement of the tender(s).

96. Section 203 of the *Public Finance Management Act* provides as follows;

“A public officer is personally liable for any loss sustained by a county government that is attributable to—

- (a) the fraudulent or corrupt conduct, or negligence, of the officer; or
 - (b) the officer’s having done any act prohibited by sections 196, 197 and 198.
- (2) The County Treasury may, by civil proceedings brought in a court of competent jurisdiction, recover damages from a public officer for any loss for which the officer is liable under subsection (1).”

97. Section 27 of the repealed 2005 Act provided as follows: -

- (1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.
- (2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1)
- (3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.
- (4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.
- (5) The accounting officer may use the procurement until and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.
- (6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed.”

98. It is not in dispute that the payments were made through the IFMIS system and the Internet Banking (IB) System. According to PW2 all IFMIS procedures were properly done and followed and the supplier has no access to IFMIS. DW3 from IB confirmed that he would not know if payment was voided unless he was told. Paul Teido, the 14th Defendant stated that the documents are originated from the user department. They are processed in to IFMIS by that department before they are brought to their department. Any officer from the user department could bring the documents to their department: There was no particular officer designated for that. PW13 confirmed that if a payment is passed by IFMIS the IBS cannot void it. If a payment is voided by IFMIS the IBS will not know. The



9th Defendant was only granted rights as an inputter which means she could view the system but she could not approve or make changes. This was also corroborated by the evidence of PW2.

99. It is evident that the relevant documents supporting the payments were present during the various approvals and therefore, no fault could be attributed to the respective Defendants who approved the necessary payments on both platforms.

100. On the issue of cancellation, Section 63(1) (b) of the PPDA is a provision on the authority of an accounting officer of a procurement entity to terminating or cancelling a procurement proceeding. The said section provides that;

“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected.”

101. In the case of *Island Homes Developers Limited v Public Procurement Administrative Review Board; Kenya Ports Authority & 2 others (Interested Parties)* [2020] KEHC 8863 (KLR) the court stated as follows with regard to the above section;

“This Court finds and holds that the averments made by Mr. Aza Dzengo in the 1st and 2nd Interested parties’ Replying Affidavit with regard to availability of funds to carry out the tender are mere allegations as they are not supported with any evidence. The minutes of the alleged meeting held on the 4.12.2019 by the 2nd Interested Party’s Board holding that the tender was floated in the absence of a budgetary allocation have not been furnished to this Court. Consequently, this Court will not concern itself with the issue of availability or otherwise of budgetary allocation. In any event, this Court cannot take it upon itself to terminate the tender contract between the procuring entity and the award winner without hearing the award winner on the matter. If, however, the 1st and 2nd Interested Parties have become aware of their possible violation of the law relating to procurement in the current matter, it is upon them to solely decide whether or not they will continue with any such disobedience and/or violation of the law.”

102. In this case, it is not clear why the payment was voided, I do agree with the Defendants’ submissions that it would have been important for the Plaintiff to avail the user by the name MKAREG to explain why he or she voided payments on the IFMIS system and consequently the IB system. No errors were detected by the IB system as a result of which the file was not sent back as all the supporting documents had been availed. The issue of insufficient funds was successfully buttressed by the evidence of DW9, Sophia Mwandawiro who confirmed that there were sufficient funds. In addition, DW10



further testified that they had to reallocate funds to meet the budget for the proposed services and that the payment would not proceed if there were insufficient funds.

103. The chief accounting officer also testified that reallocation involved moving funds from one vote to another to enable payment, and most times, the reallocation would be done before the budget was confirmed by the accountant. I have looked at Section 154(2) of the *Public Finance Management Act* which the 11th Defendant submitted that it allows an accounting officer of the county can reallocate the funds between programs where, among other parameters, provisions made in the budget of a program or Sub-Vote are available and are unlikely to be used. The said section provides as follows;

“An accounting officer for a county government entity may reallocate funds between programs, or between Sub-Votes, in the budget for a financial year, but only if—

- (a) provisions made in the budget of a program or Sub-Vote are available and are unlikely to be used;
- (b) a request for the reallocation has been made to the County Treasury explaining the reasons for the reallocation and the County Treasury has approved the request; and
- (c) the total of all reallocations made to or from a program or Sub-Vote does not exceed ten percent of the total expenditure approved for that program or Sub-Vote for that year.”

104. The 11th Defendant’s role was approval of the purchase order in IFMIS for payment made on 1st July 2015 pursuant to LSO No. 0972393 and the relevant supporting documents. There is no evidence produced by the Plaintiff to indicate otherwise, that they did not exist nor that they were forged.

Issue (g) - Whether the Plaintiff is entitled to the orders sought

105. The Plaintiff contends that there was conspiracy to defraud the County. Conspiracy is an agreement between two or more parties to purposefully commit an unlawful act or do a lawful act in an unlawful manner. This was stated by the court in *Munyua v Republic* (Criminal Appeal E023 of 2022) 2023 KEHC 17857 (KLR).
106. The Plaintiff provided a bank statement from Equity Bank that shows that Kshs 8,724,137 was paid by the county to Grand Top Solutions on 1st July 2015 and a further Kshs 9,000,000 on 3rd July 2015. The said statement also shows that Kshs 8,000,000 was withdrawn on 23rd September 2015 but the court has not been told where the trail leads. There is a cash deposit of Kshs 3,300,000 and 5,700,000 by DW1 on 3rd July 2015 into the account of Capital Solutions whose director is Serah. No further explanation has been provided to complete the puzzle. I therefore find that the Plaintiff has failed to show that the Defendants had knowledge of any conspiracy or benefited from the monies paid by the county.
107. In conclusion, the Plaintiff did not prove its case on a balance of probabilities. The court directs that the monies held in the following accounts be unfrozen;
- a. The sum of Kshs 481,387.19 held in bank Account number 0450194xxxxxx in the name of Charity Mueni Musyimi at Equity Bank, Malindi Branch.
 - b. Kshs 320,775.55 held in bank account number 0450294xxxxxx in the name of Capital Solutions Limited at Equity Bank, Malindi Branch.



- c. Kshs 3,938,663.40 held in bank account number 01285118xxxxxx in the name of Geotech Contractors Limited at National Bank, Port Way House Mombasa.
- d. Kshs 592,000.00/= held in Sacco account in the name of Sarah Musyimi-ID Number xxxxxxxx (Staff number BIA 11557) held at Stima Sacco Limited
- e. Kshs 592,000.00/= held in Sacco account in the name of Sarah Musyimi-ID Number xxxxxxxx (Staff number BIA 11557) held at Stima Sacco Limited
- f. Kshs 2,081,937.00/= held in Sacco account in the name of Josephat Lango Vaya-ID Number xxxxxxxx(Staff number BIA 14603) held at Stima Sacco Limited.
- g. This being a matter that was filed on behalf of the public there shall be no order for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

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E. N. MAINA

JUDGE

In the presence of: -

Mr. Okari for 7th to 10th Defendants

Mr. J.B Macharia for 11th Defendant

Ms Eusto for Mr. Nyaribo for 1st to 6th Defendants

Mr. Moriasi for 12th Defendant

Ms Kenaga for Saluny for 13th Defendant

Mr. Onindo for 14th Defendant

Ms Watitu for Mahinda for 15th Defendant

Mr. Mbaka for Plaintiff

Court Assistant – Geoffrey

