



**Kenya Anti-Corruption Commission v Mutinda (Civil Case 15 of 2016)
[2024] KEHC 3544 (KLR) (Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3544 (KLR)

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

CIVIL CASE 15 OF 2016

EN MAINA, J

MARCH 20, 2024

(ORIGINAL NO 400 OF 2012)

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ALPHONSE MUNENE MUTINDA DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff's claim against the Defendant is for recovery of Kshs. 25,900,000 which it alleges is public property corruptly acquired through a procurement for purchase of property LR NO. 14759/2 for use as a public cemetery by the City Council of Nairobi, (predecessor of the Nairobi City County), at an exaggerated price. The Plaintiff avers that the Defendant unlawfully benefitted from the fraudulent procurement by the sum sued for. The Plaintiff also prays for interest and the costs of the suit.

The Parties

2. The Plaintiff is a body corporate established under Section 3 of the Ethics & Anti-corruption Commission Act, 2011 mandated to institute and conduct proceedings for the purpose of recovery of or protection of public property.
3. The Defendant is an Advocate of the High Court of Kenya practicing in the name and style of Alphonse Mutinda & Company Advocates. He acted for the vendor in the impugned procurement by preparing the sale agreements and witnessing the transfer of the property from the vendor to the purchaser.



The Plaintiff's case

4. Briefly, the Plaintiff's case is that it investigated allegations that the City Council of Nairobi had incurred a loss in a fraudulent transaction where it paid Kshs. 283,000,000 towards the procurement of a parcel of land to wit L. R. No. 14759/2 for use as a public cemetery at an exaggerated price, to the benefit of the Defendant among others.
5. The Vendor, Henry Musyoki Kilonzi, entered into an agreement with Naen Rech Limited which was the tenderer on 19th December 2008 wherein the agreed sale price was Kshs. 110,000,000. On the same date, an unlawful agreement was purportedly entered into by the same vendor and the City Council for the sale price of Kshs. 283,000,000, which was eventually paid into a joint account in the names of different Advocate's firms: Odero Osiero & Company Advocates, P.C. Onduso & Company Advocates and Alphonse Mutinda & Company Advocates.
6. The purported Sale Agreement was concluded by the City Council with a party who was not the successful bidder and who did not bid or participate in tender number CCN/MOH/T/020/08/09.
7. The Plaintiff avers that the land was not suitable for use as a cemetery.
8. The Plaintiff further avers that the entire transaction was fraudulent as none of the bids for the tender was responsive therefore no bidder qualified for the award of the tender; that the City Council's Tender Committee awarded the tender on the basis of a defective tender instrument despite protests of the experts in the City Council's Planning Department and; the bidder lacked capacity to enter into a contract in that it was not the owner of the land and the sale agreement was therefore entered into between the City Council and a person who did not bid or participate in the tender. Further that the valuation report was forged, the land was not valued by the City Council prior to the execution of the purported agreement and the purchase was in disregard of professional opinion given by the Senior Funeral Superintendent to the effect that the land was unfit for intended purpose. The Plaintiff contends that the Defendant witnessed the purported transfer between the vendor and the City Council. It is alleged that the value of the land was also highly exaggerated.
9. The Plaintiff contends that its investigations revealed that out of the Kshs. 283,000,000 paid for the land, only Kshs. 110,000,000 was paid to the vendor; that the balance was distributed to several persons for no consideration at all; that among those persons the Defendant received Kshs. 25,900,000 over and above his legal fees as lawyer for the purported vendor.
10. The Plaintiff further avers that the entire transactions leading to the purchase of the land at the exaggerated price of Kshs.283,000,000 was a fraudulent scheme on the part of some public officers and other persons including the Defendant to unlawfully acquire public property and the resulting contract was therefore null and void. The Plaintiff contends therefore that the receipt of the money by the Defendant was therefore fraudulent and illegal; that the Defendant was a signatory to the escrow account that received the purchase amount and distributed it and that he received the money for no consideration and with knowledge that he was not entitled to it.
11. The Plaintiff avers that the Defendant's actions were illegal as there was unlawful acquisition of public property contrary to provisions of Section 45(1) of the *Anti-Corruption and Economic Crimes Act* and dealing with public property contrary to the provisions of Section 47 of the *Anti-Corruption and Economic Crimes Act*; that the Defendant was a principal party in the fraudulent scheme; that his conduct was dishonest by the ordinary standards of reasonable practice and that he was unjustly enriched at the expense of the City Council and therefore liable for restitution to the tune of Kshs. 25,900,000.



12. The Plaintiff further avers that it is entitled to trace and recover any property purchased by the Defendant using the aforesaid illegally acquired public funds and to interest at court rates, on all sums found to be due from the Defendant from the date of receipt until payment in full.
13. To prove its case the Plaintiff called eleven (11) witnesses whose evidence can be summarized as below:-
14. Tabu Lwanga (PW1), an investigator working with the Plaintiff testified that the Plaintiff received information that the City Council had purchased land for cemetery purposes for which the Government paid Kshs. 283,000,000 but the vendor was only paid Kshs. 110,000,000 and the remainder of Kshs. 173,000,000 embezzled; that investigations commenced in the year 2009 when the Commission obtained documents from the City Council. He traced the seller of the suit land. However, the seller died before he could testify in this case but his statement was admitted in evidence by a ruling by Justice Ong'udi dated 7th June 2018 and a Court of Appeal Judgement in Civil Appeal No. 266 of 2018.
15. PW1 stated that the procurement of the suit land was an open tender which was advertised in the Standard and Daily Nation; that there were twelve bidders, none of whom qualified as all scored zero on the mandatory requirement for a soil depth of 1.8 meters or six feet. PW1 testified that a memo had been sent to the Chairman of the Evaluation Committee and the Town Clerk to the effect that the bid document was not suitable for the tender for procurement of land for cemetery purposes; that the Tender Committee received recommendation from the Evaluation Committee to award the tender to Naen Rech Limited for a consideration of Kshs. 283 million based on a one paged valuation report which valued the land at Kshs. 325,150,000. PW1 stated that the City Council's Director of Legal affairs had prior written to the Chief Valuer of the Ministry of Lands through a letter dated 4th November 2008 requesting for valuation of the suit land and the valuer had through a letter dated 13th November 2008 requested an officer from the City Council to facilitate a site inspection. However, that was not done and so the land was never valued by the Ministry of Lands but through a report which was forged. The purported valuation report bears a date that is before the letter requesting valuation and the response requesting a City Council Officer for a site visit. PW1 testified that he visited the valuation department of the Ministry of Lands and established that the valuation was a forgery. The same was disowned by the Director of Valuation who also stated that they did not have an officer by the name A Otieno in the valuation Department as had been purported in the forged valuation report.
16. PW1 further testified that there were two sale agreements by the same vendor, one with Naen Rech Limited for a consideration of Kshs.110 million prepared by the Defendant and the other with the City Council for a consideration of Kshs.283 million, prepared by Omoti Advocates on behalf of the City Council. The signature of the seller in the sale agreement with the City Council is witnessed by the Defendant.
17. PW1 further testified that he had interviewed the vendor who confirmed that he was paid Kshs.110 million as consideration for the property; that he had sold the land to Naen Rech Ltd. He however disputed the second agreement stating that he had never sold land to the City Council and disowned the signature that was purported to be his. PW1 stated that the document examiner also found that the signature in the second agreement did not belong to the vendor. The transfer to the City Council was however signed by the Vendor and witnessed by the Defendant.
18. PW1 also testified that the consideration was paid by the Ministry of Local Government of Kenya to the City Council's lawyers, Omoti& Co. Advocates, for onward transmission to the vendor. After deducting Kshs. 1.7 million for registration and stamp duty Omoti& Co. Advocates deposited the balance of Kshs. 281,300,000 to an escrow account at the Ban of Africa in the name of Alphonse



- Mutinda (the Defendant), Mr. Onduso and Mr. Osiemo all of them advocates of the High Court. Thereafter the Defendant wrote to Bank of Africa with instructions to transfer the money to five other accounts, two of which belonged to the Defendant and which were credited with a total of Kshs. 135,900,000. The proprietor of the land had been paid a sum of Kshs. 107,500,000 leaving Kshs. 28.4 million for the Defendant. The embezzled funds, Kshs. 173 million made up 61% of the purchase price.
19. PW1 also testified that early in the year 2008 the Defendant convened a meeting in his office between himself, Cephas Kamande Mwaura, Maina Chege and the Vendor. That after the meeting, the Defendant wrote to the City Council indicating that the vendor had appointed Naen Rech Ltd as his agent but that the vendor denied having done such a thing.
 20. During cross examination, PW1 clarified that the impugned property is currently in possession of the City Council. He did not know whether the tender had been approved by the County Government as that did not form part of the investigation. He stated that he did not investigate the aspect of budgeting. He confirmed that the Tender Committee of the City Council could overrule the Evaluation Committee; that the tender documents disclosed that the land was owned by Henry Kilonzi and not Naen Rech Limited and there was a letter stating that Naen Rech was representing the interest of the vendor; that Henry Kilonzi had indeed appointed the Defendant herein as his lawyer; that Henry Kilonzi had purportedly sold to Naen Rech Limited 120 acres, which was wholly transferred to the City Council and the sale was on a willing buyer, willing seller basis between two private entities. PW1 reiterated that the sale concerned Public funds. PW1 stated that he had visited the impugned land severally in the company of another EACC Officer.
 21. David Mukuri Wanjohi (PW2), the Senior Funeral Superintendent, testified that he visited the suit land with other officers and found that it was not suitable for burial as it was not easy to excavate, was not conducive to decomposition of bodies and it lacked necessary depth.
 22. In cross examination, PW2 clarified that he was a member of the Tender Committee but stated that he was not present at the meeting that purported to award the tender. He contended that his illegal contribution at the meeting was recorded in his absence. He also stated that in regard to the land the trial holes were dug by the land owner; that the soil depth was only measured once they ascertained that the ground had the right soil. He confirmed that he had worked in this area since 1983 and was competent to make comments on the best soil for burial that the best is either red or loam.
 23. Patrick Tom Odongo (PW3), stated that the time in issue he was working at the City Council's Planning department; that he participated in the tender opening and evaluation; that he observed that the mandatory requirements indicated in the tender document would not produce land suitable for a cemetery; that the minutes purporting to recommend Naen Rech were done in his absence as he did not attend the meeting and that the minutes gave a fallacious date. He stated that he had communicated his observations in regard to the tender documents to the chair of the Technical Evaluation Team through a memo. In cross-examination, PW3 clarified that minutes were supposed to be signed at the next meeting; that dates of minutes would be captured in the minute book; that he did not visit the site with the committee but had gone on a separate day. He was emphatic that the land did not meet the accessibility criteria as there was no all-weather road. He also reiterated that none of the bidders met the criteria.
 24. John Koiyeir Barreh (PW4), testified that he worked at the City Council's then Department of Planning and Architecture; that he visited the impugned land with a document detailing what he was to look out for; that on the first trip, trial holes had not been dug; that this time holes were dug but they were only 2.5 feet deep so the land did not meet the requirement for six (6) feet depth. He stated that none of the sites qualified for a public cemetery.



25. Antony Mathenge Itui (PW5), testified that he was the Commissioner of Lands in charge of Valuation at the material time; that valuation of the suit land was not done by his department; that the “valuation” letter purporting to be from his office was not from his office and that by the time he received a request to do the valuation the said letter had already been written. He distanced himself from the letter saying that there was no officer by that name in their office.
26. PW6, Samuel Kariuki Mungai testified that he was working with Bank of Africa at the time; that a banker’s cheque payable to Odero, Osiemo and Company Advocates, P.C. Onduso & Company Advocates and Alphonse Mutinda & Company Advocates in the sum of Kshs. 281,300,000 was deposited by Alphonse Mutinda into an account in the bank and thereafter the amount credited to that account from the account of Omotti & Company Advocates. He stated that thereafter the Defendant’s firm wrote a letter instructing the bank to transfer funds to five other accounts. He stated that the bank also received instructions to transfer a sum of Kshs.30,550,000 to the Defendant’s account at Chase Bank Eastleigh Branch Nairobi. That there was also a transaction where the Defendant encashed a cheque for Kshs.200,000,000 (two hundred million) over the counter.
27. In cross-examination, he clarified that the transfers from the escrow account was requisitioned by the three firms that were signatories; that the cheque is stamped “paid” meaning that the amount had been transferred and that Kshs.97 Million was paid into the Defendant’s Client Account and eventually paid out to Henry Musyoki Kilonzi.
28. PW7, Kenneth Amollo Amuom testified that he worked at Chase Bank at the time in issue. He confirmed that a credit of Kshs. 30,550,000 was made into the Defendant’s account at Chase Bank, Eastleigh Branch, Nairobi.
29. PW8, Jacob Oduor testified that he is a Forensic Document Examiner with the EACC. He produced a Forensic Report which was prepared by Adipas Nyanjwa, now deceased, and stated that he was familiar with the technique and methodology used to prepare the report. He however revealed that he did not examine the documents in the report saying it was unnecessary. He affirmed that the transfer of the land was executed by Henry Musyoki Kilonzi.
30. PW9, Pius Nyange Maithya, a valuer with EACC, testified that he had prepared a valuation report over the impugned land; that he visited the property in the company of his colleague, Lwanga (PW1) and a Counsel, Kossy Bor; that he had assigned a value of 30 million to the land; that he does not ordinarily attach his workings on the report; that the same Vendor had sold 10 acres of the same land to a children’s home at the rate of Kshs. 400,000 per acre 8 years before his valuation and that also informed his valuation and that he met the Vendor on the land and he (Vendor) told him that he had been given an offer he could not refuse. PW9 stated that he also considered agricultural use during valuation and that he had not seen the report by the Ministry of Lands which was lower. He contended that he conducted the valuation independently.
31. PW10, Lydia Kwamboka, County Attorney of the Nairobi City County was called to produce the documents; she stated that she is the custodian of the legal documents in the County and that the documents listed in her statement were all in her custody. She produced the sale agreement between the Vendor and the City Council dated 19th November 2008 and transfer dated 23rd January 2009.
32. PW11, Richard Omanwa Mogoko, the then City Council’s Acting Director Supply Chain Management produced a copy of the tender advertisements in the dailies, bid documents by Naen Rech the successful bidder, a confirmation letter from Naen Rech to the City Council and a letter signed by the Defendant sent to the Town Clerk indicating that Naen Rech Limited was an agent of the Vendor. He also produced the minutes of the meeting held on 12th November 2008.



The Defendant's case

33. The Defendant relied on a statement of Defense dated 18th September 2012 and filed on 20th September 2010. He denied the Plaintiff's averment that the sale transaction was fraudulent. He also stated that he is a stranger to the averments about the tender process as he was not a bidder in the tender. The Defendant further averred that the agreement between the Vendor and Naen Rech Limited became null and void once the Vendor himself entered into an agreement with the City Council and agreed to pay Naen Rech a commission over and above the price of Kshs 110,000,000. The Defendant averred that the agreement between the Vendor and the City Council was lawful and binding in law and denied the particulars of illegality and unlawfulness pleaded. The Defendant stated that the impugned property was sold on the basis of "willing buyer, willing seller" and the price was not exaggerated and that the City Council was satisfied that the land was suitable for the intended purpose. He denied knowledge of any fraudulent scheme between either himself or any public officers and other persons as alleged.
34. The Defendant also denied the particulars of fraud and stated that he did not bid for the tender. He contended that he was a stranger to the Tender Committee; that he did not participate in the tender process and contended that he acted under instructions as an advocate. He stated he was not aware of any forgery in regard to the agreement which was signed in his presence and stated he was not under any duty to value the property. He further averred that any money received by him from the proceeds of the sale was distributed under instructions, and that as it constituted part of the consideration of the sale, it was not public money. He denied receiving Kshs. 25,900,000 over and above his legal fees, and contended that any money received by him was not illegal.
35. He further denied the particulars of fraud as laid out in paragraph 11 of the Plaint stating that he prepared the sale agreement under instructions; that the sale agreement was not a forgery; that the transfer prepared by him was pursuant to a legally binding agreement; that the Vendor had in fact appointed an agent to bid for the tender; that he was not a party to the disposition of the public funds and that he was entitled to the money that he received which had a consideration.
36. He disputed that the City Council lost any money given that the transaction was completed and the property transferred to the City Council which assumed ownership and interest to it.
37. The Defendant further denied that he is liable to restitute the Plaintiff in the sum of Kshs. 25,900,000 or at all as a constructive trustee. He averred that the Plaintiff is not entitled at all to trace and recover property purchased by him in whatever manner as the same was not purchased with illegally acquired public funds as alleged but with legally obtained money which had a consideration. The Defendant also disclosed that there was a criminal case in the Anti-Corruption Court between him and the Plaintiff ACCCR. Case Number 19 of 2020. He however admitted the jurisdiction of this Court.
38. At the hearing, the Defendant adopted his witness statement dated 25th July 2023 wherein he stated that the Vendor had been his client since the year 2007; that Maina Chege, a Director of Naen Rech Limited, approached him with interest to buy the suit land; that he subsequently organized a meeting with the Vendor and a price of Kshs 110 million was agreed; that on 7th October 2008, the said Maina Chege disclosed that he wanted to tender for sale of the property to the City Council to which he agreed. That he then wrote to the City Council informing it that Naen Rech Ltd was the agent of the Vendor and thereafter prepared an agreement for sale and sent it to P.C. Onduso advocates, Naen Rech Ltd's Lawyers for approval. After the award of the tender, E.N. Omoti prepared the agreement between the Vendor and the City Council which the Vendor signed in his presence on 19th December



2008. The City Council forwarded transfers to the Defendant and he had the Vendor execute the same on 19th January 2009.
39. It was his testimony that the purchase price of Kshs. 281,300,000 was paid by the City Council. Maina Chege then instructed him to withdraw Kshs. 3,350,000 to pay for survey and sub-division while Kshs. 132 million was disbursed to the Vendor, Cleophas Mwaura, Maina Chege. Land rates and Legal fees of Kshs.11,600,000 were paid as legal fees. He denied that he received Kshs 25.9 million.
 40. He further testified that the Vendor executed both agreements in his presence. He contended that the signatures of the same person may fail to match sometimes and stated that he did not participate in the tendering process and his only role was during the sale.
 41. In cross-examination, he clarified that the Award of tender was not to the Vendor but to Naen Rech Limited; that the letter to the City Council stating that Naen Rech was the Vendor's agent was written with the Vendor's instructions. He contended that the letter was necessary for the eligibility criteria. He also stated that he was not aware that the Vendor disowned the signature on the agreement between him and City Council. It was also his testimony that no stamp duty was payable upon surrender of land to the Government; that PC Onduso Advocate represented Naen Rech Ltd in the transaction which is captured in Clause 9 of the agreement which listed the advocates acting for the Vendor, and stated that it is those Advocates that opened an escrow account and instructed the Bank on how to disburse the money. He stated that the amount he withdrew from that account was Kshs. 135,900,000, and after paying the Vendor, he had remained with Kshs. 29.5 million. He contended that Kshs. 7.2 million was used for incidentals to the transaction namely rates, rent and survey. He categorically denied that he forged signatures.

The Plaintiff's submissions

42. Learned Counsel for the Plaintiff, Jackie Kibogy, submitted that investigations established that the fraud commenced at the drafting of the bid documents; that the memos dated 11th November 2008 and 19th December 2008 alerted the Chairman of the Technical Committee and the Town Clerk of the defect and insufficiency of the tender document in so far as it was for the purpose of procuring land for a cemetery; that PW3 testified that the tender document assigned a bigger weight (60%) to administrative requirements such as provision of an authenticated survey plan, certified copy of title, deed plan, official search, whereas the salient factors being suitability of the land in relation to soil profile and accessibility, received a weighted score of 27% despite suitability of site being principally of the soil profile and type.
43. Counsel stated that the Award of the tender was fraudulent as none of the 12 bidders had qualified for the award; that the recommendation that the tender be awarded to Naen Rech Limited reflected in the minutes of the Technical Evaluation Committee was false; that PW2, PW3 and PW4B testified that they visited five parcels of land in the tender and they all attained a nil score on soil type and depth, meaning the evaluation process did not yield any suitable land for cemetery use; that they were never called to a final meeting for purposes of compiling a technical report after the site visit and hence there was no resolution to award the tender to Naen Rech.
44. Counsel stated that it was an uncontested fact that at the time of bidding and Award, Naen Rech Limited was not the owner of the suit land yet the tender was to land owners; that, PW1 testified that the Vendor (deceased) denied knowledge of any sale of land to the City Council or that he had appointed an agent in the land transaction; that the introduction of Naen Rech as an agent of the owner without the owner's knowledge was therefore part of the fraud.



45. Counsel also submitted that according to PW3, the purported value of Kshs. 325,150,000/- by the Commissioner of Lands was a sham calculated to cajole the Tender Committee into believing that the amount quoted by the bidder, Kshs. 283,000,000 was a fair amount; that PW55 testified that he had requested for the City Council to provide a person to accompany their valuer to the site but the request was never acted upon, therefore no valuation was conducted by the Ministry of Lands as should have been the case; that the Ministry later received a letter from the office of the Controller and Auditor General seeking authentication of a letter purportedly from the Ministry of Lands which assigned the suit land a value of Kshs. 325,150,000 and the Ministry's response was that the letter was a forgery. Counsel pointed out that a valuation of the suit land conducted by PW1, a valuer working with the Plaintiff, had yielded a value of Kshs. 30,000,000/-.
46. Counsel submitted that Henry Kilonzi's statement was to the effect that the Defendant who was his lawyer, introduced him to one Maina Chege who posed as a representative of an Israeli Company and told him that Naen Rech Limited was interested in purchasing his land for farming purposes; that based on that representation he executed a sale agreement and transfer in favour of Naen Rech. Counsel stated that PW1 testified that the Vendor saw the sale agreement purportedly between himself and the City Council and disowned the signature and termed it a forgery and stated that he had never seen the transfer save for the last page that contained his photograph and signature. He stated that the said agreement had been prepared for the transfer to Naen Rech Limited. Counsel submitted that this evidence was corroborated by the Forensic Document Examiner who opined that the signatures on the two sale agreements did not match. Counsel argued therefore that the Defendant thus exploited his position as an Advocate of the Vendor by causing a forged signature on the purported sale agreement between the Vendor and the City Council and by swapping the Vendor's page of the Transfer Instrument in the favour of the City Council.
47. As regards the escrow account that received proceeds of the sale, Counsel submitted that while the Defendant's firm acted for the Vendor and the firm of E. N. Omotti acted for the City Council, the firms of P.C. Onduso and Odero Osiemo advocates were strangers to the transaction yet they were joint signatories of the account; that the escrow account received Kshs. 281,300,000 which was less the legal fees and taxes paid to E. N. Omotti Advocates; that PW6 testified that out of the amount deposited into the joint account, the Defendant had withdrawn Kshs. 3,350,000 and then issued instructions for disbursement of Kshs. 9.3 million to Cephaz Mwaura, Kshs. 9.45 million to Naen Rech, Kshs. 9.6 million to P. C. Onduso Advocate, Kshs.102 Million to his own account at Bank of Africa and Kshs.30.55 million to his account at Chase Bank. That the payment of Kshs.30,550,000 was confirmed by PW7 who was then working at Chase Bank and that PW1 testified that out of the Kshs. 110,000,000 the Defendant had been paid Kshs. 2 million as his legal fees and Kshs. 500,000 as disbursements. That the Defendant therefore received a Total of Kshs. 25.9 million but the Defendant did not substantiate the disbursements made to four other persons save for the transfers to Cleophas Mwaura and Maina Chege, which if deducted, would still leave the Defendant with Kshs. 25,358,000.
48. Counsel further submitted that even in the event that there was a tri-party agreement such that Naen Rech Ltd would purchase the suit land from the Vendor then sell it to the City Council, the events could not support such an arrangement as Naen Rech was only paid Kshs. 9.45 million.
49. Counsel contended that the evidence presented proved that the Defendant was at the centre of the fraudulent scheme and that he benefitted from it to the tune of Kshs. 25,900,000 and is therefore liable and should be ordered to reconstitute the Government to the tune of Kshs. 25,900,000 with interest.



50. Counsel placed reliance on the case of Regnol Oil Kenya Limited v Total Kenya Limited, Civil Appeal No. 173 of 2014 (2019) eKLR where the Court held:-

“The difference in price is the benefit that was conferred upon the Appellant through the wrongful act of their Employees. This was to the detriment of the Respondent. . . The Respondent has proved that the benefit the Appellant obtained is the Appellant’s loss. This was a benefit conferred in consequence of a wrongful act of collusion. A court of Law will never allow any person to keep such benefit . . . In David Securities PTY Ltd v Commonwealth of Bank of Australia (1992) 175 CLR 353 CITED IN Hookay Case . . . stated:

“Restitution is not however, a principle which requires, in examining any particular payment, “some subjective evaluation of what is fair or unconscionable, rather recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality” . . . The vitiating factor here is the collusion which was an illegality and wrongful. This fundamental factor was proved on a balance of probabilities and is the basis for recovery of the money obtained through wrongful act of collusion. The benefit was also ascertained. It was equivalent to the loss suffered by the Appellant. Therefore, the respondent proved its Counterclaim and is entitled to Restitution of the amount of money it held.” (Emphasis: Plaintiff’s)

51. Counsel submitted therefore, that the Plaintiff had proved its case on a balance of probabilities and is therefore also entitled to the costs of the suit and interest.
52. Counsel also cited the following authorities:-Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex Parte Meru University of Science & Technology (2019) Miscellaneous Application N0. 407 of 2018 eKLR.Regnol Oil Kenya Limited v Total Kenya Limited, Civil Appeal No. 173 of 2014 (2019) eKLR.

The Defendant’s Submissions

53. Mr. Mogeni, Learned Counsel for the Defendant, submitted that the impugned property was sold on a ‘willing buyer willing seller’ basis; that at the time of disbursement, the money was distributed based on the owner’s instructions and it was not public funds; that the Defendant never received Kshs. 25.9 million from the tender; that the Plaintiff did not prove that the Defendant had forged the Vendor’s signature and that the report by the document examiner was not binding on this Court as it was just an opinion. Counsel contended that if the Defendant indeed forged the Vendor’s signature, the Vendor would not have continued to retain him as his lawyer and that it was common that a person’s signature could be different in various documents. Counsel relied on an article by Jacques Mathyer which the writer stated that:-

“It is very difficult to determine objectively if the observed differences depend upon a real difference in the writers or if they result from a very important but normal variation of signatures of one person.”

54. Counsel argued that the Defendant did not receive any monies that were not justified from the transaction; that the transfer was indeed made in favour of the City Council, and the sale money distributed as agreed and further that the tender process did not concern the Defendant and he only acted as far as his duty as an advocate in a conveyancing transaction had demanded.



55. In support of his submissions Counsel relied on the following cases:-Christopher Ndaru Kagina v Esther Mbadi Kagina & Anor (2016) eKLR.Re Estate of Gitau Njoroge B (Deceased) (2018) eKLR.

Issues for determination

56. There is no dispute that the Defendant who is an Advocate of the High Court acted for the owner of the land the subject of these proceedings. The said owner has been referred to as the Vendor in the proceedings, submissions and now in this judgment. There is also no dispute that the City Council was looking to purchase land for use as a cemetery and that it ended up purchasing this land through a procurement process which according to the Defendant was for all intents and purposes was lawful. There is also no doubt that the Defendant received a sum of Kshs.25,900,000 from the transaction. The Plaintiff asserts that this was paid to him for no consideration. However the Defendant contends that the payment was regular the consideration being that he provided legal fees. The issues that arise for determination therefore are:-
- i. Whether the Plaintiff proved fraud on the part of the Defendant
 - ii. Whether the Defendant is liable to reconstitute the Plaintiff in the sum of Kshs.25,900,000/-.

Analysis and Determination

Issue (i):- Whether the Plaintiff proved fraud on the part of the Defendant

57. “Fraud” is defined as set out in Black’s Law Dictionary, 9th Edition at page 131 as: “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
58. As stated earlier, the Plaintiff alleges that the tender and conveyancing processes in regard to the impugned procurement were both fraudulent; that the Defendant was involved in the fraud and that he was a direct beneficiary to the tune of Kshs. 25.9 million. On the other hand, the Defendant contended that he had nothing to do with the tender process and only came in at the point of conveyancing to represent the Vendor. He contended that his role was to act for his client and the monies paid to him were due to him and were for legitimate work.
59. After a careful evaluation of the evidence and rival submissions I am satisfied that the Plaintiff has proved on a balance of probabilities; that the tender process was flawed, starting from the criteria in the advertisement, the forged minutes of the Evaluation Committee, the forged valuation of the impugned land; the forged sale agreement and as evidence by the distribution of the money paid.
60. Whereas the tender required bidders to be owners of the land it is an undisputed fact that as at the time Naen Rech Limited put in its bid it was not the registered owner of the land. Being the owner was a fundamental eligibility requirement and it is evident that it was for that reason that the Defendant who was the lawyer of the real owner of the land purported to have obtained instructions from the owner to write to the City Council informing it that Naen Rech Limited was acting as his agent in the tender. The “owner” died before he could testify but in a statement which he had recorded with the Plaintiff Commission and admissibility went up to the Court of Appeal, he disputed having given such instructions to the Defendant. The Defendant did not adduce any evidence either of this instruction from the said Vendor or an agency agreement between the Vendor and Naen Rech the bidder. While the Defendant may not have taken part in the tender process, his letter to the City Council in regard to Naen Rech Limited regularized its eligibility and in my view it amounted to a substantive participation in the tender process. He had no instructions from the owner of the land to write the letter and hence



it was fraudulent, and the Defendant cannot be absolved from the fraud which riddled the tender process.

61. The second allegation of fraud arose at the conveyancing stage and the Defendant concedes that he participated in drawing up the sale agreement. It is my finding that it has been proved on a balance of probabilities that the Defendant witnessed the Vendor's purported signature in agreement with the City Council. That signature was disputed by the Vendor and when the agreement was put to a forensic examination it was confirmed it was in fact not his. The signature was therefore a forgery. There was no contrary opinion which this court could have relied upon and this court therefore finds that the signature being a forgery the Defendant participated and oversaw a fraudulent transaction.
62. In any event, it is unlikely that the owner of the land would have agreed to an agent getting so much more than himself yet proceed to foot the legal fees and transfer incidentals. It is also curious that Naen Rech Limited ended up being paid only Kshs.9,540,000/- out of the consideration of Kshs.283 million paid for the land. The sum of Kshs. 9,450,000 does not represent Naen Rech's interest in the land and in my view that is further proof of a fraudulent scheme.
63. Fraud is also exhibited in the valuation of the land. It was the Plaintiff's evidence that the real value of the land was actually Kshs. 30 million as per its Valuer. Secondly there is evidence that what was presented as a valuation report was a forgery as it alleged to have been made by a person who purported to be an employee of the Ministry of Lands where he was not. It is not in doubt that the consideration paid for this land was based on the forged valuation report. This ended up in the value of land being exaggerated. The Defendant's argument that this was a "willing buyer, willing seller" agreement does not hold any water. The Defendant himself concedes that only Kshs.110 million was paid to the owner of the land, so who got the balance? It was not Naen Rech who was represented to be the owner because as we have seen Naen Rech received only Kshs.9,500,000/-. The balance of Kshs.173,000,000 went to persons, though unknown, who were not parties to the agreement and clearly that was illegal; that people who were not parties to the agreement could receive payment of public funds to which they were not entitled is also fraudulent. The Defendant admitted that he took part in the distribution of the money over and above that paid to the owner. It is my finding therefore that he knowingly took part in the defrauding the City Council. Again I am not persuaded that the funds once paid to the owner ceased to be public funds, provided they were paid from public coffers they were public funds. I am also not persuaded by his argument that he merely acted on instructions. This is because he could only have received instructions from his client and that client had already pocketed his Kshs.110,000,000 and was therefore not in control of the balance.
64. In the case of Railal Gordhanbhai Patel vs. Lalji Makanji [1957] E.A 314, the Court held and I agree that:

“ . . . all transactions stemming from the fraudulent High Court proceedings were all rooted on a fraudulent and illegal decree and could not in law be sanctioned by a court of law as they were null and void abinitio and could not therefore bestow any rights to any party either directly or indirectly affected by those proceedings.”
65. In the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR it was also held that:

“ With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract: -



- a. the suggestion as a fact, of that which is not true by one who does not believe it to be true;
- b. the active concealment of a fact by one having knowledge or belief of the fact;
- c. a promise made without intention of performing it;
- d. any other act fitted to deceive; and
- e. any such act or omission or the law declares to be fraudulent.”

66. The Defendant concedes that he was aware that the amount due to the Vendor was not the one noted on the agreement yet he proceeded to represent the Vendor in the agreement, concealing that fact that more than half of the purchase price was intended for persons who were not parties to the contract. He therefore deceived the City Council and knowingly superintended over the loss of Public funds. I find therefore that the answer to issue No. (i) is in the positive.

Issue (ii):- Whether the Defendant is liable for Restitution.

67. Section 51 of ACECA provides:

“A person who does anything that Constitutes Corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.”

68. The purchase of the cemetery land was evidently a corrupt scheme and the public suffered a loss to the tune of Kshs. 283 million through the sale of land which was not suitable for the intended purpose. Moreover, the purchase price was grossly exaggerated and clearly the Defendant was a direct beneficiary of the moneys from the fraudulent procurement process and the resultant void contract. It is my finding that he is liable to compensate the Plaintiff as provided in Section 51 of the *Anti-Corruption and Economic Crimes Act* set out above.

69. Whereas the Defendant alleges that he received the sum of Kshs.25,900,000 as his fee, this was discounted by the Plaintiff and it is my finding that this amount was indeed paid to him over and above what was paid to him as legal fees by his client Henry Kilonzi (the Vendor/owner). Indeed, the Defendant did not produce any written agreement to prove that those were his fees. Neither did he produce a certificate of costs. It is therefore my finding that the amount was received pursuant to the fraudulent scheme and that the Defendant is liable for Restitution in that amount.

70. The Plaintiff has also claimed for interest on the amount prayed at Court rates. Section 53 of the *Anti-Corruption and Economic Crimes Act* states that:-

“(1) A person liable for an amount under Section 51 shall also be liable to pay interest at the prescribed rate, on the amount payable.”

71. The rate of interest is prescribed in Clause 3(1) of the Anti-Corruption and Economic Crimes Regulations, 2003 as follows:-

“(3) The interest rate is prescribed for the purposes of Section 53(1) of the Act is
(1) twelve per cent, per year.”

72. Accordingly I enter judgment for the Plaintiff against the Defendant as follows: -



- a. The sum of Kshs.25,900,000/-
- b. Interest at the prescribed rate of 12% per annum from the date the amount was paid until payment in full.
- c. Costs of the suit.

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

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E. N. MAINA

JUDGE

