



**Samaan Investments Limited & 3 others v National Project Coordinator,  
National Project Implementation Unit Kenya Development Response to  
Displacement Impacts Project (KDRDIP) & 13 others (Constitutional  
Petition E013 of 2024) [2024] KEHC 10155 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CONSTITUTIONAL PETITION E013 OF 2024**

**JN ONYIEGO, J  
AUGUST 15, 2024**

**BETWEEN**

**SAMAAN INVESTMENTS LIMITED ..... 1<sup>ST</sup> PETITIONER  
TUSBAN CONSTRUCTION COMPANY LIMITED ..... 2<sup>ND</sup> PETITIONER  
AFROTRICK HOLDINGS LIMITED ..... 3<sup>RD</sup> PETITIONER  
NEWLOOK CONSTRUCTION COMPANY LIMITED ..... 4<sup>TH</sup> PETITIONER**

**AND**

**NATIONAL PROJECT COORDINATOR, NATIONAL PROJECT  
IMPLEMENTATION UNIT KENYA DEVELOPMENT RESPONSE TO  
DISPLACEMENT IMPACTS PROJECT (KDRDIP) ..... 1<sup>ST</sup> RESPONDENT  
COUNTY PROJECT COORDINATOR COUNTY INTEGRATED PROJECT  
IMPLEMENTATION UNIT (CIPIU) KENYA DEVELOPMENT RESPONSE TO  
DISPLACEMENT IMPACTS PROJECT(KDRDIP) ..... 2<sup>ND</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER HEALTH SERVICE WAJIR  
COUNTY ..... 3<sup>RD</sup> RESPONDENT  
ABAKORE HEALTH CENTRE PROJECT MANAGEMENT  
COMMITTEE ..... 4<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF WAJIR ..... 5<sup>TH</sup> RESPONDENT  
HARED SIRAT ..... 6<sup>TH</sup> RESPONDENT  
SIRAT ALI ..... 7<sup>TH</sup> RESPONDENT  
MOHAMED AHMED ..... 8<sup>TH</sup> RESPONDENT**



**MOHAMUD SALAT OSMAN ..... 9<sup>TH</sup> RESPONDENT**  
**AFFEY SALAT ..... 10<sup>TH</sup> RESPONDENT**  
**THE PUBLIC PROCUREMENT REGULATORY AUTHORITY .... 11<sup>TH</sup>**  
**RESPONDENT**  
**MINISTRY OF EAST AFRICA COMMUNITY ASALS AND REGIONAL**  
**DEVELOPMENT ..... 12<sup>TH</sup> RESPONDENT**  
**OFFICE OF THE ATTORNEY GENERAL ..... 13<sup>TH</sup> RESPONDENT**  
**MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN**  
**DEVELOPMENT AND PUBLIC WORKS ..... 14<sup>TH</sup> RESPONDENT**

### **RULING**

1. The background of the petition herein is pegged on the fact that the Abakore Health Centre, a government facility located in Wajir South Constituency was scheduled to be constructed through funding by the Kenya Development Response to Displacement Impacts Projects (KDRDIP) a project sponsored by the world bank. That in the year 2023-2024, 18,000,000/- was released to facilitate the construction of a modern ward and fencing of the facility. Besides, the same amount was to cover for the supply and delivery of maternity equipment.
2. On 02.12.2023, eligible tenderers were invited to apply for the performance of the works vide the tender document labelled ABAK/KDRDIP/QT/001/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024.
3. That at the close of the application, pre-tender meeting for tenderers was convened at Abakore health centre around February 2024 so as to clarify on any outstanding issues and also to answer questions on any matter touching on the contract at that stage; Subsequently, sealing and marking of the tenders was done. It was alleged that sometime in the month of March 2024, information and rumours went out that the subject tender had been cancelled since the funds intended to fulfill the project were no longer available as they were withdrawn by KDRDIP.
4. That the petitioners were kept in the dark until the month of July 2024 when they witnessed stage activities at Abakore Health Centre as trucks were spotted offloading building materials. Upon enquiry, the petitioners were shocked to learn that the contract had already been awarded without due regard to the procurement laws and regulations.
5. Being aggrieved by the turn of events, the petitioners through the Firm of I&M Advocates LLP instituted this suit by way of petition dated 19.07.2024 together with a notice of motion of even date seeking orders that:
  - i. Spent.
  - ii. Pending the hearing and the determination of this application inter partes, this Honourable Court do issue an order restraining the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents whether by themselves, servants, employees and/or agents from implementing or otherwise performing the works at Abakore Health Centre under tender document labelled ABAK/KDRDIP/QT/002/2023-2024 and ABAK/KDRDIP/QT/001/2023-2024.



- iii. Pending the hearing and determination of this application inter partes, mandatory orders be issued ordering the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to immediately stop or cancel the implementation or otherwise the performance of the works at Abakore Health Centre under tender document numbers labelled ABAK/KDRDIP/QT/002/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024.
  - iv. Pending the hearing and determination of this application inter partes, mandatory orders be issued ordering the 11<sup>th</sup> respondent to undertake investigations, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement proceeding or the purportedly awarded contract with respect to tender documents ABAK/KDRDIP/QT/002/2023 – 2024 and ABAK/KDRDIP/QT/002/2023-2024 for the purpose of determining whether there has been a breach of the procurement laws and regulations.
  - v. Pending the hearing and determination of the underlying petition, this Honourable Court do issue an order restraining the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents whether by themselves, their servants, employees and/or agents from implementing or otherwise performing the works at Abakore Health Centre under the tender document ABAK/KDRDIP/QT/002/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024.
  - vi. Pending the hearing and determination of the underlying petition, mandatory orders be issued ordering the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to immediately cancel the implementation or otherwise the performance of the works at Abakore Health Centre provided under the tender document ABAK/KDRDIP/QT/002/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024.
  - vii. The officer commanding Abakore police station be directed to enforce the orders of the court.
  - viii. Costs of the petition.
6. The application is anchored on the particulars on the face of it and further amplified by the content contained in the affidavit in support sworn on 19-07-24 by Ahmed Noor Taqal director of the 4<sup>th</sup> petitioner on his behalf and that of other petitioners. He stated that on 02.12.2023, eligible tenderers were invited to apply for the performance of the works vide the tender document labelled ABAK/KDRDIP/QT/001/2023-2024 and ABAK/KDRDIP/QT/002/2023-2024 raised by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents. That the tender award was awarded in secrecy thus shutting them out of the tendering process legal redress.
  7. He deposed that they did not receive any communication whether written or verbal in regards to the award of the said tender. It was averred that the said award was not only unprocedural but also offended the basic tenet of public procurement and asset disposal process which requires a process that is fair, consistent, transparent and accountable. This court was thus urged to allow the prayers sought.
  8. The court upon considering the pleadings directed that the application be served upon the respondents within two days and the respondents file their respective responses within four days. The applicant was free to file a rejoinder if any within two days of service.
  9. Ms. Mutindi, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents filed a replying affidavit, sworn on 29.07.2024 and a preliminary objection dated 26.07.2027. In the replying affidavit, it was deposed by one Wilfred Omari that he was the national project manager of the 2<sup>nd</sup> respondent, a project overseen



- by the 12<sup>th</sup> respondent. It was averred that the role of KDRDIP is only facilitative and aimed at guiding the community project management committee (CPMC).
10. That the CPMC was in charge of identifying the Abakore Health centre and further, that the procurement should be done in regards to the financing agreement, world bank procurement regulations and the *public procurement and asset disposal act*, 2015. He went further to state that the process was all inclusive comprising of the community project management committee, the community group management committee as well as the procurement subcommittee constituting of members drawn from and elected by the community, through a transparent participatory process.
  11. In the same breadth, it was deposed that the petition herein did not raise any right or fundamental freedom that was breached, denied, violated, infringed or threatened. That it was incumbent upon the petitioners to demonstrate real danger so actual, so imminent, so evident and so true to warrant the immediate intervention of the Honourable Court. That it was not demonstrated that any prejudice or irreparable harm, damage or injury had been suffered or was likely to be suffered if the Honourable Court did not intervene. It was urged that the suit herein was unmerited and as such, ought to be dismissed.
  12. The preliminary objection by the 1<sup>st</sup> 12<sup>th</sup> and 13<sup>th</sup> respondents is anchored on the following grounds:
    - i. That by dint of sections 27,26 and 167(1) of the *Public Procurement and Asset Disposal Act* 2015 as read with sections 9(2)(3) of the *Fair Administrative Action Act* and article 159(2)(c) and 169(1)(d)(2) of *the constitution*, both the application and the petition offend the doctrines of exhaustion of remedies and constitutional avoidance. The jurisdiction of the court was thus improperly invoked.
    - ii. That the petition and the application did not bring out any constitutional issue.
  13. Reasons wherefore, it was prayed that the petition be dismissed with costs to the respondents.
  14. The court directed that the preliminary objection be canvassed by way of written submissions to which only the petitioners complied with the said direction.
  15. Vide submissions dated 29.07.2024, the petitioners urged that our case law has developed a number of exceptions to the doctrine of exhaustion. That in R vs the Independent Electoral and Boundaries commission & others ex parte the National Super Alliance Kenya (N.A.S.A) [2017] eKLR, the court held that ...the exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.
  16. That where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere 'bootstraps' or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. That in awarding the tender herein, the petitioners raised weighty constitutional violations under article 10, 27,47(1), 47(2), 55,174,201,227,232(1),249 and 259 of *the constitution*. The said violations therefore warrant this court's intervention.
  17. It was averred that the issues raised in the petition did not fall within the jurisdiction of the review mechanism provided for under the *Public Procurement and Asset Disposal Act* and specifically section 167 (1) of the Act. That the same envisaged that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process. That in this case, the



impugned award of the tenders was orchestrated in the dark as the procurement process was conducted in complete disregard of all the process required under the law.

18. The petitioners urged that they would have sought for the intervention of the Administrative mechanism provided under the Act had they had an idea on the specific dates the impugned tenders were awarded before the expiry of the strict timeframes. As such, it remained unclear when the breach occurred as the petitioners/applicants only recently received the information on the award of the tender. That in the interest of justice, the application herein be allowed.
19. The Firm of Garane & Somane Advocates entered appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents but did not participate in the proceedings herein.
20. I have considered the notice of preliminary objection herein and the written submissions by the petitioners'/applicants'. The only issue for determination is whether the notice of preliminary objection has merit.
21. In the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”
22. It is trite that if a preliminary objection is allowed, the same may dispose of the entire suit with finality and without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine a case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process/es.
23. The 1<sup>st</sup>, 12<sup>th</sup>, 13<sup>th</sup> respondents argued that this court has no jurisdiction to entertain the matter herein as the petitioners did not exhaust the mechanism provided under section 27,28 and 167(1) of the Public Procurement and Assets Disposal Act, 2015 which establishes the Public Procurement Regulatory Authority, a body fettered with authority to hear issues raised in the petition herein.
24. The petitioners on the other hand submitted that they would have sought for the intervention of the Administrative mechanism provided under the Act had they had an idea on the specific dates the impugned tenders were awarded before the expiry of the strict timeframes. As such, this court was urged that in the interest of justice, the suit be allowed as prayed.
25. Noting that the jurisdiction of this court has been questioned, it is trite to note that jurisdiction is everything and without it, the court must down its tools. [ See the case of the Owners of Motor Vessel “Lilian S” vs Caltex Oil Kenya Ltd (1989) KLR1].
26. The 1<sup>st</sup>, 12<sup>th</sup>, 13<sup>th</sup> respondents contended that the suit herein did not raise any constitutional issue as the petitioners/applicants did not demonstrate any real danger so actual, so imminent, so evident and so true to warrant the immediate intervention of the Honourable Court. It is trite that for a petition to qualify as raising a constitutional issue, it must meet the criteria advanced in the most celebrated case of Anarita Karimi Njeru v Republic (1979) eKLR where it was held that a party seeking constitutional redress ought to express himself or herself with a reasonable degree of precision the nature and extent of constitutional rights violated or threatened or likely to be infringed.
27. Similarly, in the matter of the interim independent Electoral Commissions, Constitutional Application No.2 of 2011(2011) eKLR, the supreme court expressed itself that where *the constitution* exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional



limits; it cannot expand its jurisdiction through judicial craft or innovation; nor can parliament confer jurisdiction upon a court of law beyond the scope defined by *the constitution*.

28. Before me is the question whether this court has jurisdiction to grant the orders sought or not. The respondents have contended that instead of the petitioners coming to the constitutional court, they ought to have ventilated their issues via the statutorily provided mechanisms created for dealing with such complaints in this case, the public procurement administrative review board.
29. It is not lost in my mind that the petitioners are seeking for enforcement of their rights as provided for by *the constitution* as a result of the alleged infringement of their rights by the respondents. Having read the petition in totality and also having in mind the jurisdiction of this court, I am in agreement that this court has unlimited original and appellate jurisdiction in relation to matters as provided under article 165 of *the constitution*. As to whether the court should deal with the matter herein, is something that I now seek to discuss.
30. The unlimited nature of jurisdiction notwithstanding, the key question is whether the petitioners have met the threshold of what constitutes a constitutional petition. From the petition, it is my view that the main issue constituting the dispute herein is purely the fact that a tender was awarded and yet, the law provides that when a successful bidder wins a tender, then the accounting officer of the procuring entity ought to notify in writing all other persons submitting tenders that their tenders were not successful and disclosing the successful tenderer. The petitioners /applicants herein were allegedly not notified at all. The said state of affairs has since made the petitioners to seek for orders inter alia that the said process be declared a nullity.
31. Specifically with respect to procurement disputes, the question of how the date of occurrence of a breach is to be determined, was the subject of the persuasive decision by Elias JA of the English Court of Appeal in *SITA vs Manchester Waste Management Authority* (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in *Uniplex (UK) Ltd vs NHS Business Services Authority* (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

“.....In *Uniplex*, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in *Uniplex* which I wish to emphasise are paragraphs 30 and 31:

SUBPARA “30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.”

The threshold therefore in determining the date of occurrence of a breach is the date of actual or constructive knowledge of the breach by an applicant. This indeed is one of the key reasons for the notification and standstill requirements in the award of tenders, so as to allow for informed and effective challenges to award decisions before the contracts are concluded.



[ Also see the case of *Public Procurement Administrative Board vs Four M Insurance Brokers Limited & 3 others (Civil Appeal E1009 of 2023)* [2024] KECA 79 (KLR)].

32. Whereas both parties are in agreement that under normal circumstances the decision of a contract award by a procuring entity if disputed ought to be challenged before the public procurement administrative review board under section 167 of the PP&ADA to which I am in agreement, there are exceptional circumstances when an aggrieved party may move the high court seeking to enforce a constitutional right under Article 227(1) of *the constitution* which provides;
- “ when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective”
33. The petitioners have questioned the secrecy under which the contract was awarded and communicated to the winner to the exclusion of other tenderers with the intention of circumventing the applicability of appeals time frames before the review board which is 14 days. Courts can not shy away from listening to litigants whose rights have been violated by being shut away from seeking redress in the appropriate forum.
34. In my view, the applicants/petitioners have raised an exceptional circumstance under which the doctrine of exhaustion cannot apply pursuant to the allegation of frustration of that doctrine by the respondents. To that extent, the applicants have no recourse but to exercise their right to be heard hence this court has jurisdiction to make declaration under Article 10 and 227 of *the constitution*.
35. Therefore, it is my finding that the petitioners are properly before the court hence their petition should not be dismissed prematurely as the administrative review board door got closed not out of their own making unless the contrary is proved during the hearing.
36. Having held as above, the preliminary objection is hereby dismissed. Parties to proceed with the hearing of the application dated 19<sup>th</sup> July 2024. Meanwhile, the application dated 19<sup>th</sup> July 2024 is allowed in the interim in terms of prayer B pending hearing interpartes. Parties who have not filed their responses to the application and petition to file the same with 14 days from the date of delivery of this ruling. Costs shall be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15<sup>TH</sup> DAY OF AUGUST 2024

**J. N. ONYIEGO**

**JUDGE**

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