



**Kiarie & another v Modern Precast (K) Ltd & 2 others (Constitutional
Petition E001 of 2022) [2022] KEHC 12618 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E001 OF 2022**

RB NGETICH, J

JULY 28, 2022

**IN THE MATTER OF CHAPTER 6 AND ARTICLE
22(2) OF THE CONSTITUTION OF KENYA**

BETWEEN

MAINA KIARIE 1ST PETITIONER

ERIC KITHINJI 2ND PETITIONER

AND

MODERN PRECAST (K) LTD 1ST RESPONDENT

CHANDRESHKUMAR MADHUBHAI 2ND RESPONDENT

JIGNABEN CHANDRESHKUMAR BABARIYA 3RD RESPONDENT

JUDGMENT

1. The petitioners filed the petition and application filed on 13th January 2022 describing themselves as champions of Civil and Human Rights challenging the extension of the original tenders for the ongoing works at Kirigiti Stadium, Kiambu County. The 1st respondent is described as Limited Company while the 2nd and 3rd respondent are Directors of the 1st respondent.
2. Grounds on the face of the application are that the Respondents failed to conduct themselves ethically and procedurally and flaunted the *Public Procurement and Asset Disposal Act* 2015.
3. The applicants averred that the Respondents were awarded contract of a sum of Kshs 596,514,670/= under Tender Number D113/CE/KBU/190 2 JOB NO 10749A by the National Government to construct Kirigiti Stadium in Kiambu County in October 2020. On 24th June 2021 the respondents were given additional monies amounting to Ksh. 169, 400,000/= under Tender no. QD113/10749A/VOL.1/56.



4. The Respondents averred that fresh tender ought to have been done as the increment of the contract price was more than 25% as provided by Section 139 (6) of the [Public Procurement and Asset Disposal Act](#).
5. The petitioner sought the following reliefs.
 - a. A declaration that the proceedings are of public interest.
 - b. A declaration that the actions of the respondents were fraudulent and illegal.
 - c. The 2nd and 3rd respondents be held personally liable for the acts of the 1st respondent.
 - d. Issue of conservatory orders restraining the Respondents, their agents or anyone acting on their behalf from continuing with the works at Kirigiti Stadium forthwith.
 - e. Respondents be condemned to bear the costs of these proceedings.
 - f. Any other orders that the court may deem fit.
6. In response, the Respondent filed the following grounds of opposition dated 22nd February 2022.
 - a. There is nothing constitutional about the application and petition dated 13th January 2022.
 - b. The purported petitioner seems to be disgruntled by how a construction tender was issued to the 1st respondent and wants the same interfered with without enjoining all the requisite and or concerned parties.
 - c. That petition has not met the threshold set out in the case of *Anarita Karimi Njeru vs Republic No.1 (1979)* eKLR thus is bad in law and abuse of court process to frustrate commerce; a transaction by independent persons.
 - d. No single document and /or evidence has been tendered by the petitioners to justify the purported infringement on the part of the Respondents.
 - e. That no justification has been tabled to warrant this honourable court to interfere with incomes made after due execution to tendered and contracted works by the 1st Respondent.
 - f. The petition is frivolous, vexatious bad in law and amounts to an underhand means of frustrating the efforts by the National Government to see the construction of Kirigiti Stadium stopped.

Petitioner's Submissions

7. Counsel for the petitioner submitted that he has not addressed the issues raised and submitted that the violation of the [Public Procurement and Asset Disposal Act](#) for failure to re-tender as there was an increment of the contract price. The respondents flouted the law by having their contract amended/ varied by asking for additional funds before the stipulated twelve (12) months.
8. Counsel submitted that the respondent should be discontinued from further construction of the Kirigiti Stadium for having violated Article 227 of [the Constitution](#) which outlines procedures for procurement of public goods and services; that the respondents committed fraud by failing to re-tender for the contract and failed in doctrine of equity by using unprocedural methods to acquire a further tender with the National Government without adhering to the stipulations of the law.



Respondent's Submissions

9. Counsel for the respondent filed submissions on 4th March 2022 and submitted that the petitioner failed to reveal with precision the provisions of *the Constitution* breached by the respondent.
10. Further that the petition is anchored on Article 22 of *the Constitution* of Kenya thus it does not fall under public interest and the petitioner has failed with precision the manner of infringement and illegality committed by the Respondents against the petitioner.
11. Counsel further submitted that matters touching on Public Procurement and Disposal Act 2016 are not Constitutional but Civil and or Commercial issues and cited the case of *Philip Njoroge Kimani vs Liberty Africa Technologies Limited & Anor* (2021) the court noted it is trite that, where it comes to matters concerning the violation of human rights is well expounded and found in the case of Anarita Karimi Njeru vs Republic.
12. Counsel submitted that the petitioners have failed to prove a violation of their rights as the petitioners are supposed to state the manner of infringement, the nature and extent of the infringement and the injury suffered and urged the court to dismiss the petition.

Analysis and Determination

13. I have considered grounds of the petition and grounds in opposition as well as the submissions by counsels herein. What I consider an issue is whether the petition as filed meets the required threshold.
14. In the case of Anarita Karimi Njeru vs Republic (11979) KLR 154 where the court held that a party seeking redress from the court on infringement of *the Constitution* should set out with a reasonable degree of precision that which he complains has been violated.
15. The petitioner's argument is that the respondents were awarded original tender construction of the Kirigiti Stadium costing Kshs 596,514,670/= by National Government but additional amount of Kshs 169,400,000/= to continue with the works without retendering Contrary to Section 139(6) of Public Procurement and Disposal Act of 2015 which outlaw variations which cost over 25% of the contract sum without retendering and no variation should be done within 12 months of the contract as per Section 139(3). That the respondents have violated Article 227 of *the Constitution* which outlines procedure of procurement.
16. The respondents argument is that failure to retender denied equal opportunity to other contractors yet works done was at level of 50%.
17. The respondent argued that doctrine of equity does not operate where there is fraud and where there is breach, intent of equity is negated and that they have come to court after realizing that the respondents have committed fraudulent activities and used unprocedural methods to acquire further tender from the National Government.
18. I agree with decision in *Kiambu County Tenants Welfare Association vs Attorney General & Anor* (2017) eKLR it was held as follows:-

“ Court have over the years established that for a party to prove a violation of their right under the provisions of the bill of rights they must not only state the provisions of *the constitution* allegedly infringed in relation to them but also the manner of infringement and the nature and extent of that infringement and that the nature and extent of the injury suffered if any... in my view, the Petitioner has failed to discharge the burden to prove to the required standard. To my mind, the burden of establishing all the allegations rests on the



petitioner who is under an obligation to discharge the burden of proof being discharged or not.”

19. The petitioner stated that the petition is brought under Chapter 6 of *the Constitution*, Article 226(2) of *the Constitution* and the Public Procurement and Assets Disposal act 2016.
20. The petitioners allege fraudulent activities but have not attached any documents in support of the alleged activities nor prove of infringement and the extent of the injury suffered if any.
21. From the foregoing, I find that the petitioners have not set out with a reasonable degree of precision, nature of infringement and the injury occasioned. In my view issues touching on procurement are commercial and the petitioners should have approached court as such.
22. From the foregoing, I find that the petitioner has failed to meet the threshold set in the case Anarita Karimi Njeru Case.
23. Final Orders:-
 - 1) This petition is hereby dismissed.
 - 2) Costs to the respondents.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 28TH DAY OF JULY, 2022

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RACHEL NGETICH
JUDGE

In the Presence of:

Kinyua – Court Clerk

Mr. Muchiri holding brief for Dastan Omari for Respondents

Mr. Gikunda for Petitioners

