



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCACECS/E011/2022

ETHICS AND ANTI-CORRUPTION COMMISSION VS BOB KEPHAS OTIENO AND LILIAN ACHIENG
ALOO AND 1 OTHERS

JUDGMENT

BEFORE HON. JUSTICE BENJAMIN MWIKYA MUSYOKI

The suit herein revolves around alleged fraudulent payments made to the 2nd and 3rd Defendants' joint account from the salary suspense account of Homa Bay County Assembly (hereinafter referred to as 'the Assembly') authorized by the 1st Defendant. Vide a Complaint dated 11th April, 2022, the Plaintiff sought the following orders jointly and severally against the Defendants;

The sum of Kshs. 12,571,166.50/=.

Costs of the suit.

Interest on (a) above at court rates from the date of receipt to the date of payment in full.

Any other or further relief that the Court may deem fit to grant.

The plaintiff's case

It was the Plaintiff's case that pursuant to its statutory mandate, it conducted an inquiry into allegations of fraudulent and illegal transfer of public funds to the tune of Kshs. 12,571,166.50 by the 1st Defendant from the salary suspense account of 'the Assembly' to the joint bank account of the 2nd and 3rd Defendants. According to their investigations, the 2nd Respondent, a teacher employed by the Teachers Service Commission was married to the 3rd Defendant, a Business Growth and Development



Manager at Equity Bank, Homa Bay branch and together they held a joint account number 0150190497679 at Equity Bank, Homa Bay Branch.

It was contended that the said account was dormant since 2006 when it was opened until sometime in 2015 when it began receiving huge sums of money from the County Government of Homa Bay and the Assembly. On diverse dates between 24th December 2015 to 22nd December 2017, the 1st Defendant authorized the transfers to the said account from the salary suspense account of the Assembly disguised as payment of the 2nd Defendant's salary and which funds were then withdrawn by the 3rd Defendant yet the 2nd and 3rd Defendants were neither employees, suppliers nor contractors of the Assembly or County Government.

It was pleaded further that, the 1st and 3rd Defendants abused their positions to embezzle public funds from the Assembly to the detriment of the public. The Plaintiff pleaded fraud and illegality against the 1st Defendant as follows;

Failing to ensure proper management and control as well as accounting for the finances of the Assembly contrary to Section 147 and Section 196 of the Public Finance Management Act.

Making and/or authorizing unlawful, illegal and fraudulent payments for services not rendered to the Assembly contrary to Section 196 of the Public Finance Management Act.

Failure to ensure that the resources within his area of responsibility are used in a way that is prudent, lawful, authorized, effective, efficient, economical and transparent as provided for under Sections 147 and 162 of the Public Finance Management Act.

Unjustly enriching himself through kickbacks received from the 2nd and 3rd Defendants from funds improperly received from the Assembly.

Abusing his office by improperly conferring a benefit to the 2nd and 3rd Defendants and himself contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003.

The Plaintiff also attributed fraud and illegality on the part of the 2nd and 3rd Defendants as follows;

Dishonestly receiving funds from the Assembly with no goods, work or services rendered.



Failing to disclose to the Assembly or the County Government of Homa Bay of the receipt of the said funds.

Having received the said funds from the Assembly, unlawfully retaining and converting the same for their use.

Conspiring with the 1st Defendant to defraud the public by embezzling funds from the Assembly.

It was thus averred that the Defendants were personally liable for the loss of Kshs. 12,571,166.50/= converted from public funds occasioning loss to the public. The Plaintiff called a total of 12 witnesses in support of its case.

PW1 was Titus Okere, a Senior Research Officer at the Assembly who previously served as the Principal Procurement Officer in the same Assembly. It was his testimony that there were no tender documents, advertisements, purchase requisitions, bid documents, tender opening, evaluation and award minutes, letters of notification of awards or anything to show that the 2nd Respondent ever traded with the County Assembly.

Mr. Okere highlighted the documents that would ordinarily show that an entity traded with the Assembly and added that any tender for goods or works of value above Kshs 6 million was required to be openly advertised in two national newspapers while for services of Kshs 3 million and above required the same advertisement. He identified two bilateral agreements with Damila Enterprises dated 23rd April 2014 and 8th December 2015 signed by the 1st Defendant on behalf of the employer (the Assembly), stating that a legal officer or county officer signed in that regard. He also identified a Local Purchase Order (LPO) dated 5th December 2015. It was his testimony that he knew Damila Enterprises who did some work for the Assembly but stated that payment should be made to it and not another entity.

During cross-examination by Mr. Seko for the 1st Defendant, the witness stated that he was aware that Damila Enterprises was associated with the 2nd and 3rd Defendants. He confirmed that the account number 0150190497679 was opened with the signatories being the 2nd and 3rd Defendants as per the account opening form, the name being indicated as Davelilan. He testified that the County Government had several accounts, the first being account number 1000170627 belonging to the executive arm which the 1st Defendant was not a signatory and another account



number 100239379 in which the 1st Defendant was a signatory.

It was his further testimony that if there was need to have payment made to account different from the goods or service provided, one had to write to the accounting officer to channel the money to that different account. Further, in relation to the account number 01141456870100 belonging to the Assembly, the 1st Defendant was responsible for monies paid out of the said account subject to being provided with supporting documents.

During cross-exam by Mr. Juma for the 2nd and 3rd Defendants, he stated that there were no tender documents with the 2nd Defendant as an individual but they had dealt with Damila Enterprises which the 2nd Defendant was a co-owner. He stated that upon the death of a member of staff, the Assembly spends on humanitarian grounds on normal funeral activities and while he was serving, three members died but stated that he did not deal with the tenders for the said funeral activities.

PW2 was Samuel Omondi Adera, the Principal Human Resource Manager who adopted his witness statement dated 18th March, 2022. He stated that employees recruited by the Assembly are issued with a unique personal number which is used to run the payroll and where an employee had a claim, the same was processed through the accounts office and not the human resource department

He stated that the Plaintiff by a letter dated 22nd March 2019 requested for information on whether the persons listed therein were employees of the Assembly upon which he provided a list of members of staff as well as the payroll products for 2015 to 2016 which were produced as exhibits. It was his testimony that the 2nd Defendant has never been an employee of the Assembly.

PW3 was Pamela Atieno Ongiro, the Payroll Manager of the Assembly. She testified that once a person is employed, she received the appointment letter indicating the relevant details which she then requests for their payroll number and enters the particulars into the payroll following which the employee starts receiving salary, which is processed twelve times in a year. It was her testimony that for the manual payroll, it contains people who do not have payroll numbers such as ward staff who are employees of the Member of the Assembly who are changed regularly. She added that she had seen bank statements for bank account of the 2nd Defendant indicating that she received numerous payments from the Assembly



captured as salary but the 2nd Defendant was not an employee of the Assembly.

In cross-examination, she confirmed that the 1st Defendant was the accounting officer of the Assembly between 2015 to 2017 and that she was not in a position to state why the payments were made as she did not process them. Further, that salaries were not paid to joint accounts but to individuals and that the amounts do not vary as is the case with the 2nd Defendant's case.

Charles Modi Auma, was the fourth witness. He told the court that he is the County Director of Human Resource Management of Homa Bay County Government since July 2016. He adopted his witness statement dated 9th March 2022 in which he confirmed that the 1st and 2nd Defendants among others were not employees of the Executive arm of Homa Bay County stating that he only knew the 1st Defendant as the clerk of the Assembly.

PW5 was Francis Wanyoike Njuguna who works with Equity Bank Sudan but previously worked with Equity Kenya in charge of clearing. He testified that the bank was served with miscellaneous applications nos. 58 of 2017 and 1271 of 2019 touching on account numbers 0983000100774 Equity Bank Homa Bay suspense account and 0150190497679 in the name of the 2nd Defendant. It was his testimony that a suspense account is used by the bank to process transactions from institutions and with their instructions, the said amount is remitted to the beneficiaries. Further, cash withdrawals by third parties without the express consent of the account holder was prohibited unless through a court order or the third party is appointed through a power of attorney.

Mr. Wanyoike added that the account of the 2nd Defendant received funds from two Central Bank accounts belonging to the Assembly being account numbers 1000170627 and 1000239379 and also one Cooperative bank account number 01141446870100 owned by the Assembly. The funds were channeled through the suspense account on diverse dates between 3rd December 2015 and March 2017. He added that the credits followed instructions from the 1st Defendant but some instructions were not available. He produced the extract of the suspense account, cheques in favour of the 2nd Defendant from the Assembly and instructions to pay various beneficiaries signed by the 1st Defendant and the account opening form for the account number 0150190497679 in the name of the 2nd Defendant as part of his documents.



During cross-examination, PW5 stated that account number 1000170627 was for the County Government and that the 1st Defendant needed authorization from the mandate holders to authorize payments. He stated that the name of the suspense account was Suspense Account for Homa Bay County and the term salary in the said account name did not mean that every amount paid therefrom was for salary. He added that account number 0150190497679 was a joint account, the name Davelilan having been rejected as no certificate of registration was produced in that regard hence retaining the account name as that of Lilian.

PW 6 was Jacinta Adede, the Finance Officer of Assembly since 2015 who told the court that she knew Damila Enterprises which traded with the Assembly and received some payments in their accounts at equity bank. In cross-examination, she stated that the said Damila Enterprises was doing business with other entities and that the account in question belonged to both the 2nd and 3rd Defendants. He stated that as a matter of policy, it was wrong for the 2nd and 3rd Defendants to ask for payment in an account belonging to the 2nd Defendant which is a completely different person from the supplier.

Leonard Kimutai Kipsanai, the 7th witness, working at the Central Bank of Kenya testified that vide a court order in miscellaneous application number E4217 of 2021, they provided the bank statements as well as account opening documents and mandate cards for the account numbers 1000170627 and 1000239379.

He added that vide a letter dated 6th July 2015, they received a request from the County Government of Homa Bay authorizing the opening of accounts (recurrent and development) in the name of the Assembly. The said accounts were opened with account no. 1000239379 being the recurrent and account no. 1000309482 being the development account. He identified the 1st Defendant as an authorizer of the recurrent account and a signatory in the development account. He also provided an audit trail for transactions for the accounts numbers 1000170627 and 1000239379 and produced a statement in that regard.

In cross-examination, he testified that the 1st Defendant was not the sole signatory nor could he transact without the authority of the other authorizer and could also not transfer funds from account no. 1000170627. He added that, the 1st Defendant's approval was made after an approval



had been issued by another person who was satisfied and that the said transactions were not initiated by the 1st Defendant.

PW8 was Irungu Evan working as a Security Officer at Cooperative Bank who adopted his witness statement dated 13th May, 2022. It was his testimony that the Plaintiff served them with orders in miscellaneous application number E4183 of 2021 to investigate account no. 01141456870100 belonging to the Assembly upon which the bank provided the account opening documents, bank statements and mandate cards. The bank also provided cheque images from the Cooperative Bank to Equity Bank as requested by the Plaintiff which were produced. During cross-examination, he stated that nothing indicated that the payments were not proper and that the cheques he produced had more than one signatory.

Alex Kinyanjui, the ninth witness who works with the Plaintiff as a Senior Forensic Investigator, testified that he is trained in using the IFMIS system by the National Treasury and has read-only access rights and authorization to access IFMIS. He told the court that, he received a request from Charity Muniu, an investigator with the Plaintiff to retrieve transaction data regarding payments made by the Assembly to the 2nd Defendant regarding the payments accumulating to the tune of Kshs 12,571,166.50/=. He accessed the IFMIS system and found that the 2nd Defendant registered as Lilian Achieng Aloo with IFMIS number 685238. He however found no payments or invoices made in her favour in the system.

PW10 was Charity Muniu, an investigator with the Plaintiff who adopted her witness statement dated 6th June 2022. It was her testimony that they received information on fraudulent payment to one Lilian Achieng Aloo to the tune of Kshs 12,571,166.50/= following which a team was assembled to investigate whether she was an employee of the Assembly, whether money was paid to her and how much, who was responsible for the payments and whether there was malpractice.

She added that according to their investigations, it was established that the 1st Defendant was the Clerk of the Assembly, the 2nd Defendant was a teacher at Riga Secondary School under TSC number 475397 and the 3rd Defendant was an employee of Equity Bank serving as the manager then. It was also established that 2nd and 3rd Defendants were married.

It was her testimony that investigations established that during the period



of interest, funds were transferred from three bank accounts being; the Homa Bay County recurrent account no. 1000170627, Homa Bay County Assembly recurrent account no. 1000239379 both held at the Central bank and account no. 01141456870100 held at the Cooperative Bank into a salary suspense account number 0983000100774 held at Equity Bank Homa Bay Branch. Thereafter, the 1st Defendant authorized debits from the said suspense account to various beneficiaries including account number 0150190497679 in the name of the 2nd Defendant. Upon payments being made, the monies were withdrawn by the 3rd Defendant.

It was her testimony that the payments to the 2nd Defendant from the suspense account were authorized by the 1st Defendant which were unlawful as the 2nd Defendant was not an employee or supplier to the Assembly. Further that the said joint account was activated in 2015 and immediately began receiving the said payments. It was also her testimony that payments made to Damila Enterprises were different from those made to the 2nd Defendant and accounts of the two were different.

During cross-examination, PW10 stated that Damila Enterprises was owned by both the 2nd and 3rd Defendants and that there would have been nothing wrong with Damila Enterprises giving Lilian's account for purposes of payments. She added that during their raid at the Assembly in 2019, they never took any procurement documents. She stated in re-examination that they did not find any documents supporting payments to Lilian or Damila Enterprises.

Stephen Yego appeared as PW11 and told the court that he is a document examiner with the Plaintiff and that he received documentary exhibits from PW10 requesting for forensic analysis on signatures appearing therein which he acted on and compiled his report referenced as EACC/LAB/DE/48/22 which he produced as an exhibit. He confirmed that the respective signatures were those of the 1st and 3rd Defendants. When he was cross-examined, he stated that they do not use the naked eye which forms part of their preliminary observation to do a report but a machine which is calibrated.

Lastly, Noah Ochieng Otieno, a private accountant who worked with the County Government of Homa Bay as Chief Finance Officer from 2015 to 2022 was called as PW12. He testified that for a contractor or supplier to be paid, the voucher must be signed by the accounting officer of the department and the accountant and in relation to the Assembly, the Clerk



must sign before any payment is made.

It was his testimony that he would receive requests for funds from the Clerk of the Assembly which request was submitted to the CEC Finance and copied to him and once approval is issued by the CEC Finance, he requested for the funds from the office of the Controller of Budget which were transferred to the Assembly account upon approval. When the Assembly has activities and the County has not received monthly exchequer release, the Clerk of the Assembly would request for funds for those activities which if approved by the CEC Finance are advanced from the Executive bank accounts and later reduced from the Assembly's monthly allocation.

It was his testimony that he was not privy to how suppliers and contractors are awarded tenders and paid by the Assembly as the Clerk is the accounting officer but for the executive, payments were processed through IFMIS or internet banking. During cross-examination, he stated that it was not possible for the 1st Defendant to spend money from account number 1000170627.

Defendants' case

In their joint Statement of Defence dated 28th May, 2022, the Defendants denied all the allegations against them and argued that this suit is *sub judice* Milimani ACEC suit number E015 of 2021, EACC v Bob Otieno Kephass & 4 others. They called three witnesses in support of their case.

DW1 was the 1st Defendant who adopted his witness statement dated 11th January 2023 and testified that he was the Clerk of the Assembly at the time material to this suit. He stated that the Assembly did not operate a suspense account as it is an internal bank account and that the payments made by the Assembly to the joint account of the 2nd and 3rd Defendants were for services rendered to the Assembly by the 3rd Defendant in his own capacity or under the business name Damila Enterprises. As such, there was no salary paid to the 2nd Defendant as alleged.

The 1st Defendant added that the Assembly lost three of its members during that period being Boaz Ondiek, Monica Amolo and Jessica Owidi which resulted in the Assembly undertaking direct procurement to Damila Enterprises to cater for the services in that regard as they were emergencies. He stated further that the 3rd Defendant directed that the payments for the services should be made either to their joint account



at Equity Bank number 0150190497679 or Equity Bank account number 0980261644914. At the time of payments, the 3rd Defendant indicated that payments be made to the account number 0150190497679 as the other account had tax issues.

He thus maintained that the payments made to the said account were lawfully made for services rendered and there was no fraud involved. He stated further that following the raid in his office in 2017 by the Plaintiff, documents important to this case were taken and were never availed to him which would have shed more light on the issues.

In cross-examination, the 1st Defendant stated that it was Damila Enterprises which traded with the Assembly and that he authorized payments to the 2nd Defendant. He stated that, he had knowledge of case number ACEC E015 of 2021 which had been appealed but he could not recall how much the court had stated he received from Damila Enterprises which was found not to have supplied anything to the Assembly or done any work.

He added that the budget for the said funerals was under vote 35 on emergencies and that not all tenders to Damila Enterprises were direct tenders save for the three following the demise of staff members. He also stated that he had no role in the award of tenders as he was notified at the tail end of who was awarded and why and that he authorized payments as the Clerk of the Assembly and not in his personal capacity, his work being to pay what other departments had approved.

During re-examination, he stated that the plaint seeks an upwards of Kshs 12 million yet the amount for the direct contracts was only 6 million, the balance being from the accounts of the Executive arm of the County Government which he had no authority over.

The 2nd Defendant adopted her witness statement dated 11th January, 2023 and testified that she and the 3rd Defendant who is her husband were the proprietors of Damila Enterprises which was in business of supplying goods and services to schools and other clients including Homa Bay County. She added that the business did some work for the Assembly including construction of a perimeter wall and catering services for funeral services of Honourable Boaz, Monica and Jessica. It was her testimony that she never received any payments from the 1st Defendant as the account number 0150190497679 was a joint account with the 3rd Defendant and



that she has never been an employee of the Assembly.

During cross-examination, she stated that she never traded with the Assembly or the Executive and that Damila Enterprises was facing tax issues since 2014 hence the reason they directed the payments to be made to their joint account. She added that the payments for the funeral services was around Kshs 6 million and that she was not aware what the balance was paid for. It was also her testimony that she was not aware what the cheques of Kshs 2 million, 3.6 million and 5.4 million on different dates to the 1st Defendant were for but it could be explained by the 3rd Defendant.

She also identified one Everlyn Ogutu as the 1st Defendant's wife who received Kshs 1.7 million. She added that she knew Mourice and Carolyn Sang in 2020 when they were arrested and she did not know why they received funds on diverse dates in 2015. She indicated that she did not run Damila Enterprises and only has a 1% stake in it. During re-examination, she told the court that letters from Damila Enterprises are executed and authored by the 3rd Defendant and that the business uses the 3rd Defendant's tax PIN.

The 3rd Defendant told the court that Damila Enterprises was registered in 2013 by him and the 2nd Defendant and he was in charge of all operations including bank transactions. He added that Damila Enterprises has done works for both the Assembly and Executive since 2014 ranging from construction, catering services and supply of stationery and that they would receive payments through cheques or RTGS. Mr. Obonyo stated that he started having issues with taxes and decided to have a secure account in the event Damila Enterprises' account was frozen. He stated that Damila Enterprises used his tax PIN for purposes of paying taxes.

The 3rd Defendant testified further that he was the Business and Growth Manager at Equity Bank from 2012 to 2017 when he resigned. He explained that a suspense account is a pool collection account owned by the bank where banks receive remittances from clients with many payees in one cheque after which they wait for instructions on who to pay how much.

It was his testimony that he has never applied for a tender with the 1st Defendant and he got to know him when he was following up payments. He added that he was awarded the tenders for catering services which were emergencies and that payments were spread due to limited funds but were



paid to their joint account. He denied being convicted of any fraud or money laundering and added that neither the Assembly nor the Executive has complained of any irregular payments.

During cross-examination, the 3rd Defendant stated that Damila Enterprises traded with the Assembly and Executive and payments would sometimes be made to Damila Enterprises or the 2nd and 3rd Defendant's joint account upon his instructions. In relation to the question of whether the letters instructing payments to the joint account were received or stamped, he stated that the same were not disputed by the Assembly.

He also averred that from the Assembly, they received Kshs 7 million and the balance was from the Executive. He testified that he knew the 1st Defendant sometime in 2013 and that in 2015, he borrowed money from him which was issued in cash or deposited in the account of Damila Enterprises. He stated that, he was aware of civil suit number E015 of 2021 but he did not know whether the court said Damila Enterprises did not work for the County and the issue of whether it worked or not has never been determined by any other court. He confirmed that money from tenders from the Assembly were paid but he could not tell whether they were through IFMIS.

Analysis and determination

After closure of the parties' respective cases, they filed their written submissions. The Plaintiff filed its written submissions dated 16th July 2026, the 1st Defendant filed submissions dated 18th August 2026 and the 2nd and 3rd Defendants filed their submissions dated 15th August 2026. I have considered the pleadings in this matter, the evidence produced, the rival submissions and the law. In my considered opinion, the following issues arise for the determination;

Whether the 2nd Defendant was unlawfully paid Kshs 12,571,166.50 by the Assembly.

Whether the Defendants are jointly and severally liable for the loss of Kshs 12,571,166.50/=.

Who should bear the costs of the suit?

Whether the 2nd Defendant was unlawfully paid Kshs 12,571,166.50 by the Assembly

It is a fundamental principle in law that he who asserts must prove which



principle has been codified in Section 107 of the Evidence Act. The burden is placed on the person who desires the court to find in his favour. This being a civil suit the standard of proof is on a balance of probabilities.

However, where the allegations involve fraud, it has been held that the standard is higher than that of ordinary civil cases but not as high as beyond reasonable doubt as is required in criminal cases. In **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, Honourable Justice P.K. Tunoi, JA. (as he then was) stated as follows:

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

The Plaintiff brought this suit on the basis that the 1st Defendant authorized the transfer of a total of Kshs 12,571,166.50/= from the salary suspense account of the Assembly to the joint account number 0150190497679 held by the 2nd and 3rd Defendants disguised as salary to the 2nd Defendant who was neither an employee nor a supplier or contractor of the Assembly or County Government of Homa Bay. Based on analysis of the evidence, there is no dispute that the amount was received by the 2nd Defendants. The dispute is whether the same was paid as salaries or for services tendered and offered.

It is common ground that the 2nd Defendant was never an employee of the Assembly. It is also common ground that the money was paid into account number 0150190497679 which was a joint account belonging to the 2nd and 3rd Defendants. It is also agreeable between the parties if the evidence is anything to go by that, the payments were made following instructions from the Assembly whose accounting officer was the 1st Defendant. It may not be clear whether the instructions to the bank was for payments as salaries or payments for services offered through a tender process.

There is also contestation from the Defendants that suspense account belongs to the bank and not the Assembly and therefore the averments in the plaint are at variance with the Plaintiff's evidence. In my view, these are semantics. I do agree that the suspense account belongs to the bank where a pool is created for its clients to deposit funds then the bank waits



for instructions on who to pay how much. The fact however remains that payments or disbursements of monies from the funds deposited by the Assembly in the suspense account was made with instructions from the assembly. Therefore, the paying entity in this case is the Assembly. It would be of no difference and would not matter whether the payments were designated as salaries or payments for some goods or services. All what is important is whether there were justifications for the payments through a lawful process.

In their testimonies, the Defendants alleged that the amount paid to the 2nd and 3rd Defendants was for services rendered in provision of catering services for the funerals of three Members of the Assembly was Kshs 6,000,000.00 although the 3rd Defendant mentioned Kshs 7,000.000.00. They feigned ignorance of the extra Kshs 6,571,166.50 or in case of the 3rd Defendant Kshs 5,571,166.50 although the 3rd Defendant seemed to say that the difference must have been from the Executive arm of the County Government for other unrelated works. However, analysis of the bank statement for account number 0150190487679 produced by the Plaintiff as exhibit 19 and as narrated by PW9 shows that the payments received from the Assembly totaled to Kshs 12,571,166.50 as pleaded in the plaint.

As stated above, it is not disputed that the 2nd Defendant was never an employee of the Assembly. In that regard the payments can only be lawful if there is proof that the same was paid for services rendered or goods supplied. By their own admissions, the Defendants have stated that there was no tendering or procurement process for the alleged three catering services. The 2nd and 3rd Defendants' list of documents which I admitted in evidence late after the Plaintiff had closed their case for reasons given in my ruling dated 18-06-2026, had a total of 24 documents.

The said list had bilateral agreements between the Assembly and Damila Enterprises and some letters of quotations, offers, awards and acceptance for the alleged catering services. My simple calculation shows a total of Kshs 7,106,890.00 for the three services. In that regard, even if I were to accept that the payments in question went to the alleged services, the Defendants have not explained the difference of Kshs 5,464,276.50. As a preliminary point in this issue, it is my finding that the payments of the said difference remain unaccounted for and there being no documents to support them, I must infer fraud on the part of the Defendants.

I will proceed to analyse whether the alleged procurement of catering



services were lawful if at all they existed. According to the Defendants, the 2nd and 3rd Defendants trading as Damila Enterprises were engaged by both the Assembly of and the County Government Executive to perform various works for the said entities following which they were paid for the said services. They produced several tender agreements issued by the County Assembly ranging from tenders for renovation of Assembly staff houses, construction of staff perimeter wall, landscaping driveway and parking, cabro block works, renovation of clerk's offices phase 1 and another for phase 2, refurbishment of assembly roofing, landscaping vegetation works and proposed development of staff house.

The Defendants sought therefore to rely on the agreements as proof that the works were completed. However, the existence of a contract is not proof of work done. According to PW1, where contracts for works are issued, upon the request for payments by the bidder, a certificate of work done is issued and it is on that basis that the contractor will be paid. If works are completed, the project manager will issue a completion certificate which will advise the amount to be paid. Thereafter, an invoice is sent to the accounts department following which payment is processed.

The documents the Defendants have thrown at the court are too general to justify payments. I do believe that every payment is done for specific works or projects. The Defendants cannot lump up tenders together without specifying what was paid for which project and expect the court to find in their favour. Reading through the evidence, the Defendants have not provided any evidence that the 2nd and 3rd Defendants performed any works which were completed and for which payments were deserving.

I agree with the Plaintiff that the said alleged direct tenders were totally unsupported by any documents backing the same. Even where there is direct procurement, there should be accompanying or supporting documentation. It cannot be done by way of a single letter and related agreement executed by one officer. The letters produced by the Defendants are nothing more than correspondences between the 1st Defendant and Damila Enterprises meaning that the 1st Defendant was the requisitioner, originator, evaluator and the person awarding the alleged tenders. There are no minutes of the evaluation committee, no necessary approvals, no tender documents, no approved budget and no procurement plan to support the awards. More intriguing about these documents is that some pre-date the 1st Defendant's appointment as the Clerk to the Assembly.



Section 103(2)(b) of the Public Procurement and Asset Disposal Act (PPADA) which provides for the instances when direct procurement may be used reads as follows;

“A procuring entity may use direct procurement if due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;”

Further, Section 104 of the said Act provides for the procedure for direct procurement as follows;

An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement-

- (a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.*
- (b) appoint an ad hoc evaluation committee pursuant to [section 46](#) to negotiate with a person for the supply of goods, works or non- consultancy services being provided;*
- (c) ensure appropriate approvals under this Act have been granted;*
- (d) ensure the resulting contract is in writing and signed by both parties.*

There is no evidence provided by the Defendants that the above provisions were complied with. PW1 who was in the procurement department at the time and whereas he stated that the Assembly on humanitarian grounds catered for normal funeral services for deceased members of staff, it was his testimony that he never interacted with any such contracts awarded to Damila Enterprises in relation to the funeral services.

The 1st Defendants argued that failure to provide the tender evaluation documents was occasioned by the raid in his offices in 2017 in which the documents were taken by the Plaintiff and also that a fire consumed the said office at some point. However, the reasons provided are not to me, sensible. The Plaintiff denies ever confiscating any such materials and if indeed the Defendants were under the belief that the documents were in possession of the Plaintiff, they ought to have undertaken steps as provided in law to call for the said documents in the form of discovery



under Section 22 of the Civil Procedure Act. I also find it ironical that the Defendants could not trace the procurements documents but were able to conveniently obtain and produce the alleged letters of offers, awards and bilateral agreements.

Having found that there was no evidence of any works done, it is important to emphasize that the release of the funds to an account which does not belong to the entity allegedly contracted points to a broader aspect of concealing the intentions of the said funds. I note that PW1 and PW 6 testified that as a matter of policy, it was wrong for the 2nd and 3rd Defendants to request payments to be made to their joint account. The attempted explanation for that step appears to me to be an afterthought and manufactured for the sole purpose of defending this suit. The reason given for the diversion of the payments is not convincing. The tax demand letters and assessments produced by the Defendants in an attempt to explain this point are all dated the year 2023 whereas the last of the payments in question was made in 22nd December 2017.

In view of the above, I cannot reach a conclusion different from that; the payments of Kshs 12,571,166.50 made to the 2nd and 3rd Defendants between 24th December 2015 and 22nd December 2017 was fraudulent and unlawful.

Whether the Defendants are jointly and severally liable for the loss of Kshs 12,571,166.50/=?

Section 147 of the Public Finance Management Act provides as follows;

Subject to the Constitution, the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances, including-

- (a) promoting and enforcing transparency, effective management and accountability with regard to the use of their finances;*
- (b) ensuring that accounting standards are applied;*
- (c) implementing financial policies in relation to their finances;*
- (d) ensuring proper management and control of, and accounting for, their finances in order to promote the efficient and effective use of budgetary resources;*
- (e) preparing annual estimates of expenditures;*
- (f) acting as custodian of the entity's assets except as may be provided by other legislation or the Constitution;*
- (g) monitoring the management of their finances and their financial performance;*



- (h) *reporting regularly to the county assembly on the implementation of their budget; and*
- (i) *take such other action, not inconsistent with the Constitution, as will further the implementation of this Act.*

Having found that the 2nd and 3rd Defendants received irregular payments for work not done, it is inevitable I must hold that the same should be restituted to the Government. This is in line with the mandate of the Plaintiff donated by Section 11(1)(j) of Ethics and Anti-Corruption Act. It cannot be normal when public coffers are being emptied and depleted to pockets of individuals when the public did not receive commensurate services or benefits for the same.

The 1st Defendant being the accounting officer of the Assembly had the duty to ensure efficient use of public funds and that the same were released to deserving contractors who performed their works. He confirmed that he was the ultimate authorizer of payments after the user and other departments and had approved and supervised the relevant tenders.

The 1st Defendant claimed that he authorized the payment after procurements had been done and supervised by the user departments. However, this is defeated by the Defendants' own documents. The letters allegedly awarding the three tenders for catering services are authored by the 1st Defendant. One cannot see the hand of any other officer at the Assembly. It is deplorable and ironic that the 1st Defendant participated in fleecing the same institution which has the people's mandate of overseeing and oversighting budgets, planning, delivery and execution of the people's aspirations by the other arm of Government.

There were also claims that as part of the fraudulent actions by the Defendants, the 1st Defendant got kickbacks sent to his account following payments to the 2nd and 3rd Defendants. The Defendants explained that the said payments were meant to repay loans advanced to the 3rd Defendant. There is however no evidence that there was any loan advanced to the 3rd Defendant. Noteworthy, the transfers to the 1st Defendant followed almost immediately funds were paid by the Assembly which points to a fraudulent scheme. In my considered view, the 1st Defendant was a beneficiary, an active participant and a co-architect of the fraudulent payments.

According to Article 266(5) of the Constitution, a holder of a public office



who approves use of public funds contrary to the law, is liable for any loss arising from the use and shall make good the loss. Section 203 (1)(a) of the Public Finance Management Act provides for personal liability of a public officer for any loss occasioned by fraudulent or corrupt conduct or negligence.

In similar circumstances, Honourable Justice E.N. Maina held in **Ethics and Anti-Corruption Commission v Otieno & another [2023] KEHC 1459 (KLR)** that;

‘It was also an offence under Section 45(1)(a) for the 2nd Defendant to have received a benefit from the County Assembly of Homa Bay without having sold any goods or rendered any services to it. The Defendants are therefore liable to compensate the County Assembly of Homa Bay for what they unlawfully paid and acquired. That is the law as is prescribed in Sections 51 and 53 of the [Anti-Corruption and Economic Crimes Act](#) and Section 203(1)(a) of the [Public Finance Management Act](#) which states that (“A public officer is personally liable for any loss sustained by a county government that is attributable to — (a) the fraudulent or corrupt conduct, or negligence, of the officer”) and also Article 226(5) of [the Constitution](#) which states that “if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.)”

Section 51 of Anti-Corruption and Economic Crimes Act comes in too. Under the said Section, 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. The money in issue in this matter belonged to the Assembly and the Defendants are therefore liable to compensate it for the loss through the Plaintiff.

In the above context, I also find the second issue answers to the affirmative. The 1st Defendant is liable for having caused the loss of the money through corrupt and fraudulent conduct. The 2nd and 3rd Defendants are equally liable for having fraudulently received the funds for works not done or service not offered.



Who should bear the costs of the suit?

By virtue of proviso to Section 27 of the Civil Procedure Act, costs of the suit should follow the event. Although costs are always at the discretion of the court, that discretion must be exercised judiciously. The Plaintiff has succeeded in its claim and the only fair and just order is to award it costs.

Final orders

The following are my final orders;

- a. Judgment is hereby entered jointly and severally against the Defendants and in favour of the Plaintiff for a sum of Kshs. 12,571,166.50.
- b. The above sum shall attract interest at court rates from the date of filing this suit until payment in full.
- c. Costs of the suit are awarded to the Plaintiff.

Dated signed and delivered at Nairobi this **16th** day of **October** 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;
Mr. Miss Biwott for the plaintiff; and
Mr. Miss Obura holding brief for Mr. Seko for the 1st defendant; and
In absence of the 2nd and 3rd Defendants.

2 | Page

SIGNED BY:
HON. JUSTICE BENJAMIN MWIKYA MUSYOKI



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT ANTI CORRUPTION AND ECONOMIC CRIMES
DATE: 2026-10-17 16:52:25+03

