

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**  
**ANTI-CORRUPTION SUIT NO. E026 OF 2018**

ETHICS AND ANTI-CORRUPTION COMMISSION .....PLAINTIFF

=VERSUS=

JOSEPH MUINDI TEVULO .....1<sup>ST</sup> DEFENDANT

BENJAMIN RUTO TIMITIM .....2<sup>ND</sup> DEFENDANT

ROBERT SIMIYU WAMBULWA T/A

KOYI BUILDING CONTRACTORS .....3<sup>RD</sup> DEFENDANT

### **JUDGMENT**

1. The Plaintiff in this suit, the ETHICS AND ANTI-CORRUPTION COMMISSION (EACC- hereinafter referred to as the Commission), is Kenya's Anti-Corruption Agency. It filed this suit against the Defendants for the recovery of monies from them, that the County Government of Trans Nzoia paid to the 3<sup>rd</sup> Defendant, for two tenders. The first tender being for the construction of shades of the Kenyatta Stadium in Kitale town, while the second one was for the renovation of the said stadium.
2. The Commission has in this suit claimed that the said tenders and the tendering process were fraught with fraud, irregularities and illegalities. For which anomalies, it has in this suit blamed the Defendants who it has accused of working in cohort in a cleverly conceived and carefully executed scheme to perpetrate tender fraud and misappropriate public funds allocated to the Trans Nzoia County government.

3. At the time of those tenders, JOSEPH MUINDI TEVULO the 1<sup>st</sup> Defendant was working at the Trans-Nzoia County Government as the Head of the Supply Chain Management and Secretary of the Tender Committee. The 2<sup>nd</sup> Defendant was the County Architect tasked with the responsibility of supervising the renovation works and ensure they were carried out and in accordance with the terms of the tender.
4. The Plaintiff has by its Plaint dated 28<sup>th</sup> April 2016 prayed for the following reliefs against the Defendants jointly and severally:
- (a) A declaration that the contracts dated 16<sup>th</sup> September 2013 and 22<sup>nd</sup> April 2014 between the 3<sup>rd</sup> Defendant and the County Government of Trans Nzoia were founded on fraud and illegality, hence are null and void *ab initio*.**
  - (b) Payment of the sum of Ksh 25,334,525/50 being the monies that the 3<sup>rd</sup> Defendant was paid by the County Government pursuant to those two illegal contracts.**
  - (c) In the alternative payment by the Defendants of the sum of Ksh 16,874,729= part of the said total sum of Ksh 25,334,525/50 that the Trans Nzoia County Government paid to the 3<sup>rd</sup> Defendant (in b above), that was in excess of Ksh 8,459,796= the actual value of the works carried out by the 3<sup>rd</sup> Defendant on those contracts.**
  - (d) Interest on the amount (b) or (c) above.**
  - (e) Costs of this suit.**

5. The Plaintiff has maintained that the tender process in the impugned tenders was tainted with fraud and illegalities on the part of the Defendants. That pursuant to that flawed and irregular tendering process, the 3<sup>rd</sup> Defendant trading in the business name KOYI BUILDING CONTRACTORS, was awarded the two tenders, and later upon the 2<sup>nd</sup> Defendant issuing approval certificates, paid a sum of Ksh25,334,525/50. Which amount consisted Ksh16,634,525/50 for the tender for the renovation works, and Ksh15,843,918= for the construction of stands.
6. For the renovation works the budget that the County Government had in its budget approved for the year 2013/2014, was only Ksh12,376,441=. While for the construction of the shades, the budget that the County had in its budget approved for that finance year, was only Ksh10 Million. These payments were made after the 2<sup>nd</sup> Defendant issued Certificates of Completion, purporting that the works were completed and handed over to the County Government, yet they were not. The particulars of negligence are stated in paragraph 10 of the Plaintiff.
7. At the time this suit was filed there were parallel criminal proceedings against the Defendants in the Chief Magistrate's Anti-Corruption Court in ELDORET CHIEF MAGISTRATE'S ANTI-CORRUPTION CASE NO. 5 OF 2015.

### ***The Defence Case***

8. The Defendants entered appearance and filed Defence but did not later participate in the proceedings despite being served severally with hearing notices. Apparently, they in their wisdom or lack of it, did not consider this suit to be important enough for their attention or concern. For them, these proceedings counted for nothing. Conversely, in a public interest suit such as this one that asserts procurement-related irregularities, illegalities and illegal acquisition of public monies, such a cavalier stance is most undesirable.
9. This stance should perturb any right-thinking mind, especially for the 1<sup>st</sup> Defendant JOSEPH MUINDI TEVULO a public servant through whose conduct the County Government of Trans Nzoia expended such colossal sums on fictitious works that resulted from an overly flawed and fraudulent tender process.
10. Mr MUINDI having been the County's Head of Supply Chain and Secretary to the County's Tender Committee for those tenders, his participation in these proceedings was not only crucial, but should have been compulsory and secured by all means- even involuntarily. He needed to say something. Unfortunately, by his absence from the proceedings, hoped that he had safely tucked himself away from the reach of this Court's hand. Nothing can be farther from the truth. The hand of justice is long enough and all are within its reach.
11. Mr MUINDI's apparent disregard for this suit and proceedings despite having been a Public Officer that actively processed the said tenders, only amounts to impunity; and which impunity is unacceptable and should not be expected of those holding public office. Their duty to account for their actions relating to

their tenure in public office, are like a shadow accompany them into retirement. They will be called upon to account, even after they have ceased holding those offices or are enjoying their retirement.

*Where a Defendant Who Has Filed a Defence Does Not Call Witnesses or Adduce Any Evidence*

12. Where a Defendant who has filed a Defence fails to attend Court and testify on it, or elects not to testify or call any evidence, his filed Defence is to be disregarded and count for nothing; and all the statements in it shall be of no evidentiary value for *inter alia*, the lack of the opportunity to test those statements and documents by cross-examination. In such a circumstance, as held by Sewe J in **National Bank of Kenya Ltd v. Elijah K Arap Chepkwony [2017] eKLR**, there will have been no evidence in rebuttal of the Plaintiff's evidence or to substantiate the Defendant's allegations.

13. It was similarly held by Mbaluto J. in **Nairobi (Milimani) HCCC No. 165 OF 2000 Interchemie E.A Ltd v. Nakuru Veterinary Centre Ltd** where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted. This decision was recently quoted with approval by Chigiti J in **Ngugi v. Karanja & Anor [2023] KEHC 2368 (KLR)**.

### ***Analysis and Determination***

21. From the pleadings on record, this Court has to determine the following issues:

- (a) Whether there was any irregularities, fraud and illegalities in the procurement of the 3<sup>rd</sup> Defendant's services in the renovation of the Kenyatta Stadium, and for the construction of sheds at the Stadium.
- (b) Who should be liable for those irregularities, if any?
- (c) Whether any monies were paid to the 3<sup>rd</sup> Defendant for that tender, and if yes, how much?
- (d) Whether those monies should be refunded to the Kenya Government; and if yes, how much, and by who?
- (e) What other orders are appropriate for the Court to make in the circumstances of this case?

#### *Burden of Proof and Standard of Proof*

22. It is a trite principle of law that he who alleges must prove. This is a general rule, and which like any other general rule in law, has exceptions. To act to the contrary, one has to bring oneself under those exceptions; otherwise ordinarily, it is the allegor that has the burden of proving that which he or she has alleged.
23. Under Kenyan law, this general rule has been encapsulated in Sections 107 to 109 of the Evidence Act (Cap 80 of the Laws of Kenya) which provide as follows:

#### **Section 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 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."**

**Section 108 (The Incidence of the Burden)**

**"The incidence of 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 (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 the fact shall lie on any particular person."**

24. 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 contradistinguished it with the evidential/evidentiary burden of proof. In that Appeal, Warsame JA explained 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."**

25. The legal burden of proving this case rested on the Plaintiff throughout the proceedings of the suit; and only the evidentiary burden like a pendulum occasionally shifted to the Defendants. Unfortunately, even when it shifted, them having disregarded this suit and elected not to participate in it were not present to discharge that evidentiary burden. They through their disregard for these court proceedings and due process, squandered that opportunity to controvert the Plaintiff's story.
26. Unlike the Defendants, the Plaintiff did not squander the moment and effectively discharged the burden of proof by not only making assertions in its pleadings, but also following through with its witnesses and documents to offer proof.
27. Like hand and glove the burden of proof tugs along with the standard of proof; in that apart from discharging the burden of proof, a party has to prove his case to the required standard of proof. Which standard in civil cases such as this one, is on a balance of probability; also called the preponderance of doubt. Unlike in criminal cases where the standard of proof is that of beyond reasonable doubt.



28. This suit being a civil suit and these proceedings being civil proceedings and not criminal proceedings, the required threshold of proof (also called the standard of proof), is that of a balance of probability. This standard and which is also described as preponderance of doubt (or preponderance of evidence as referred to in the Black's Law Dictionary), is of a lesser degree than the criminal law's beyond reasonable doubt; and comparatively easier to achieve than the latter.

29. The balance of probability does not mean, and is not synonymous with equality of probability. To meet this threshold, the probability proffered by the protagonist, has to be higher than that proffered by the antagonist. Thus, the positive probability has to be more than fifty percent. This standard was aptly put by Lord Denning in Miller v. Minister of Pensions (1947) 2 All ER 372 in the following statement:

**"If the evidence is such that the Tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not."**

30. If at the close of the evidence, an objectively-minded person seized of the facts will say this fact is more probable than not, this standard will have been attained.

#### *The Evidence on Record*

31. The Plaintiff called a total of 6 (six) witnesses, namely: (1) PW1 FREDRICK WAKOFULA SIFUNA who was the County Secretary of the Trans-Nzoia County at the material time; (2) PW2 DINAH MAKOKHA who was an Accountant at the material time working in the Trans-Nzoia County Government as the Head of Budget and Chair of the County Tender Committee; (3) PW3 COLLINS

MICHAEL OWUOR who at the material time worked with the Transitional Authority as an Administrative Officer on Secondment to the Trans-Nzoia County Government; (4) PW4 JOHN WANJALA MULONGA a Building Contractor in Trans-Nzoia County who had competed with the 3<sup>rd</sup> Defendant for the tenders the subject of this suit; (5) PW5 FRED WANYAMA SIMIYU who was at the material time of the subject tenders working with the County Government of Trans-Nzoia as the Chief Officer of Finance; and (6) PW6 ABDULHAMID FAROOQUE LOW a Deputy Director at the Ethics and Anti-Corruption Commission (EACC) and who investigated this case.

32. PW6 produced 27 documents including a letter from the Registrar of Companies. The documents included Search Warrants from courts, Bank Statements, tender documents for those tenders, as well as payment vouchers. He faulted the entire tendering process including the tendering method that was used. He stated that given the high number of firms that participated in that tender (87 in number), the tender committee should have used the open tender method and not the restricted tender method it used. He stated that latter is suitable where there are a few competing firms.
33. He further stated that his investigation disclosed instances of bid rigging in those tenders. Further that there were no tender evaluation minutes for those two tenders, hence there was no evidence to show that the tenders were evaluated. That there also no evidence that the tenders were opened; since there were no tender opening minutes. This evidence is corroborated with that of PW1 DINAH NASWA MAKOKHA who was the Tender

Committee Chair at the material time. Who in her testimony stated that the tender to the 3<sup>rd</sup> Defendant was not in the Tender Register. She even disowned the minutes that the 1<sup>st</sup> Defendant purported to be those of an alleged Tender Committee Meeting of 8<sup>th</sup> April 2014.

34. Mr LOW in his testimony further disclosed that some of the documents in the bid documents related to other projects totally differed from the two projects; and gave the example of the construction of court rooms at Kitale Law Courts. Which he said led him to conclude that the putting together of the bid documents was done hurriedly to sanitize the tender process and get the defendants off the hook.
35. He further stated that two firms that participated in the tender, TRANSWEB GENERAL CONTRACTORS and SIBBERAIS BUILDING CONTRACTORS LTD, were not in the list of prequalified suppliers; hence were not the County's prequalified suppliers. Which is an illegality. That his investigations further revealed that ROBERT SIMIYU WAMBULWA the 3<sup>rd</sup> Defendant, was a Director in the said SIBBERAIS BUILDING CONTRACTORS LTD. This is a per P. Exhibit 27 which is a letter from the Registrar of Companies. Mr LOW singled out JOSEPH MUINDI TEVULO the 1<sup>st</sup> Defendant, for misleading the Tender Committee that the tender had been evaluated, yet there was no evaluation at all.
36. He further stated that the tender for renovation of the Stadium to KOYI BUILDING CONTRACTORS was awarded at Ksh 16,014,310/40, yet what was actually paid to him was Ksh16,634,535/50; which was more than the amount of the

tender. Which amount he stated was gross without any deduction of the Withholding Tax.

37. As for the tender for the construction of shades, he stated that JOSEPH MUINDI TEVULO the 1<sup>st</sup> Defendant, forged an extract of a Tender Committee meeting of 8<sup>th</sup> April 2014 that purportedly awarded the tender to KOYI BUILDING CONTRACTORS at Ksh 15,843,918=. That the members of the said Committee in the statements they recorded them stated that tender was never discussed or awarded. That yet JOSEPH MUINDI TEVULO issued to KOYI BUILDING CONTRACTORS, a letter of Notification of Award of Tender dated 8<sup>th</sup> April 2014. Which is the same date as the date of the purported Tender Committee meeting.
38. Mr LOW further stated that on 22<sup>nd</sup> April 2014 the said JOSEPH MUINDI TEVULO (1<sup>st</sup> Defendant) signed as a witness, the Contract for the Tender of Construction of Shades. Yet there was no signature for the County Government as Employer, which is usually signed by the Accounting Officer who is the County Secretary.
39. He further stated that pursuant to that Contract, KOYI BUILDING CONTRACTORS were paid Ksh 10 Million less retention fee of Ksh 1 Million, plus Withholding Tax of Ksh 300,000=; leaving Ksh 8,700,000= as the actual money he received. This is in P. Exhibit 29(b, which is a Bank Statement from the Co-operative Bank Account, entry dated 17<sup>th</sup> June 2014.

### ***Final Findings and Orders***

40. The evidence so far on record in this suit has revealed serious flaws, irregularities, improprieties and illegalities in the manner

the Defendants handled the subject tenders. It has gravely faulted not only the award of the said tenders but also the payments (overpayments) as well the entire tendering processes.

41. With extensive details, detailing the anomalies and outright violations of the procurement process and law. These infractions and fraud were aptly summed up by PW6 in his testimony. A testimony that notably clearly bore out his expertise in conducting such investigations. He in a blow by blow account left nothing to guess work; as he dissected and explained the entire scam with graphic details on every element and material particular of the scheme and fraud perpetrated by the Defendants in the subject tenders.
42. This covered the entire process from the bids to the tender award and to the payments. As already noted, the effect of the Defendants having filed Defence and subsequently failed or elected to call witnesses and adduce evidence in support of their Defence(s) and to controvert the Plaintiff's assertions, is that those assertions remain uncontroverted and if they meet the evidentiary threshold, they are to be believed and relied on by the Court in its determination of the suit.
43. Notably, the County had a budget for the said works, but which as a result of this fraud-laden tender caused the County Government to pay more than was budgeted. I need to emphasize though, that the Defendants' sin was not only overshooting the budget. But also the irregularities, illegalities and fraud in the said tenders. The contracts were as illegal as the tenders themselves.

44. This Court considers the subject transaction as an execution of illegality, rather than the rendering of a service for which payment should be made. To qualify for payment the contract had to be legal and lawful. Allowing the 3<sup>rd</sup> Defendant to retain the monies paid on those contracts, will be tantamount to not only rewarding an illegality, but also sanitizing and laundering those fraudulent tenders.
45. As to whether liability should extend beyond the 3<sup>rd</sup> Defendant and to his co-defendants, my answer is in the affirmative; as they are his partners in the illegality and fraud. In cases of tainted tendering process, liability should be to the awardee, and to the facilitators within the procuring entity. Such liability is, in my view, strict liability- thus notwithstanding that any one of them may not have been proved to have derived any financial benefit.
46. There should be no reward to the perpetrator of an illegality, as that is tantamount to rewarding the illegality. Any reward or payment he obtains from that illegality, is for refund and surrender. So that illegality begets sanction and not reward. An illegality is like the proverbial elephant and the seven sisters. No matter what part of it any of them had from her view point seen, the elephant remained one whole.
47. The total amount of money that the Trans Nzoia County Government paid the 3<sup>rd</sup> Defendant ROBERT SIMIYU WAMBULWA trading as KOYI BUILDING CONTRACTORS on the said tenders, is Ksh 25,334,525/50.
48. This Court hereby enters judgment for the Plaintiff as against the defendants jointly and severally, and issues the following Orders:

- (a) A declaration that the contracts dated 16<sup>th</sup> September 2013 and 22<sup>nd</sup> April 2014 between the 3<sup>rd</sup> Defendant and the County Government of Trans Nzoia for the renovation of Kenyatta Stadium in Kitale Trans Nzoia County, were tainted with irregularities, illegalities and fraud, hence are null and void *ab initio*.
- (b) A copy of this judgment be transmitted to the Honourable Attorney General of the Republic of Kenya to consider appropriate sanctions against the 1<sup>st</sup> Defendant JOSEPH MUINDI TEVULO who was a public officer at the time of the subject tenders, and which sanctions may include barring him from holding any Procurement Portfolio in Public Sector or Kenya Government entity.
- (c) The Defendants shall jointly and severally forthwith refund to the Kenya Government, the entire sum of Ksh 25,334,525/50 that the County Government of Trans Nzoia paid on those contracts.
- (d) Interest is hereby awarded on that sum at commercial rates, from the date this suit was filed, until payment in full. The applicable interest rates of the material time be ascertained.
- (e) The Plaintiff will have the costs of this suit.

DATED and DELIVERED at NAIROBI on this 30<sup>th</sup> day of April 2025.



PROF (DR) NIXON SIFUNA

JUDGE