



Ajab Hardware Limited v County Government of Tana River (Petition E005 of 2023) [2024] KEHC 13316 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
PETITION E005 OF 2023
SM GITHINJI, J
OCTOBER 31, 2024**

BETWEEN

AJAB HARDWARE LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF TANA RIVER RESPONDENT

JUDGMENT

1. By way of a Petition dated 10th July, 2023 the Petitioner sought the following orders;
 - a. A declaration that the Respondents failure to provide an itemized breakdown of tax withheld and remitted to KRA is a violation of the Petitioners rights.
 - b. A declaration that the Respondents failure to provide an itemized breakdown of tax withheld and remitted to KRA is a violation of the Petitioners rights to access information.
 - c. An order compelling the Respondent to provide to the Petitioner a certified and itemized breakdown of the taxes withheld and remitted to KRA in respect of the payments done to the Petitioner within a reasonable timeline set by this Honourable Court.
 - d. Costs of this Petition.
2. The Petitioner averred that on 21.8.2015 it entered into a contract with the Respondent to undertake the construction of Garsen Modern Market and Garsen Bus Park. That the provisions of Section 6 (2) (a) of the *County Governments Act* and Section 87 (1) and 135 of the Public Procurement Act provides for contracts of such works and ultimately periodic payments. He also averred that the periodic payments should take place upon the relevant certification by the works department which certifies that work is done up to standard.
3. He contended that pursuant to the periodic certification payments were made to the petitioner on 24.10.2015, 11.11.2015, 3.2.2016, 3.06.2016, 16.06.2016, 8.11.2016, 14.09.2016, 23.06.2017,



02.03.2018, 27.05.2018 and 12.04.2018 for a gross amount of Kshs. 312, 737, 074 and a net of Kshs. 264, 590, 137 after deduction of the retention sum of 10% VAT withholding of 6% and income tax withholding (advance tax) 3%. It was his contention that after the deduction of VAT withholding of 6% and income tax withholding (advance tax), the Respondent remitted the withheld amounts in bulk to the Kenya Revenue Authority.

4. He asserted that the failure to provide a specific breakdown of the funds remitted to the Kenya Revenue Authority apportioned to the specific suppliers resulted in failure of the amounts withheld failing to reflect on the Petitioners iTax Portal. That on 26.1.2021 the petitioner sought for that information but the request was ignored. Further, that the Petitioner has sought assistance from the Public Sector Division of the Domestic Taxes Department of KRA but was informed that the Respondent was yet to give a breakdown of the taxes paid in bulk according to the respective tax payers/contractors and / or suppliers.
5. He averred that as a result of the failure of the Respondent to itemize the specific amount withheld and remitted to KRA in bulk to the specific suppliers and contractors, the Kenya Revenue authority raised additional assessment against the Petitioner which culminated in Tax Appeal No.11 of 2021 Ajab Hardware Limited vs Commissioner of Domestic Taxes. That the matter was heard and judgment delivered on 23.12.2022. That on 19.05.2023 KRA raised an assessment of Ksh. 10,672, 021.06 and as such, the Petitioner prays for a declaration to redress the violation of the Petitioner's fundamental rights and freedom under Article 35 of *the Constitution*.

Response

6. The Respondent filed a Replying Affidavit sworn by MARIM BUNU who deponed that the Petition offends the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules which demands that where the Plaintiff or Petitioner is a Corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. That in view of Order 4 Rule 1 (4) the Petition is defective as the Petitioner has not produced any CR12 to demonstrate that the Petitioner is an incorporated body and that the deponent to the affidavit in support of the petition has not produced any authority to plead.
7. She also deponed that the Petitioner has failed to particularize the specific alleged constitutional provisions that have been violated, denied and or infringed by the Respondent. That the Petition as filed by the Petitioner offends the provisions of Rule 10 (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
8. She contended that tax, if at all withheld on the account of the Petitioner, was remitted to KRA and in fact, the Respondent was not a party to the Tax Appeals Tribunal case, Civil Appeal No. 82 of 2021 which ought to have been the forum in which the Petitioner ought to have ventilated the issue. Further, in the absence of KRA as a party in this Petition, the issues purportedly raised by the Petitioner cannot be properly litigated.

Preliminary Objection

9. The Respondent in the Preliminary Objection dated 15th April, 2024 sought to have the Petition dismissed on the grounds that the Petition is legally incompetent, fatally and incurably defective and an abuse of the court process as it offends the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules.



Petitioner's Submissions

10. On whether the Preliminary Objection dated 15.04.2024 is merited, counsel submitted that this is not a suit commenced by Plaintiff so as to fall under the purview of Order 4 rule 1 (4) of the Civil Procedure Rules but a Petition filed pursuant to *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. He submitted that Rule 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provides the form of a Petition does not contemplate the points of law contained on the preliminary objection raised herein.
11. He also submitted that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule introduced via *Legal Notice 117/2013* are made pursuant to Article 22 (3) (d) which provides that the court, while observing the rules of natural justice shall not be restricted by procedural technicalities.
12. On whether the Petitioner has established violation of its rights, counsel submitted that procurement of public goods and services is regulated by Article 227 of *the Constitution*. He submitted that the periodic payments that were paid to the Petitioner attracted VAT, withholding tax and Income Tax (advance tax) which information ought to have been generated by the Respondent and transmitted to the Kenya Revenue Authority as credits and which ultimately would assist in determining the exact amount of tax payable by the Petitioner.
13. It was his submission that the Respondent erred by remitting funds in bulk and failing to provide a breakdown specific to each contract and to each contractor via their specific PIN Number thereby causing the Petitioner to be served with demand notices and subsequently additional assessment for tax. He submitted that as a consequence of the failure of the Respondent to avail supplier- specific payments and their corresponding tax obligation on the amounts withheld is the subject of this Petition.

Disposition of the Preliminary Objection

14. As to what constitutes a preliminary objection has been the subject of several judicial pronouncements and is well settled. The Supreme Court addressed its mind on this issue in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR and stated:

“ Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”
15. In the present case, the reason advanced by the Respondent for seeking striking out is that there is noncompliance with mandatory provisions of Order 4 rule 1(4) of the Civil Procedure Rules 2010 to the extent that the deponent of the affidavit verifying the petition has not exhibited any authority under seal to do so and therefore the petition should be struck out under Order 4 rule 1 (6).
16. I bear in mind that striking out is a draconian remedy that should only be resorted to in the clearest of cases. I am alive to the wise counsel of Madan JA in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR that:

“ A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption



and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

17. Though the portion of the rule requiring filing of an authority under seal is couched in mandatory terms, the portion on consequences of noncompliance is not. The court therefore has discretion on whether or not to order striking out of any pleading that is non-compliant. In exercising that discretion, the court must be alive to its obligations under Article 159 of the Constitution of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities.
18. Having said so, I am hesitant to allow the Preliminary Objection and proceed to determine the petition in its entirety.

and Determination of the Petition

19. I have considered the Petition, the response thereto and the submissions by counsel and in my view what lies for determination is whether the Petitioner’s Constitutional Rights have been infringed as stated in the Petition dated 10th July, 2023 and whether it is entitled to the orders sought.
20. I am guided by the Court’s position in the case of John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms: -

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

21. Further, in Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 Others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR cited with approval the decision in Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 Others [2015] eKLR where the court set out the principles that a court should bear in mind when interpreting the Constitution. The court held;

“The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.”

22. The Petitioner contends that pursuant to the periodic certification, periodic payments were made to the petitioner and that the failure to provide a specific breakdown of the funds remitted to the Kenya Revenue Authority apportioned to the specific suppliers resulted in failure of the amounts withheld failing to reflect on the Petitioner’s iTax Portal. According to the Petitioner, the Respondent failed to comply with the mandatory requirements of the fair administrative actions act. The Petitioner further contended that its legitimate expectation has now been violated by the inaction of the finance department of the Respondent to act as it is supposed to.



23. It is not disputed that for a constitutional petition to be sustained a basic threshold must be met. This being a constitutional petition, it is important to set out the parameters that determine whether a matter raises issues for determination in a constitutional petition or whether the issues ought to be dealt with as an ordinary suit. It is important to note that even in ordinary civil disputes, it is not difficult to find that there is some underlying constitutional principle involved. However, the mere fact that some underlying principle may be gleaned from the pleadings does not necessarily raise the matter to the level where it may qualify for determination as a constitutional issue.
24. I note that the Petitioner has cited the provisions of Article 20, 22 and 23 of *the Constitution* among the article that have been infringed. The above cited provisions of *the constitution* make vivid provisions for an obligation to respect, uphold and defend *the constitution* as well as a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. It is my view that those provisions ought not be misused.
25. I have also carefully considered the entire petition and the rest of the Provisions of *the Constitution* cited by the Petitioner and in my view I am satisfied that in the Petition before me there was no direct violation or infringement of any constitutional provisions under Bill of Rights to justify the Petitioner to invoke the Constitutional Jurisdiction of this Honourable court. For this reason, I am inclined to dismiss the Petition dated 10th July, 2023 with no order as to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31ST DAY OF OCTOBER, 2024.

S.M. GITHINJI

JUDGE

In the presence of; -

Mrs Samena holding brief for Sisanya for the Defendant/Respondent

Mr Ngane for the Petitioner

