



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 4 OF 2020**

**BARSOGAT INVESTMENT LTD.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT**

**RULING**

1. The petition, dated 4<sup>th</sup> May 2020, was brought at the instance of Barsogat Investment Limited, to be known hereafter as the petitioner, citing several constitutional violations of its rights. It was brought against the County Government of Vihiga, a devolved unit of government, under the Constitution, 2010, to be referred to hereafter as the respondent.

2. The case by the petitioner is that the respondent advertised for open tenders for rehabilitation and maintenance works with respect to Ebukhuya-Esere-Olilo and Burandi-Arende roads. The petitioner was among some of the firms that submitted bids, which were uploaded on the IFMIS portal. Subsequently, the bids were opened and an evaluation was carried out, out of which the petitioner emerged the winner, as per results that were posted on the IFMIS portal. Thereafter, the respondent did not communicate to the petitioner, as the successful bidder, forcing the petitioner to write a letter, dated 17<sup>th</sup> April 2020, to enquire about the matter. Upon that enquiry, the respondent issued a fresh notice inviting fresh bids for the same works.

3. The affidavit in support of the petition was sworn by an officer of the petitioner, known as Patrick Imbantu, who attached several documents to support the case for the petitioner. I will only recite the most crucial of those documents. The first is a copy of the invitation to tender, dated 11<sup>th</sup> November 2019, with respect to the two tenders the petitioner bid for. There are three extracts from the IFMIS portal, which show that the bid by the petitioner was ranked winner. There is also the letter dated 17<sup>th</sup> April 2020, by the petitioner, addressed to the respondent, enquiring about the outcome of the evaluation of the bids. The other document is the invitation for fresh tenders, in a document from the respondent, dated 22<sup>nd</sup> April 2020.

4. The petitioner contends that as a result of the conduct of the respondent recited above, its fundamental rights and freedoms were infringed and or contravened, specifically the right to fair administrative action, provided for in Article 47 of the Constitution, and acted contrary to Articles 10, 201, 227 and 232 of the Constitution. The petitioner complains that the respondent acted contrary to sections 63, 79, 86, 87 and 88 of the Public Procurement and Disposal Act by unprocedurally re-advertising the tenders in issue.

5. The Petitioner seeks the following reliefs:

- (a) a declaration that the respondent was in breach of Articles 10, 27, 47, 201(d), 227(1) and 232 of the Constitution and sections 63, 79, 86, 87 and 88 of the Public Procurement and Disposal Act, in re-advertising the tender that had already been evaluated;
- (b) an order of *certiorari* quashing the decision of the respondent to re-advertise and receive bids in respect of the tender herein;
- (b) general damages for breach of the petitioner's rights as set out in Articles, 10, 27 and 47 of the Constitution; and
- (d) Costs of the petition.

6. Upon being served, the respondent reacted to the petition, by filing a Notice of Preliminary Objection, dated 10<sup>th</sup> September 2020, raising grounds that:

- (a) the petition was incompetent, bad in law and available for striking out;

(b) the petition violated the express provisions of section 28 of the Public Procurement and Disposal Act, 2015; and

(c) the High Court lacked jurisdiction to hear and determine it.

7. Directions were given on 24<sup>th</sup> September 2020, for disposal of the preliminary objection by way of written submissions. Both sides complied with the directions by filing their respective written submissions.

8. In its written submissions, the respondent raises two issues, one, jurisdiction of this court to determine the petition, and, two, costs of the petition.

9. On jurisdiction, the respondent points at sections 27 and 28 of the Public Procurement and Disposal Act, to argue that the said Act establishes the Public Procurement Administrative Review Board, mandated to hear, determine and review disputes around tendering and assets disposal disputes. It also points at section 5 of the Civil Procedure Act, 2010, which states that the court has jurisdiction to try all suits of a civil nature except those which its cognisance is either expressly or impliedly barred. It is argued that jurisdiction over the matter lay with the Public Procurement Administrative Review Board, and the court, by dint of sections 167(1) and 175(1) of Public Procurement and Disposal Act, by way of judicial review of the decisions of the Public Procurement Administrative Review Board.

10. The respondent has cited *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited* [1989] KLR 1, to make the point that jurisdiction is the foundation of exercise of authority by a court, and where there is no jurisdiction the court should stop in its tracks. *Macharia & Another vs. Kenya Commercial Bank Limited & 2 others* Civil Application No. 2 of 2011, is also cited, and it states that jurisdiction of a court is vested by the Constitution or legislation, or both, and a court can only exercise jurisdiction where the same has been granted to it by those two legal sources. It was said that a court could not arrogate to itself jurisdiction exceeding that which is conferred by the law.

11. With respect to whether a court has jurisdiction to handle disputes in respect of which specialist tribunals have been set up under legislation, the respondent has cited several decisions. There is *Francis Gitau Parsinei vs. National Alliance Party & 4 others* [2012] eKLR, where the court remarked that where the Constitution and, or, statute establishes a dispute resolution procedure, then that procedure must be followed. Then there is *Diana Kethi Kilonzo vs. IEBC and 2 others*, Constitutional Petition No. 359 of 2013, where the court said that the Constitution had allocated certain powers and functions to various bodies and tribunals, and urged that those bodies and tribunals needed to be given leeway to discharge the mandate bestowed upon them by the Constitution and national legislation, since the people of Kenya, by passing the Constitution, 2010, intended that the powers of decision-making be shared by different bodies, and that the courts ought not cross over to areas that the people of Kenya had reserved for other authorities. Then there is *Republic vs. Independent Electoral and Boundaries Commission and Another Ex Parte Coalition for Reform and Democracy & 2 others* [2017] eKLR, where the court opined that the existence of alternative remedies affected, to an extent, the availability of judicial review remedies. It urged that where a statute provided an alternative remedy to a party, a court ought to exercise restraint and give opportunity to the relevant bodies and State organs to deal with the dispute as provided in the relevant statute, and that where the alternative remedy was inadequate as a means of redress, then the court ought to act without such restraint. It went on to state that where it would be necessary for the party to split its case between different judicial and quasi-judicial bodies, then, in such a circumstance, it would be fair to start at the tribunal or body vested with specific jurisdiction to hear and determine all the questions in controversy, and, in such a scenario, the availability of alternative remedies would not be a sustainable objection to the High Court as the tribunal could grant all the necessary reliefs.

12. The other decision is in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others* [2012] eKLR, which turned specifically on the Public Procurement Administrative Review Board, where the court said that the Board, from its nature, was better equipped than the High Court to handle disputes relating to breach of duty by a procurement entity.

13. The other set of authorities cited discussed the doctrine of exhaustion of remedies. In *John Kakindu Makau vs. County Government of Makueni & 6 others* [2018] eKLR, the court held that the High Court did not have jurisdiction over a constitutional petition as the Constitution and statutes provided for dispute settlement mechanisms through which the matter raised in the petition could be addressed. It was held that the petitioner, in that matter, ought to have exhausted all the other legal avenues provided in law, or the purpose of that case, the County Assembly, the Public Procurement Regulatory Authority, and the Public Procurement Administrative Review Board, before moving the High Court by way of constitutional petition. It was stated that a party could only move the High Court where the other remedies did not provide an efficacious and satisfactory answer. *Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & Others* Civil Appeal No. 63 of 2017, it was said that it was only after a person was locked out of accessing the Public Procurement Administrative Review Board, that he could proceed by way of alternative remedy or remedies such as constitutional petition. Similar sentiments were expressed in *Republic vs. Independent Electoral and boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR.

14. It is finally submitted that a dispute around tendering and procurement did not fall within the jurisdiction of the High Court and, therefore, the court ought not be seized of it, since it had not been demonstrated that the procedure and processes provided for under the Public Procurement Administrative Review Board had been exhausted or had failed.

15. On costs, the respondent submitted that it would be entitled to costs upon dismissal of the petition.

16. On its part, the petitioner submitted that the preliminary objection did not fall within the parameters set in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Co. Limited* [1969] EA 696. It is submitted further that the jurisdiction of the Public Procurement Administrative Review Board was limited to just reviewing, hearing and determining tendering and asset disposal disputes, and alleged that the dispute in the instant petition went beyond that. Article 165(3) of the Constitution is cited to bring out the general jurisdiction of the High Court, with respect to criminal and civil matters, fundamental rights and freedoms, appeals from constitutional tribunals, interpretation of the Constitution, among others. Article 165(5) of the Constitution is also cited with respect to limitation of jurisdiction of the High Court, that it has no jurisdiction to handle matters reserved for the Supreme Court and those falling under the jurisdiction of the courts established under Article 162(2) of the Constitution. It is argued that the Public Procurement and Assets

Disposal Act is subordinate to the Constitution, and it cannot oust the jurisdiction of the High Court to handle a constitutional petition. It is further submitted that the Public Procurement Administrative Review Board is subordinate to the High Court. *Christopher Ndarathi Murungaru vs. Standard Limited & 2 others* [2012] eKLR, is cited to support that contention. Articles 10, 165(3)(d) and 227(1) of the Constitution are cited to underline the contention that the respondent is obligated under the Constitution to act in a certain manner, and that its conduct departed from what was expected of it by the Constitution.

17. There is only one substantive issue raised in the preliminary objection that I am called upon to determine, and that is whether I, sitting as a Judge of the High Court, have jurisdiction to hear and determine the petition before me.

18. Jurisdiction of the High Court is stated in Article 165 of the Constitution. Under Article 165(3), the high court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine questions as to whether a fundamental right or freedom in the Bill of Rights has been denied or violated or infringed or threatened; jurisdiction to hear appeals from decisions of constitutional tribunals set up to remove a person from office, save for that set up under Article 144; jurisdiction to hear questions relating to interpretation of the Constitution; and any other original or appellate jurisdiction conferred by the Constitution. A variety of statutes have also conferred both original and appellate jurisdiction on the High Court, and there could be some that have also limited the jurisdiction of the High Court over certain matters. Article 165(5) of the Constitution has set out areas where the High Court has no jurisdiction, and that is with respect to matters reserved for the exclusive jurisdiction of the Supreme Court and the courts envisaged in Article 162(2) of the Constitution.

19. The matter before me is a petition brought under a variety of constitutional provisions, which I have narrated in paragraphs 4 and 5 of this ruling. The preliminary objection, as framed, is, therefore, challenging the jurisdiction of the High Court to entertain a constitutional petition.

20. I have recited, at paragraph 18 of this ruling, the jurisdiction of the High Court as vested by Article 165 of the Constitution. What is of relevance herein is the jurisdiction relating to Constitutional petitions, and that is what Article 165(3)(b)(d) is about, that the jurisdiction to hear and determine questions relating to fundamental rights and freedoms, and with respect to the interpretation of the Constitution.

21. The Constitutional provisions upon which the petition before me is premised are Articles 10, 27, 47, 201(d), 227(1) and 232. Article 10 is located in Chapter Two of the Constitution, which declares and defines what makes up the Republic of Kenya. Article 10 articulates the national values and principles of governance that underpin the Republic of Kenya. The values and principles include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance; and sustainable development. It is declared that these national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

22. Articles 27 and 47 are located in Chapter Four of the Constitution, the Bill of Rights, and they, therefore are part of the provisions that state the fundamental rights and freedoms of person in Kenya. Article 27 states the right to equality and freedom from discrimination. It is stated that every person is equal before the law and has the right to equal protection and equal benefit of the law; and that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 47 states the right to fair administrative action. Under this provision it is stated that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and that if a right or fundamental freedom of a person has been or was likely to be adversely affected by administrative action, that person would have a right to be given written reasons for the action.

23. Articles 201(d) and 227(1) are located in Chapter Twelve of the Constitution, on public finance. Article 201 states the principles that govern public finance. Article 201(d) states that public money ought to be used in a prudent and responsible way. Article 227 is about procurement of public services. Under Article 227(1) State organs and entities are required to enter into contracts, for goods and services, in accordance with systems that are fair, equitable, transparent, competitive and cost-effective.

24. Article 232 is housed in Chapter Thirteen, on public service, and it states the values and principles that underpin public service. These include high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely accurate information; fair competition and merit as the basis of appointments and promotion; representation of Kenya's diverse communities, among others.

25. For all practical purposes, the cause before me is framed as a constitutional petition, for it is properly anchored on constitutional provisions. Articles 27 and 47 are cited in the argument that the fundamental constitutional rights of the petitioner were violated by the respondent. The argument behind Articles 10, 201(d), 227(1) and 234 is that the respondent conducted itself in a manner that did not accord with national values and principles of governance, the principles governing public finance, and the values and principles of public service. The case by the petitioner, as I understand it from its pleadings, is that the respondent not only violated its fundamental constitutional rights, it also acted in a manner that did not measure up to the constitutional values and principles required of public bodies by the Constitution. It not only violated the rights of the petitioner, it also violated the Constitution itself in the process. My point is, the petition before me is properly anchored in the Constitution, and in my view, it meets the standard set in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, *Meme vs. Republic* [2004] eKLR and *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR.

26. I appreciate that *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154, has come under some criticism, on grounds that it limits access to the High Court, for persons seeking redress for violation of constitutional and human rights. In my view, however, it still states the minimum test for pleadings in this realm. In the matter, the court stated:

*“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”*

27. Let me go back to the issue of jurisdiction. The matters raised through Articles 27 and 47, being about violation of the Bill of Rights, would bring the petition herein within the purview of Article 165(3)(b), the jurisdiction to determine a question whether a right or fundamental freedom in the Bill of Rights had been violated or infringed or denied or threatened. Articles 10, 201, 227 and 234, being about values and principles of governance, generally, and in relation to public finance and public service, would bring the petition within the realm of Article 165(3)(ii), the jurisdiction to interpret the Constitution, and specifically with relation to determining questions whether anything said to be done under the Constitution or any law was consistent with or contravention of the Constitution. Clearly, the matters raised in the petition bring the same within the jurisdiction of the High Court. It cannot be, then, that the High Court has no jurisdiction, whether sitting in Kakamega or Nairobi or Mombasa or Lodwar to entertain the petition filed in this cause.

28. The respondent is a creature of the Constitution. It is bound by the values and principles articulated by its creator, and it is under an obligation to act fully in accordance with its provisions. It is accountable under the Constitution, and any person who is aggrieved by any of its acts, whether done under the Constitution or any other law, has a right to challenge the said conduct or act under Article 165(3)(b)(d), where it violates or infringes or threatens that person's constitutional rights, or where the said conduct is inconsistent with or contravenes any of the provisions of the Constitution. That is what the petitioner alleges in his petition, and, in that respect, the High Court has jurisdiction to entertain the petition.

29. One of the arguments by the respondent is that the jurisdiction of the High Court, over the constitutional petition, is taken away by section 27 of the Public Procurement and Disposal Act. That is an incredible submission to make. It is elementary that the Constitution is the supreme law in Kenya, by dint of Article 2(1) of the Constitution. All other laws are inferior or subordinate to the Constitution, for they draw their legitimacy from the Constitution, and most of them are made by entities created by the Constitution itself. It would be a strange phenomenon to have laws created by a creature of the Constitution being superior to the creator of the creature. The supremacy of the Constitution is underlined by Article 2(4), which states that any law which is inconsistent with the Constitution is void to the extent of the inconsistency.

30. Article 165(3) of the Constitution vests jurisdiction in the High Court to entertain constitutional petitions which raise questions about violations of the Bill of Rights and which call for interpretation of the Constitution. It cannot be then that legislation passed by Parliament, like the Public Procurement and Disposal Act, can carry provisions that would oust the jurisdiction of the High Court, granted to it by Article 165(3) of the Constitution.

31. I have read and reread sections 27 and 28 of the Public Procurement and Disposal Act, and I have not seen anything in those provisions that would suggest that they were intended to oust the jurisdiction of the High Court, to entertain constitutional petitions which question the manner in which procurement processes were conducted, and particularly where it is alleged that the conduct violated constitutional rights or was inconsistent with or contravened the Constitution. A law designed to limit the jurisdiction of the High Court to entertain constitutional petitions around such matters would run afoul of Article 2 of the Constitution and would be unconstitutional.

32. I am not persuaded by the argument, in *John Kakindu Makau vs. County Government of Makeni & 6 others* [2018] eKLR, that the High Court would lack jurisdiction to entertain a constitutional petition where statutes provide dispute resolution mechanisms through which the matters raised in the constitutional petition could be raised. I understand the above decision to be saying that where there are alternative remedies, the High Court would have no jurisdiction, where issues are raised through a constitutional petition. Related to it, is the argument that doctrine of exhaustion remedies operates to oust the jurisdiction of the High Court to determine constitutional petitions, unless the other remedies have been exhausted. I doubt that that doctrine applies to constitutional petitions, I submit that it can only apply to other causes at the High Court, founded on statutes, but not constitutional petitions grounded on Article 165(3) of the Constitution.

33. The jurisdiction to entertain a petition that raises constitutional questions is granted by the Constitution, Article 165 to be specific. It cannot be the case, then, that there is no jurisdiction to entertain such petition merely because the law has provided alternative, and more specific, dispute resolution mechanisms, or because the other mechanisms have not been exhausted. These other mechanisms are not designed to address constitutional questions or redress constitutional violations. They address other concerns relating to the same process, but do not have the specific jurisdiction that the Constitution has granted the High Court, to address constitutional questions and redress constitutional violations.

34. I find the position taken in *Republic vs. Independent Electoral and Boundaries Commission and Another Ex Parte Coalition for Reform and Democracy & 2 others* [2017] eKLR, more persuasive. The alternative mechanisms do not oust the jurisdiction of the High Court over a constitutional petition. The High Court retains jurisdiction, after all it has supervisory jurisdiction over all subordinate courts and quasi-judicial tribunals, by dint of Article 165(6) of the Constitution, and it has unlimited original jurisdiction in criminal and civil matters, by virtue of Article 165(3)(1). What the High Court ought to do, where it is faced with a constitutional petition, over a matter in respect of which alternative dispute resolution mechanisms exist under some law, is to exercise restraint, and allow space to the other tribunals to handle the dispute. There could be some element of overlap, but the constitutional jurisdiction of the High Court under Article 165(3)(b)(d) is specific and unique, and it cannot be exercised through the alternative mechanisms, hence in existence of those alternative mechanisms cannot possibly oust it.

35. In the end, I find and hold that I, sitting as a Judge of the High Court, have jurisdiction to entertain and determine the constitutional petition in this cause. Consequently, the preliminary objection raised by the respondent, dated 10<sup>th</sup> September 2020, is without merit, and is hereby disallowed. This being a constitutional cause, there shall be no order as to costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF MARCH 2021.**

**W MUSYOKA**

**JUDGE**