



**Sasa Contractors Ltd v Jaramogi Oginga Odinga University of Science and Technology & another; Equity Bank (Garnishee) (Civil Case E002 of 2023) [2024] KEHC 16011 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16011 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL CASE E002 OF 2023  
DK KEMEL, J  
DECEMBER 18, 2024**

**BETWEEN**

**SASA CONTRACTORS LTD ..... PLAINTIFF**

**AND**

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... 1<sup>ST</sup> DEFENDANT**

**EQUITY BANK ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**EQUITY BANK ..... GARNISHEE**

**RULING**

1. Mr. Otieno, learned counsel for the Plaintiff has raised an oral objection to the effect that the Defendant’s application dated 4/11/2024 has been filed by a counsel who is not properly on record. It was submitted that the firm of Onsongo & Co. Advocates had purported to file an application on behalf of the Defendant to which they raised an objection like the present one which the court upheld and struck out the Notice of Appointment. It was submitted that the present application dated 4/11/2024 has been drawn and signed by Onsongo Advocate without the same being under care of Miss Nyamita as had been the case previously. Further, it was submitted that the provisions of Order 9 Rule 9 of the Civil Procedure Rules require consent on representation. Learned counsels urged the court to peruse paragraph 16, 17, 18, 19, 20 and 21 of the replying affidavit by the Plaintiff and note that the Defendant had sought for guidance regarding their need to appoint an external advocate to represent it and in which the Solicitor General granted a conditional approval subject to adherence to the procurement processes and *the constitution*. Learned counsel submitted that there was no procurement of external counsel by the Defendant as advised by the Solicitor General. It



was also submitted that the Defendant being a public institution must strictly observe procurement procedures. Finally, it was submitted that his court should not allow the application that has been filed by a counsel who was not properly appointed to act for the Defendant since there must be proper representation of public entities and thus the application dated 4/11/2024 should be struck out.

2. Mr. Onsongo, learned counsel for the Defendant opposed the objection raised by the Plaintiff. It was submitted that the Plaintiff has not utilized its right provided under Article 35 of *the Constitution* regarding access to information and that if it is not complied then the Plaintiff can file a constitutional petition in that regard. It was submitted that under the Public Procurement and Disposal Act, there is the Public Procurement Regulatory Authority which is charged with responsibility of monitoring, assessing and reviewing the assets, disposal system and that it can receive complaints on procurement of goods and services and hence this is not the right forum to raise complaints of procurement as the Plaintiff wants this court to usurp the duties of the said authority and to determine whether the appointment of external counsel by the Defendant was within the law. It was submitted that this court lacks jurisdiction receive process and determine the complaint. Learned counsel contended that the contents of paragraphs 16 – 21 of the Plaintiff's replying affidavit is not a notice of motion, chamber summons or application by the Plaintiff to the Defendant to supply the information sought and hence they ought to have made a formal application. It was also submitted that a party has a right to be represented by counsel of his own choice as the Defendant enjoys that right. It was further submitted that the relationship between an Advocate and client is personal and that if the Plaintiff is not happy about it then it should move to the said Authority. Finally, counsel urged this court to dismiss the objection so that the parties can deal with the substantive application for stay.
3. I have given due consideration to the oral submissions of learned counsels for the Plaintiff and the Defendant. It is not in dispute that learned counsel Mr. Onsongo had earlier in these proceedings secured a consent with the Defendant's previous Advocates M/s Nyamita and M/s Katwa to act alongside the said Advocates for the Defendant herein and has therefore been participating in these proceedings up to the ruling of this court dated 30/10/2024 and thereafter. It is the Defendant's application dated 4/11/2024 that has irked the Plaintiff who is of the view that Mr. Onsongo as external counsel for the Defendant has not been properly brought on board to act for the Defendant. It is not in doubt that a party has a right to appoint counsel of his/her choice and that the relationship between counsel and client is purely a private affair. It is also not in dispute that the Defendant is a public Institution and thus governed by the provisions of Article 227 of *the Constitution* regarding the issue of procurement of public goods and services and that the Public Procurement and Disposal Act enacted in 2015 is the statute that governs matters relating to procurement of goods and services. It is also not in dispute that there exists a Public Procurement Regulatory Authority created under the said Act whose mandate is to monitor, assess and review the processes of assets disposal by public entities as well as receive complaints regarding procurement of goods and services. It is also not in dispute that the Plaintiff, vide its replying affidavit paragraphs 16 – 21 thereof, has sought to question the appointment of Mr. Onsongo to represent the Defendant as its external Advocate and that the Defendant has not filed a further affidavit in response thereto or furnished the requisite documents sought by the Plaintiff. That being the position, I find the only issue for determination is whether the objection raised by the Plaintiff has merit.
4. As noted from the observation aforesaid, the Plaintiff's grouse herein is that Mr. Onsongo Advocate was not properly appointed by the Defendant as the requisite procurement procedures were not complied with. The Plaintiff is now asking this court to enquire into the circumstances leading to the appointment of Mr. Onsongo as the Defendant's external Advocate. However, the Plaintiff has not lodged a substantive application in that regard such as by way of Judicial Review or constitutional petition. I am unable to accept the invitation by the Plaintiff to veer from these proceedings and enquire



as to why the Defendant has not complied with the Plaintiff's request for information vide Article 35 of *the Constitution* regarding the appointment of the Defendant's Advocate. Indeed, the Plaintiff has averred that the Defendant has flouted the procurement procedures in appointing Mr. Onsongo as its external advocate and that it has sought for information to no avail. As noted above, matters relating to procurement of services by public bodies are regulated by the Public Procurement and Disposal Act through the Public Procurement Regulatory Authority that is charged with several duties such as receiving of complaints on procurement of goods and services by public bodies. The Plaintiff has urged this court to resort to the provisions of Article 227 of *the Constitution* and cite the Defendant herein for violating the same when it sourced the services of Mr. Onsongo as an external Advocate. If there was a violation of *the constitution*, then it was incumbent upon the Plaintiff to move the court appropriately. The averments vide paragraphs 16-21 of the Plaintiff's replying affidavit did not serve as a notice seeking information since the same are averments from the Plaintiff's stand point while the Defendant has the option of filing a further affidavit if need be as it is not obliged to do so if it does not want to do so. The application will thereafter be determined on its merits. The failure by the Defendant to put in a rejoinder does not in itself amount to refusal to give information as guaranteed by Article 35 of *the Constitution* as contended by the Plaintiff. Learned counsel for the Plaintiff has urged this court to intervene in the matter by resorting to the principle of constitutional avoidance even though no formal application has been made in the matter and to proceed and investigate the complaint raised before it. It is clear that there is already a forum for the Plaintiff to seek redress regarding the issue of procurement of services for external Advocates by the Defendant and hence mixing up the issues in the pending application is likely to convolute the matter. As long as the Defendant's counsel has filed the requisite pleadings regarding the notice of appointment of Advocate, the court will accept the Defendant's choice of counsel and direct the Plaintiff to challenge the issue of the procurement of external Advocate by the Defendant in the appropriate forum. It is my considered view that the objection raised herein is meant to further delay the faster determination of the pending application. It is in the best interest of the parties to fast track the determination of the pending application.

5. In view of the foregoing observations, it is my finding that the Plaintiff's objection lacks merit. The same is dismissed with no order as to costs. Parties are directed to proceed and set down the Defendant's application dated 4/11/2024 for hearing on priority basis.

**DATED AND DELIVERED AT SIAYA THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Otieno.....for Plaintiff

Onsongo.....for Defendant

N/A Bwire.....for Garnishee

Ogendo.....Court Assistant

