



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 188 OF 2018

IN THE MATTER OF: ARTICLE 22 & 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLE 2,3,35 & 95 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ACCESS TO INFORMATION ACT NO. 13 OF 2016

AND

IN THE MATTER OF: WATER ACT 2002

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT

BETWEEN

COAST LEGAL AID & RESOURCE FOUNDATION (CLARF).....PETITIONER

VERSUS

THE COAST WATER BOARD SERVICES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

THE PUBLIC PROCUREMENT AUTHORITY.....3RD RESPONDENT

JUDGMENT

Parties

1. The Petitioner is a Human Rights watchdog group that claims to promote human rights awareness amongst citizen of Kenya and purports to keeps both private and Government institutions accountable for the due process of the law.
2. The 1st Respondent is parastatal established under the Water Act 2002 vide Gazette Notice No. 1328 of 27.2.2004.
3. The 2nd Respondent is the Attorney General of the Republic of Kenya
4. The 3rd Respondent is a regulatory authority established under Section 8 of the Public Procurement and Assets Disposal Act.

The Petition

5. The Petitioner vide Petition dated 5/7/2018 avers that under the equalization fund, the 1st Respondent received funds from the National

Treasury, which were to be utilized toward water projects in the Coastal region. The said projects were to be tendered through the 1st Respondent's office in Mombasa on or before 10.4.2017. However, the procurement process is over and no advertisement has been made by the 1st Respondent to confirm the highest bidders, yet the National Treasury is in the process of releasing funds and the 1st Respondent has neglected and/or refused to disclose the names of the companies awarded the said tenders. Further, that the Petitioner states that the procurement process has been undertaken in secrecy to the extent that 10% of the contract sum has been released without valid and proper documentation to persons with questionable qualifications, yet the public has been denied the opportunity to interrogate the participants in the procurement process by the 1st Respondent. Therefore, taxpayers stand to lose money to the alleged contractors.

6. The Petitioner further avers that in public interest, it wrote a letter to the 1st Respondent on 21/7/2017 requesting for documentation to enable it challenge the irregular award of the subject tender, and mismanagement of funds. The request for documentation was ignored. It is the Petitioner's case that the 1st Respondent has failed to promptly furnish it with the requisite documents and no explanation have been offered as to why they cannot furnish the said documents. Further, it is the Petitioner's case that the 1st Respondent is required to act in a transparent manner.

7. The Petition is supported by Affidavit sworn on 5/7/2018 by **Mr. Joseph Juma Mukewa**. The Petition prays for the following ORDERS:

i. A declaration that the 1st Respondent has violated the Petitioner's right under Article 35 of the Constitution.

ii. An order compelling the 1st Respondent to avail and/or furnish all the documents requested by the Petitioner as listed in paragraph 25 above.

iii. An order for the 1st Respondent to provide a list of all tenders applications received and to whom they were awarded and the criteria used to award the same.

iv. An order for the 2nd Respondent to specifically provide performance guarantee issued on each tender 10% of the contract sum of all contracted work or supplies under Equalization Fund 1 of 2016- 2017 Drought Mitigation Project for verification.

v. An order that the National Treasury be restrained from releasing Equalization Fund 1 of 2016- 2017 Drought Mitigation Projects Coastal Region.

vi. An order for the stoppage /suspension of the project till order (ii),(iii),(iv) and (v) above are complied with.

vii. Such other and all further relief as this honourable Court may deem fit and just to grant.

viii. The course of and occasioned by this Petition be provided for.

The Response

8. The 1st and 2nd Respondents opposed the Petition vide Replying Affidavit sworn on 2.10.2018 by Jacob K. Torutt who is the 1st Respondent's Chief Executive Officer. The deponent avers that the 1st Respondent indeed, on or about April 2017, published a public invitation to bid on its website www.cwsb.go.ke, for bids for the Coastal Regional Equalization Fund Project, and that received bids, and the said bids were opened in the presence of all the tenderers who chose to attend. Thereafter, the 1st Respondent's evaluation committee evaluated all the bids and a bid evaluation report and recommendation for award of the tender made. Therefore, based on the Tender Evaluation Committee's recommendation, the tender was awarded to the successful bidders and all the bidders were duly informed thereafter.

9. The deponent avers that pursuant to the Executive Order No. 2 of 2018 on the procurement of public goods, works and services by public entities, which took effect on 1/7/2018, the 1st Respondent through its procurement officer **Ambrose Magige**, published a report on procurements undertaken by the 1st Respondent on 15/7/2018. Further, it is noteworthy that some of the projects have already been finalized, while majorities are still underway and payments have been made. Therefore, if the Petitioner feels aggrieved, then they should lodge a complaint with the Public Procurement Administrative Review Board in line with the Public Procurement and Assets Disposal Act.

10. It is the 1st Respondent's case that the Petitioner has rushed to this Court instead of following the procedure laid out under the Public Procurement and Assets Disposal Act.

11. The 2nd Respondent opposed the Petition vide Grounds of Opposition dated 11/12/2020. The grounds are summarized as follows:

i. That the Petition is scandalous, vexatious and an abuse of the Court process.

ii. That there is no cause of action against the 2nd Respondent.

iii. That there is no legal person in the name of the Public Procurement Authority capable of being sued.

iv. That an Application to access information ought to have been made in writing providing sufficient details and sufficient particulars for the Public Officer or any other official to understand what is being requested pursuant to Section 8 of the Access

to Information Act.

v. That a complaint ought to have been lodged to the Commission on Administrative Justice pursuant to Section 14 and 22 of the Access to information Act if information was denied.

12. The 3rd Respondent opposed the Petition vide Replying Affidavit sworn on 1/10/2018 by **Maurice Juma** who is the 3rd Respondent's Director General. The deponent avers that he has perused all the 3rd Respondent's documents and to the best of his knowledge the Authority has never received any complaint or request to investigate the 1st Respondent for any irregularity relating to the subject tender. Further, that the Petitioner has substantiated neither the alleged investigations and reports, which it claims have revealed the subject tender was irregular and corrupt, nor the particulars of the irregularities and incidents of corruption. Therefore, the averments remain mere allegations.

Submissions

13. The petitioner filed its submissions on the 10/11/2020 and additional submissions on the 11/12/2020. The 1st Respondent filed its submissions on 4/9/2020; the 2nd Respondent filed its submissions on 18/12/2020, while the 3rd Respondent filed its on 3/10/2020. Parties relied on their submissions.

14. From the pleadings and submissions filed before this Court by the parties, in my view, the only issue for the determination is whether the Petitioner's right to access information as protected by Article 35 of the Constitution has been violated by the Respondents.

Determination

15. As observed above, this petition alleged violation of right of access to information. It is premised on the allegation that the Petitioner requested for documentation to enable it file a suit challenging the 1st Respondent procurement process on the subject tender. However, his request was denied and as a result, his right to information guaranteed under Article 35 of the Constitution was violated, and the 1st Respondent has failed to Act in a transparent manner in relation to the subject tender that has been awarded to persons allegedly with questionable credibility.

16. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. The Petitioner would want this Court to believe that the 1st Respondent has denied him the information he had sought vide an alleged letter written on 21/7/2017. The burden of proving the allegations lay squarely upon the Petitioner. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**, the High Court stated at paragraph 55 and we agree:

“It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”. It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

18. Similarly, in **Christian Juma Wabwire vs. Attorney General [2019] eKLR**, the Judge relied on the decision in **Lt. Col Peter Ngari Kagume and 7 others vs. AG, Constitutional Application No. 128 of 2006** where it was held that: -

“23 ...[I]t is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses...the court is dead to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation...”

19. For purposes of actualizing Article 35 of the Constitution, the **Access to Information Act 2016 (the Act)** was enacted. Under **Section 4** thereof, a right to access information held by a public body for purposes of exercising or protecting any right or fundamental freedom is secured. Further, **Section 4(3)** of the Act is categorical that access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost.

20. Section 8 of the *Act* provides for procedure of accessing information in the following terms:

“(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being

requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in a manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.”

21. In order to discharge his burden of proof, it was incumbent upon the Petitioner to produce the letter written on 21/7/2017 for the Court’s perusal and consideration, to ascertain whether the said letter amounted to a proper request for information under **Section 8 (1) of the Act**. The 1st Respondent denies all the allegations made by the Petitioner including the one requesting for documents.

22. Even supposing the 1st Respondent had declined to give the Petitioner the information required after request, the Petitioner still had to exhaust all the avenues of dispute resolution mechanism under the Access to information Act before approaching this Court by way of a constitutional Petition. Section 14 of the Act provides the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested.

23. The said Section 14 provides:

“(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.”

24. In the circumstances, I find and hold that the Petition does not raise any constitutional issues at all. Secondly, the Petitioner has failed to discharge the burden of proof placed upon him by Section 107(2) of the Evidence Act, and the Petition lacks in merit. The same is dismissed with parties to bear own costs.

Orders accordingly.

Dated, Signed & Delivered at Mombasa this 29th day of April, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Mwanjeje for 2nd Respondent

No appearance for Applicant

Mr. Mohamed Court Assistant