



REPUBLIC OF KENYA



Ethics and Anti-Corruption Commission v Fish Nets Enterprises Ltd & 13 others (Anti-Corruption and Economic Crimes Civil Suit E003 of 2021) [2024] KEHC 3196 (KLR) (Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3196 (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 E003 OF 2021

EN MAINA, J

MARCH 20, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

FISH NETS ENTERPRISES LTD 1ST DEFENDANT
BONAYA DIDA BONYA 2ND DEFENDANT
QABALE WARIO HALAKE 3RD DEFENDANT
WARIO BORU TORE 4TH DEFENDANT
HALAKE TADICHA 5TH DEFENDANT
GUYO ADI 6TH DEFENDANT
ELIJAH KIARIE NDUATI 7TH DEFENDANT
CHRISTOPHER KIMATHI 8TH DEFENDANT
ZAINAB TACHE GUYO 9TH DEFENDANT
GUYO BUKE SUKU 10TH DEFENDANT
HAWO GALGALO KANATO 11TH DEFENDANT
MUTEA JOHN KIUNGA 12TH DEFENDANT
GIRO LIBAN 13TH DEFENDANT
FAYO GALGALO 14TH DEFENDANT



JUDGMENT

1. The Plaintiff's claim against the Defendants is for a declaration that the sum of Kshs.7,220,000 paid to the 1st Defendant by the County Government of Isiolo constitutes proceeds of corruption; judgment against the Defendants jointly and severally in the sum of Kshs.7,200,000 plus interest from the date of filing suit until payment in full. In the alternative, that Judgment be entered in the sum of Kshs.7,220,000 together with interest from the date of filing suit until payment in full and that the preserved sum of Kshs.5,187,000 in Account number 01109437125000 at the Co-operative Bank Ltd held in the joint names of the 3rd and 4th Defendants be applied towards settlement of the Judgment and decree of this court.

The Parties

2. The Plaintiff is a body corporate established under Section 3 of the Ethics & Anti-Corruption Commission Act, 2011 with the mandate to institute and conduct proceedings for the purpose of recovery or protection of public property.
3. The 1st Defendant is Limited Liability Company - registered as Fish Nets Enterprises Ltd – which received the impugned payments, and whose directors are the 2nd and the 3rd Defendants and which at all material times, carried on business within Isiolo Town, in the name and style of Ganale Whole Sale or Ganale Wholesalers.
4. The 2nd Defendant, was at all material times a clerical officer employed at the County Government of Isiolo employed thereat since 2013, and a co-director of the 1st Defendant.
5. The 3rd Defendant, was at all material times a business lady and co-director of Fish Nets Enterprises Ltd [the 1st Defendant herein].
6. The 4th Defendant, resides and works for gain in Isiolo and jointly with the 3rd Defendant is the holder of bank account Number 0110943712500 at the Co-operative Bank Ltd.
7. The 5th Defendant, was at all material times the Chief Officer in-charge of administration in the office of the Governor of Isiolo County.
8. The 6th Defendant, was at all material times between 2014 and 2016 the Personal Assistant to the Governor of Isiolo County.
9. The 7th Defendant was at all material times an employee of the County Government of Isiolo, employed as the Acting Head of Treasury.
10. The 8th Defendant, was at all material times an employee of the County Government of Isiolo, employed as a Procurement Officer in the Office of the Governor.
11. The 9th Defendant, was at all material times an employee of the County Government of Isiolo, employed as a Clerical Officer in- charge of Stores at the County Treasury.
12. The 10th Defendant, was at all material times an employee of the County Government of Isiolo, employed as a Licensing Officer.
13. The 11th Defendant, was at all material times the Secretary in the Governor's office.



14. The 12th Defendant, was at all material times an employee of the County Government of Isiolo, employed as a Computer Programmer and an Information Communication and Technology (ICT) Officer.
15. The 13th Defendant, was the Chief Officer in the office of the Governor of Isiolo from November 2016 to August 2017.
16. The 14th Defendant, was at all material times the Chief Officer, Finance and Economic Planning, in the County Government of Isiolo.

Plaintiff's Case

17. The Plaintiff contends that the 1st Defendant was unlawfully, fraudulently, and unjustly paid a sum of Kshs.7,220,000 by the County Government of Isiolo following procurement fraud, malpractice, collusion, and conspiracy orchestrated by the 5th to the 14th Defendants.
18. It is averred that the 3rd Defendant derived a benefit of Kshs.2,030,000 from the monies unlawfully paid to the 1st Defendant through a withdrawal of the said sum from the 1st Defendant's account and through a further sum of Kshs.5,187,000 which was transferred into the joint bank account of the 3rd and 4th Defendants.
19. It is the Plaintiff's case that there were irregularities in what was purported to be the procurement process that culminated in the payment of the impugned monies.
20. Evidence was led that the impugned payment was made on the basis of a requisition note drawn by the 5th Defendant on 10th September, 2014. The said requisition note is said to have been made pursuant to forged letters dated 25th July 2014 purportedly authored by the Member of the County Assembly and the Ward Administrator of Cherab Ward. Thereafter, no proper procurement process was conducted by the County Government of Isiolo as was required under Section 27 of the Public Procurement and Disposal Act, 2005 and the PPDA Regulations 2006.
21. The Plaintiff also alleges that on 11th December 2014, the 5th Defendant fraudulently, unlawfully, and irregularly issued instructions by way of complementary notes, to an entity trading as Ganale wholesale [business name under the 3rd Defendant (Qabale Wario Halake)] instructing it to supply various food items to unnamed recipients thereby committing the County Government of Isiolo into financial liability.
22. The Plaintiff contends that between 22nd October 2014 and 16th December 2014 the 6th Defendant issued similar instructions to Ganale Wholesaler, to supply various food items to unnamed persons, thereby unlawfully committing the County Government of Isiolo into financial liability.
23. It is contended that the said complementary notes were used as the basis for the subsequent payment yet they are not procurement documents known in law; that based on the instructions issued by the 5th and 6th Defendants, in the manner described above, the 1st Defendant issued to Isiolo County Government invoices and delivery notes, and a demanded payment of Kshs.7,220,000/= for goods allegedly supplied.
24. It is contended that the invoices and delivery notes issued by the 1st Defendant to Isiolo County Government were not backed by any prior local purchase orders (LPO) or preceded by any procurement process by the County Government of Isiolo as would have been expected under the Public Procurement and Disposal Act, 2005 and the PPDA Regulations 2006.



25. It is the Plaintiff's case that on 19th May 2017, the 13th Defendant, the Chief Officer Governor's Office, Isiolo County unlawfully and fraudulently instructed the 14th Defendant to process payments in the sum of Kshs.7,220,000/= in favour of the 1st Defendant on account of goods allegedly supplied; That on the same date, the 14th Defendant fraudulently and improperly approved the said request and thereby effectively authorizing the fraudulent payment in favour of the 1st Defendant; that on the same date, the 8th Defendant unlawfully and fraudulently prepared Local Purchase Orders No. 3011825 and No. 3011826 for a sum of Kshs.3,611,000/= and Kshs.3,609,000/= respectively in favour of the 1st Defendant.
26. The Plaintiff avers that the 9th, 10th, 11th, and 12th Defendants fraudulently signed inspection and acceptance forms relating to the LPO Numbers 3011825 and 3011826 aforesaid and backdated them to 23rd November 2016 purporting to have inspected and accepted the goods purportedly supplied by the 1st Defendant to the Isiolo County Government.
27. Further, that on or about 19th May 2017 the 9th Defendant fraudulently prepared and issued undated Counter Requisition and Issue Voucher No. 6542052 and No. 6542053; and Counter Receipt Voucher Numbers 7241289 and 7241290 purporting to acknowledge that Isiolo County Government had ordered and received goods from Fish Net Enterprises Ltd (1st Defendant) and which purported to correspond with LPO Numbers 3011825 and 3011826 respectively.
28. Further, that on 6th June, 2017 the 13th Defendant, being the Accounting Officer at the Governor's Office, executed payment vouchers thereby improperly authorizing payment of Kshs.7,220,000/= to the 1st Defendant notwithstanding that the said payment was unlawful as it was not supported by corresponding procurement proceedings or a valid contract.
29. It is also the Plaintiff's case that the 2nd Defendant being an employee of Isiolo County Government and a Director of Fish Nets Enterprises Ltd was prohibited under the provisions of Section 42(3) of the *Anti-Corruption and Economic Crimes Act*, 2003 from trading with the County Government of Isiolo either directly in his name, or indirectly through Fish Nets Enterprises Ltd; that the sum of Kshs.7,220,000.00 was paid by Isiolo County Government to the 1st Defendant as a result of corrupt practices and amounts to proceeds of crime; that the 1st, 3rd, and 4th Defendants unjustly enriched themselves in the sum of Kshs.7,220,000/= from Isiolo County Government and the Plaintiff seeks restitution of the said sum on behalf of the public and the County Government of Isiolo.
30. To prove its case, the Plaintiff called eight (8) witnesses as follows: PW 1 Richard Kipkosgei Kilimo, an investigator with the Ethics and Anti-Corruption Commission, Upper Regional Office, Isiolo who testified that the Commission received complaints to the effect that employees of the County Government of Isiolo were conducting business with their employer the County Government of Isiolo and that no procurement was being undertaken. Specifically, the complaint was that Fish Nets Enterprises Limited, the 1st Defendant, purported to have supplied food items to the County Government of Isiolo. PW1 testified that upon analysis of the materials/evidence, a conclusion was made that there was loss of public money; that the conclusion was informed by the fact that the procurement law, to wit, the *Public Procurement and Disposal Assets Act*, 2005 was not adhered to.
31. PW2 Paul Ouko Abuto an Assistant Director Legal Section at National Registration Bureau testified that he checked the details of the Kenyan Identity Cards that were forwarded to them by the Plaintiff; that however, it was not possible to determine where the holders of the Identity Cards lived. They also did not check if the persons really existed or not; but only reported what was in their database.



32. PW3 Abdulahi Huka, the Cherab Ward Administrator, Isiolo County since March 2014) denied having written the letter dated 25th July 2014 which is purported to have been authored by him and which was requesting for emergency relief to Cherab ward. He asserted that he was not involved in the procurement process. He stated that he only wrote proposals which were not binding. Nevertheless, he had to be consulted in regard to issues concerning Cherab ward.
33. PW4 Hassan Diba Kumpa (MCA Cherab Ward 2013 to 2017) also denied being the author of a letter dated 25th July 2014 which requested for food for Cherab Ward and stated that the requested items were for Cheri ward, and not Cherab Ward. He too testified that he was not privy to any procurement process and that his consent is not required in such process.
34. PW5 Dr. Salad Kikuyu Sarite testified that he was the Head of supply chain Isiolo County at the material time. His role was to, inter alia coordinate procurement plans, management of procurement staff and to write professional reports after the evaluation process. He explained in detail how procurement is conducted right from the stage of planning and budgeting to the award, contract, inspection and payment. He stated that in regard to this case the EACC officers investigating the case showed him a letter dated 10th September 2014 which was requisitioning for food aid to certain Wards in the County. He was also shown two Local Purchase Orders (LPOs) and immediately noticed that the LPOs had no dates at top, but which had the date 19th May 2017 at the bottom. He stated that that was not a good practice much as it did not necessarily invalidate the LPOs. He testified that he was also shown some delivery notes and noted that the dates on those delivery notes did not correspond with the dates on the LPOs; that although logically the LPO should come before delivery of goods and services, the deliveries were purported to have come before the LPOs; that in this case the delivery notes are dated 2014 whereas the LPOs are dated 2016. He also stated that the Inspections Certificates in respect of the purported deliveries were dated 23rd November 2016; that the Form S13 and S11 which are used to receive goods and to confirm delivery were not dated. He asserted that complementary notes are not part of the documents used in the procurement process. Further that there was a mismatch between the Inspection and Acceptance certificates, and the lists of beneficiaries dated 13th November 2014 and 17th November 2014. He maintained that based on the documents, the procurement process was not properly conducted but that the method used to initiate it was proper given that the value was not in excess of Kshs.5 million.
35. The witness stated that the S11 and S13 which are internal documents are the operational documents to confirm receipt of the goods and the same should have been dated as at the time the goods were received in the stores and the time they left the stores. He disputed that there were documents that went missing from their offices.
36. He expounded that it is the County treasurer through the procurement officer who advises the method of procurement; that the complementary cards shown to him were addressed to Ganale wholesalers and not Fish Nets Enterprises Limited. He stated that if there was collusion, the monies to Fish Net would have been paid in 2015; and that he is not aware of any complaint that goods were not delivered. In conclusion he maintained that the procurement process was not properly conducted.
37. PW6 Peter Ngenchu Muhuha testified that he had been the Chief Officer Finance, Isiolo County since 9th March 2018; that he did not use the LPOs, S11 and invoices to make the payments as that was the role of the Accounting Officer; that his role was to consolidate all the payments from various departments. He acknowledged that he received a letter dated 10th September 2014 from the Chief Officer Governor's office and that there were also some letters written to the Governor requesting for relief food by the Cherar Ward Administrator and Ward MCA addressed to the Governor – both 25th July, 2014.



38. He stated that he makes payments as the final payer in Internet Banking provided the accounting officer has authorized the payment; that he does not authenticate the supporting documents as that is done by the Head of Treasury. He described his role in making payments as that of a conveyor belt save for payments concerning his department. He stated that he had not seen the letters dated 19th May 2017 authorizing the processing of the 1st Defendant' pending bills. He stated that in 2014 the 14th Defendant was the Chief Officer Finance.
39. PW7 John Rutere Njeru (Service Desk office, Co-operative Bank Isiolo since 2017) adopted his written statement dated 4th May, 2021. His statement is to the effect that Fish Net Enterprises Ltd Bank Account No. 01148438091100 was opened by the 2nd and 3rd Defendants, who are the directors of the company. That on 18th August 2020 Kshs.5,187,000/= was transferred from the account of Fish Nets to the joint Account No. 01109437125000 of the 2nd and 3rd Defendant.
40. PW8 Ivy Akinyi Scott testified that she was a Forensic Document Examiner working for the EACC; that she prepared a report dated 25th November 2020; that she examined the specimen and signatures of the Defendants against the documents the subject of this case; that some signatures did not match with the documents from Isiolo County; that in particular, the signature of Hassan Kumpa was different, but she could not tell by whom it was signed but she was sure it was not signed by the Defendants.

The Defendants' Case

41. The 1st, 2nd, 3rd, and 4th Defendants filed a Statement of Defence dated 15th December 2021 and the 5th to the 14th Defendants one dated 11th March, 2022. The Defendants denied every allegation contained in the Plaint and averred that the Plaint does not raise any reasonable cause of action against them and ought to be dismissed and that the Plaintiff is not entitled to the prayers sought in the Plaint. In addition to their written statements, some of the Defendants also testified court as follows.
42. DW1 Guyo Adi (the 6th Defendant) testified that he was the Personal Assistant to the Governor of Isiolo County between 2014 to 2016; that he was not involved in the procurement process; that he issued complementary cards/notes on behalf of the Governor but the same were never used to procure services or goods. That the same were paid for by the Governor personally and not by the County Government of Isiolo.
43. In the case of complementary notes/cards to Ganale Wholesalers, his evidence was that he was not aware how they were paid for; that he never issued complementary notes to Fish Nets Enterprises Limited, which is owed by the 3rd Defendant; that he had never heard of it before and did not know of any connection between Ganale Wholesalers and Fish Nets Enterprises Ltd.
44. DW2 Halake Tadicha (the 5th Defendant) stated that at the material time he was the Chief Officer in charge of Administration in the Office of the Governor's. He conceded that he made the requisition for relief food to the Chief Officer Finance through the letter dated 10th September 2014; that the request was kick started by letters from the area MCA's; that he initiated the process as the AIE holder for the user department and that his involvement in procurement ended at that stage. He contended that he gave the award of tender to Fish Net Enterprises Limited as the lowest bidder, to supply the relief food. To him, the company performed the contract since the community received the relief food. He conceded that the counter requisition voucher in regard to the contract is undated.
45. DW3 Hawo Galgalo Kanato (the 11th Defendant) stated that in 2014 she was the secretary at the Governor's office; that she received goods from Fish Nets Enterprises Limited and signed the Inspection Certificates in 2016. That the signed Certificate of Inspection was not an Isiolo County Government document, but a Local Government document. That she was not the one who signed the



- delivery notes dated 2014. According to her the Inspection and Acceptance Certificate was introduced with IFMIS but did not exist before. She could not confirm whether the food was distributed but was emphatic that she witnessed the delivery of the food. She contended that it was standard procedure for all suppliers to look at the delivery note before signing the introduced Inspection and Acceptance certificate.
46. DW4 Giro Liban (the 13th Defendant), testified that he was the Chief officer in the office of the Governor from November 2016 to August 2017); That his responsibility was to check the documents attached to the payment vouchers; but, in the instant case, by the time he was in office the subject tender process had been completed. He conceded that there are glaring discrepancies in that the LPO's as they were issued two (2) years after food was supplied. He stated that he was advised by the County Treasury Department that that was the right procedure; that notification and LPOs were issued only if funds available. That it was given that explanation, that he signed the payment vouchers as there was nothing irregular about the documents. He contended that the actual payment was made four (4) years later by which time he was no longer the Chief Officer. He maintained that he was not involved in the procurement process in regard to Fish Nets Enterprises Ltd and stated that procurement is a function of the treasury and had nothing to do with the Chief Officer. He alleged that there was poor record keeping by the procurement and stores department.
47. DW5 Bonaya Dida Bonaya (the 2nd Defendant) testified that in 2013 he was deployed by the National Government to work for the Isiolo County Government in 2013. He conceded that he was a co-director of Fish Nets Enterprises Limited. He stated that he declared the Conflict of Interest through a letter dated 31st July, 2014; that he was not in any way involved in the procurement process, and that the tender was awarded to the 3rd Defendant, his co-director in Fish Nets Enterprises Ltd on 22nd October 2014; that Fish Nets was incorporated in 2013 and that he only learnt about the tender from his co-director. He stated that that was the only tender awarded to Fish Nets; that he was a signatory to the County accounts and further he disclosed that by the time the company was prequalified, he had not declared the conflict of interest.
48. DW6 Qabale Wario Halakhe (3rd Defendant) testified that she is a business lady and co-director of Fish Nets Enterprises Ltd. She stated that in 2014 she was awarded two contracts by the County Government of Isiolo. That she received the LPOs for the two contracts in 2019. That in 2017 she sued the County in a court in Meru, to wit, Meru HCC No. 22 of 2017 after the County refused to pay her but the case did not proceed because the National Government gave a directive concerning pending bills. That the company was later paid by the County Government of Isiolo and because she did not know the persons who made the payments there was no collusion. She averred that she could not remember the quantity of the maize that she delivered. She conceded that Bonaya [2nd Defendant herein], was her co-director in Fish Nets Enterprises Ltd, and further disclosed that he was her brother although she did not know where he worked. She stated that Bonaya was not involved in the supply of the goods. That she closed down her shop in Isiolo after the accounts were frozen by this court.
49. Learned Counsel consented to summing up their cases through written submissions.

Plaintiff's Submissions

50. The Plaintiff submissions are dated 11th October, 2023. It is submitted that the Plaintiff has a mandate to institute proceedings for recovery of public property under Section 3 and 11 of the *Ethics and Anti-Corruption Commission Act* and Article 79 and 252(1)(a) of *the Constitution* of Kenya and enunciated in the case of Nakuru Civil Suit No.43 of 2008 KACC-vs- Sammy Komen Mwaita & Another.



51. It is the Plaintiff's submissions that the 1st Defendant never supplied any goods to the County Government of Isiolo. That the requisitions made were based on forged letters purporting to be genuine letters written by the Member of County Assembly and Ward Administrator; that the 1st Defendant issued the County Government of Isiolo with invoices and delivery notes in the year 2014 that were not backed by any prior Local Purchase Orders(LPO), contract, or any procurement process; that the inspection was allegedly done on 23rd November, 2016 about two years after the alleged date of delivery of foodstuff which was 13th November, 2014 which means that inspection was done after the beneficiaries received the foodstuff instead of before.
52. Learned Counsel for the Plaintiff submitted that the tendering process was illegal, fraudulent, and a corrupt scheme to defraud the County Government of Isiolo as the tender was a sham and inexistent; that the complimentary cards/notes issued by the 5th and 6th Defendants to Ganale Wholesalers instructing them to supply various food items to unnamed persons was irregular, illegal, and fraudulent. Counsel contended that Ganale Wholesalers belonged to the 3rd Defendant; that there is evidence that the Local Purchase Orders(LPO's) issued two years later were a forgery; that the Inspection and Acceptance Committee minutes/report signed by the 9th, 10th, 11th, and 12th Defendants are also forgeries as they are dated way after the goods had allegedly been distributed to the beneficiaries. Further that the 9th Defendant fraudulently prepared and issued undated Counter Requisition and Issue Vouchers and Counter Receipt Vouchers purporting to acknowledge receipt of goods by the County Government of Isiolo.
53. According to the Plaintiff, there was a corrupt scheme to defraud the County Government of Isiolo in violation of Article 227 (1) of *the Constitution* as is evident from the irregularities in the procurement documents, in that instructions were not properly supported by any prior procurement proceedings nor any contract between the 1st Defendant and the County Government of Isiolo.
54. Counsel submitted that the 2nd Defendant was an employee of the County Government of Isiolo, and also a Director and mandatory signatory of the 1st Defendant's bank accounts and as such under the Section 42(3) of the *Anti-Corruption and Economic Crimes Act*, 2003 he was prohibited from trading with the County Government of Isiolo either directly in his name or indirectly through the 1st Defendant. Counsel asserted that the letter declaring the conflict of interest had no indication that it was received by the County Government of Isiolo and that as he was a signatory of the account which received money from the County the 2nd Defendant cannot distance himself from the tender.
55. Counsel stated that as there is evidence that there was collusion by the Defendants in receiving, initiating, or playing part in processing of the fraudulent payment of Kshs.7,220,000 to the 1st Defendant this court should find them jointly and severally liable.

Submissions of the 1st to the 4th Defendants

56. In his submissions dated 14th November, 2023, Learned Counsel for the 1st to the 4th Defendants begun by asserting that the uncontroverted fact in this case is that on 20th July 2014, the 1st Defendant was prequalified as a supplier for the Isiolo County. Counsel submitted that the County Government requested for quotation which the 1st Defendant duly completed and returned. That thereafter the County responded through a Notification dated 29th October 2014 which informed the 1st Defendant that it had been awarded a the tender to supply foodstuff; that the 1st Defendant proceeded to supply the foodstuff whereupon the 2nd Defendant embarked on pushing for the payment; that finally in 2007(sic) the County issued the LPOs to the 1st Defendant as had been communicated in the letter of allocation that the LPOs would be issued once funds were available; that the 3rd Defendant filed suit



- when it became evident that the County would not pay but the suit was soon abandoned when the National Government issued a directive that all pending bills be paid and the 1st Defendant's bill was then cleared for payment both internally and by the Auditor General. The County then paid the bills in instalments of Kshs 1million and Kshs.5,187,000.
57. Counsel submitted that the internal reports on pending bills by the County Government of Isiolo are admissible; that the said reports were retrieved through due process and were properly certified in accordance with Sections 79 and 80 of the Evidence Act. Counsel stated that as a matter of fact the report was supplied to the defense by the Plaintiff and it was therefore ridiculous for it to insist for the author to be called to produce it. Counsel stated that having cross examined the Defense witness on that report the witness should have been allowed to produce it. To support his submissions Counsel cited the decision of the Supreme Court in the case of Torino Enterprise Limited vs. Attorney General Petition No. 5 of 2022.
58. On whether the 1st Defendant supplied the food, Counsel submitted that the food was delivered and received by the County Government of Isiolo as affirmed by the affixing of the County's stamp on the delivery note. Further because the person who was in-charge of the stores testified that she witnessed the food being delivered and that she stamped the delivery note. Counsel stated that that was the evidence of a government officer who remained steady and consistent even in the face of cross examination.
59. Regarding the issue of discrepancy between the particulars of the recipients and the records of the Registrar of Persons, Counsel argued that the same had nothing to do with the supplier as her role ended when she supplied the food and it was not her business to find out if it was put to good use. Counsel averred that whereas the report might prove that the food may have been misappropriated by County officials it was in no way proof that the food was never supplied.
60. Regarding the documents Counsel submitted that the discrepancies in documentation were succinctly explained by the 11th Defendant; that it was due to the fact that the County Government of Isiolo had not yet set up proper systems having just been established and also being in a transitional stage. Counsel stated that the witness explained that the structures including the Inspection and Acceptance Certificates were set up after introduction of the IFMIS payment system; that the failure of the County Government to properly maintain its record cannot be attributed to the 1st Defendant given that she was not privy to the internal workings of the County.
61. As to whether there was proper procurement, Counsel first drew the attention of this court to the case of Centurion Engineers Limited V Kenya Bureau of Standards Civil Appeal No. E398 of 2021 where the Court of Appeal precluded the Respondent from raising the provisions of the PPDA as it had not raised it in the trial court. Counsel stated that from the pronouncement by the Court of Appeal once an entity conducted itself in a manner that did not accord with the PPDA and does not incorporate the provisions of the Act the supplier is entitled to be paid and the procuring entity is precluded from relying on the PPDA at the last minute. Counsel stated that the procurement herein was in compliance with the Public Procurement and Disposal Act, 2005; that the complementary notes which purported to have been issued had nothing to do with tender issued to the 1st Defendant and they were a non-issue; that the same is a red herring that is neither here nor there and one raised so as to distract this court from the real issues in the case. Counsel submitted that the tender was initiated by the letter dated 10th September 2014. Counsel contended that in any event procurement is initiated by the Chief Officer who does not require the permission of anyone to do so and that the tender was undertaken through an elaborate process counsel urged this court to distinguish the cases cited by Counsel for the Plaintiff as in those cases no procurement process was undertaken. Counsel urged this court not to visit the infirmities in the process followed by the County upon the supplier.



62. On whether the 2nd Defendant's alleged conflict of interest invalidated the procurement process, Counsel submitted that it did not given that he had declared the same; that the 2nd Defendant falls in the exception provided in Section 55(3) of the PPDA. Further that he did not participate in the procurement.
63. On the question of whether the payment was irregular and unlawful Counsel submitted that no scintilla of evidence was adduced to support the Plaintiff's allegations; that to succeed, the Plaintiff had to prove beyond peradventure that the 1st Defendant did something unconscionable and irregular to be given the award. Counsel placed reliance on the case of Centurion Engineers Limited V Kenya Bureau of Standards (supra). Counsel contended that the picture painted by the evidence made it clear that the allegations of collusion were not true; that if anything the 1st Defendant did not get any payment during the period 2013 to 2017 when the 5th to the 14th Defendants were in office. Counsel asserted that had there been collusion between the 1st Defendant and the officials he would have been paid promptly. Counsel averred that those who paid the 1st Defendant were the same officials who testified in this case; that Peter Ngechu testified that the payment was subjected to all the layers of verification. Counsel pointed out that despite that those officials were not made defendants in this case.
64. Counsel concluded his submissions by stating that this suit is motivated by ulterior motives; that nothing illustrates this more than the inclusion of the 13th, 14th and 7th Defendants who had nothing to do with the procurement. Counsel reiterated his contention that it is telling that those who did the payment were not sued. Counsel decried what he described as egregious abuse of investigative power and discretion by the Plaintiff. He averred that this was but a proxy war in which the 1st Defendant was a pawn. He urged this court to release the money in the frozen account stating that it is unfair and unconscionable for one to have waited for payment since 2014 to date.

Issues for Determination

65. From the material before court, I discern the following to be the issues that arise for determination:
 - i. Whether public funds in the sum of Kshs.7,220,000.00 were unlawfully paid to the 1st Defendants by the 5th to the 14th Defendants.
 - ii. Whether the 2nd Defendant, an employee of the County Government of Isiolo and a Director of the 1st Defendant, unlawfully benefitted from the funds paid to the 1st Defendant.
 - iii. Whether the Defendants are jointly and severally liable to the County Government of Isiolo for the said funds.
 - iv. Who should bear the costs of this suit.

Analysis And Determination

Issue No.(i):- Whether public funds in the sum of Kshs.7,220,000 were unlawfully paid to the 1st Defendant by the 5th to 14th Defendants.

66. That County Government of Isiolo paid the aforesaid sum of money to the 1st Defendant. What is in issue is the propriety of the payment. I have carefully considered the evidence and submissions by both sides in regard to this issue and my finding firstly is that contrary to the submission of learned Counsel for the Defendant there was no tender in this case. It is an admitted fact that the process that culminated in the impugned payment was initiated by the 5th Defendant through a letter dated 10th September 2014. The 5th Defendant was the then Chief Officer in the office of the Governor of



Isiolo County. In the letter the 5th Defendant writes that it had become necessary to give food aid to residents of the named Wards because of the prevailing severe drought and that for that reason the Governor had authorized and given directive for the food aid to the affected families. Again, contrary to the submissions of Learned Counsel for the Defendants the Chief Officer expressly states that the Governor's authorization was informed by the request of the leaders and representatives of the affected areas. The alleged representatives happened to be Abdulahi Huka (PW3) and Hassan Diba Kumpa, the Ward Administrator and MCA for Cherab Ward respectively who both denied that they had made the written requests for food. Their said requests were alleged to have been by way of letters dated 25th July 2014. The letters were put under forensic examination and found to be forgeries. In effect therefore the alleged authorization and directive by the Governor was based on forged requests. Clearly the 5th Defendant's letter could not have given rise to any lawful requisition. It is also noteworthy that the 5th Defendant himself told this court that the Governor did not initiate procurement and if he did then he paid from his pocket. In my view the procurement having been initiated by the Governor's office, rather than the County Executive Member Finance as would be expected under Sections 112 to 114 of the *Public Finance Management Act*, then the Governor should have paid from his pocket. It is my finding that in the absence of a requisition then the procurement process became unlawful ab initio and no lawful payment could have flowed from it.

67. Secondly there was no notification or request for quotation as alleged and indeed there was not expected to be any if indeed there was an emergency which as we have seen was not the case. Indeed, from their evidence and arguments Defendants proceeded as they did, not because there was an emergency but because the procurement was below the threshold of Kshs.5million and which as stated by PW5 did not require tendering. The County could otherwise have lawfully used the direct procurement method under Section 74(3) of the PPDA, 2005. However even then the process that was followed in this case was unlawful as there was no written contract as was required under Section 75(C) of the *PPDA*, 2005. From the evidence, the LPO which could have sufficed as a contract came long after the goods were allegedly delivered and the invoices sent. It is obvious that but for the unavailability of funds the invoices would have been paid even though there was no contract. So again the lack of a written contract invalidates the payment.
68. Thirdly, the procurement was illegal for violating the provisions of Section 33 of the PPDA, 2005 which precluded a procuring entity from doing business with its employee such as was the 2nd Defendant, either directly or indirectly. In this case it is admitted that the 2nd Defendant was a director in the 1st Respondent and so the County could not have traded with it. The procurement was also illegal under Section 42(3) of the *Anti-Corruption and Economic Crimes Act* which prohibits an agent of a public body, as was the 2nd Defendant, from knowingly having a private interest in the procurement. Accordingly, whereas the 3rd Defendant qualified to trade with the County, as she was neither a spouse or child of the 2nd Defendant, (see Regulation 26 of the PPDA Regulations, 2006) even had there been a valid contract the payment was tainted by the fact that the 2nd Defendant benefited from it. I am not persuaded that the fact that the 2nd Defendant had declared his conflict of interest gave him a carte blanche to do business with the County. It is also not lost to this court that the 3rd Defendant had an obligation under Section 127 of the PPDA, 2005 to ensure that any contract awarded to her complied with the law. Being the sister of the 2nd Defendant it cannot be true that she did not know where he worked.
69. In light of the foregoing, I find that the payment of Ksh.7,220,000 admittedly received by the 1st Defendant and which was proven to have been made by the 5th to 14th Defendants was illegal as it violated the provisions of the *Public Finance Management Act* (see Sections 196 and 197). It also violated the provisions of Section 45(2) (b) of the *Anti-Corruption and Economic Crimes Act*. The



procurement process having not been followed the payments were not justified and it would be remiss for this court to find otherwise. My so saying finds support in the case of *Ethics & Anti –Corruption Commission v Vulcan Lab Equipment Limited* [2020] eKLR where the court stated: - “a contract entered into in a procurement process that is flawed for violating the PPDA is stricken by invalidity and illegality and cannot be given effect by the courts.”

70. Counsel for the Defendants cited the case *Centurion Engineers Limited V Kenya Bureau of Standards* (supra) in persuading this court to find that the payment was lawful. The facts of that case are however distinguishable from those of this case as in that case there was a valid contract between the parties and as a matter of fact the dispute concerned variation of that contract. In my understanding the reason the Respondent was precluded for relying on the PPDA was because it was raising it for the first time in the Appeal. I have also in this case made a finding that the conduct of the 2nd Defendant tainted that procurement and the holding in the case of *Kenya Sugar Research Foundation V Kenchuan Architects LTD* [2013] eKLR.

Issue No. (ii):- Whether the 2nd Defendant, an employee of the County Government of Isiolo and a Director of the 1st Defendant, unlawfully benefitted from the funds paid to the 1st Defendant.

71. The 2nd Defendant has not disputed to being a co-director of the 1st Defendant and at the same time being an employee of the County government of Isiolo. It is evident that he received part of the money paid to his bank account and to the joint account with the 3rd Defendant. I have already found that the payments to the 1st Defendant were unlawful. It is also my finding that any payment made therefrom to the other Defendants was equally unlawful.

Issue No. (iii):- Whether the Defendants are jointly and severally liable to the County Government of Isiolo for the said funds.

72. Having come to the conclusion that the payments to the 1st Defendant which were then transferred to the joint account of the 3rd and 4th Defendants was unlawful, and the Defendants having all participated whether by initiating, or authorizing, or approving or doing the actual payment or even through benefitting from the payment they are all equally liable for the loss. To hold otherwise would be to encourage illicit enrichment from corrupt practices.

73. The 5th to 14th Defendants being public officers are liable to restitution for the loss under Section 51 of the *Anti-Corruption and Economic Crimes Act* and Section 53(3) of the *Anti-Corruption and Economic Crimes Act* gives the Ethics and Anti-Corruption Commission the mandate to recover the amount lost.

74. Article 266(5) of *the Constitution* provides that: -

“If the holder of a Public Office, directs or approves the use of Public Funds contrary to law or instructions, the person is liable for any loss arising from the use and shall make good loss, whether the person remains the holder of Public office or not.”

75. While Section 203 (1)(a) of the *Public Finance Management Act* also states that:

“A public officer is personally liable for any loss sustained by a County Government that is attributed to –

- a. The fraudulent or the corrupt conduct or negligence of the officer.”

76. The liability extends to the Defendants who have since left the offices that they held at the material time.



Issue No. (iv): - Who should bear the costs of this suit.

77. As to costs, it is trite that whereas costs are in the discretion of the court, the general rule is that they follow the cause and this case is no exception and so the costs shall be borne by the Defendants.

Disposition

78. The upshot is that judgement is entered for the Plaintiff against the Defendants jointly and severally as follows: -

- a. The sum of Kshs. 7,220,000.
- b. The preserved sum of Kshs. 5,187,000 in the account number 01109437125000 at Co-operative Bank Ltd held in the joint names of the 3rd and 4th Defendants be applied towards settlement of the Judgment and decree of this court.
- c. Interest to be calculated at 12% per annum from the date of filing suit until payment in full as prayed in the Plaint.

It is so ordered.

SIGNED DATED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF MARCH 2024

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E. N MAINA

JUDGE

