



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 42 OF 2020

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 27 (1) & (2) AND 28 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: BREACH OF PROVISIONS OF ARTICLE 227 (1)

OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: BREACH OF SECTION 60 OF THE PUBLIC PROCUREMENT
AND ASSET DISPOSAL ACT, 2015, SECTION 9 OF THE ADVOCATES ACT CAP 16 AND
RULE 2 OF THE ADVOCATES (PROFESSIONAL INDEMNITY) REGULATIONS, 2014**

AND

**IN THE MATTER OF: RULES 3, 4, 10, 11 AND 20 OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE
AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS**

AND PROVISIONS OF THE LAW

AND

**IN THE MATTER OF: TENDER NO. KPA/160/2019-20/BLS-PREQUALIFICATION OF
LEGAL SERVICES BY KENYA PORTS AUTHORITY**

BETWEEN

WILLIS ODUOR OLUGA.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. The Respondent/Applicant through a Notice of Motion dated /7/2020 brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure

Act Chapter 21 of the Laws of Kenya and Rule (3) sub rule 1, 4, 5, 6, and 8), 8 (2), 17 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013* seek the following orders: -

a) That this application be heard and dispensed with in the first instance.

b) That the petition dated 30th June 2020 filed on 1st July 2020 under: Mombasa High Court Constitutional Petition No. 42 of 2020- Willis Oduor Oluga vs Kenya Ports Authority be and is hereby consolidated with the Petition filed in the High court at Nairobi under Nairobi High Court Constitutional Petition No. 200 of 2020-Law Society of Kenya vs Kenya Ports Authority and Public Procurement Regulatory Authority.

c) That the petition dated 30th June 2020 filed on 1st July 2020 under: Mombasa High Court Constitutional Petition No. 42 of 2020- Willis Oduor Oluga vs Kenya Ports Authority be and is hereby transferred to the High Court at Nairobi for hearing and determination together with the petition filed in the High Court at Nairobi under Nairobi High Court Constitutional Petition No. 200 of 2020-Law Society of Kenya vs Kenya Ports Authority and Public Procurement Regulatory Authority.

2. The application is premised on the ground set out therein and is supported by Affidavit sworn on 13/7/2020 by **John Turasha** who is the Respondent's employee. The deponent avers that the Respondent was electronically served with a Petition dated 16/6/2020 **Nairobi High Court Constitutional Petition No. 200 of 2020-Law Society of Kenya vs Kenya Ports Authority and Public Procurement Regulatory Authority** challenging the Respondent's Tender No. KPA/160/2019-20/BLS for Prequalification of Laws Firms for Provision of Legal Service of Kenya Port Authority. The application was certified urgent. However, the court declined to grant any ex-parte orders.

3. The Applicant states that on 24/6/2020, it filed and served the Response to the Petition NO. 200 OF 2020 at Nairobi, and currently, the petition at Nairobi is pending before the Honourable J.A. Makau for further directions. However, on 2/7/2020, the Applicant was served with the instant petition together with an application seeking conservatory orders. It is averred that the subject matter of this instant petition is the Applicant's tender No. KPA/160/2019-20/BLS, which is also the subject of the Petition filed earlier in Nairobi.

4. The Applicant states that Nairobi Petition No. 200 of 2020 was filed against it and the Public Procurement Regulatory Authority by the Law Society of Kenya ostensibly on behalf of its members, who include the petitioner in the instant petition. However, the Petitioner herein did not disclose the existence of the Nairobi petition to this court. Therefore, the Petitioner being a member of the Law Society of Kenya, is guilty of material non-disclosure. Consequently, therefore, the petition herein is likely to embarrass the Court should it proceed to hearing independently with the one filed before the court at Nairobi.

The Response

5. The motion is opposed by the Petitioner/Respondent vide a Replying Affidavit and a Further Affidavit sworn on 24/7/2020 and 20/1/2021 respectively. The Respondent avers that he has no objection to the consolidation of his Petition with the Nairobi Petition. However, he has a strong objection to the transfer of his Petition to Nairobi for the following reasons:

a) That both the Petitioner and Respondent are based in Mombasa, and in fact, the Respondent has appointed Counsel based at its Mombasa office. Therefore, there is no justification to transfer the instant Petition to Nairobi and Rule 8(1) of Constitution of Kenya(Protection of Right and Fundamental Freedoms) Practice and procedure Rules, 2013, which expressly provides that a Petition should be instituted in the High Court within whose jurisdiction the alleged violation took place.

b) That the Petitioner spoke to Counsel representing LSK in the Nairobi Petition No. 200 of 2020 and he has reliably informed him, which information he verily believes to be correct that LSK wants the Nairobi Petition to be transferred to Mombasa and indeed , Mr. Omwanza Ombati made an Application to transfer the Nairobi Petition to Mombasa on 6/7/2020 but the presiding Judge Justice J. Makau directed that the Nairobi Petition be held in abeyance and be mentioned on a subsequent date to find out the position of this Mombasa Petition. A copy of the order made on 6/7/2020 in the Nairobi Petition marked "W002" was produced.

c) From the foregoing, it is clear that the Judge in the Nairobi Petition is not keen to proceed with the Nairobi Petition due to the pendency of the instant Petition otherwise he would have proceeded with it on 6/7/2020 but in his wisdom he directed that it only be mentioned to await progress in this Petition. Therefore, it is clear that the Petitioner in the Nairobi Petition wants the Nairobi Petition transferred to Mombasa.

d) That indeed when the parties appeared before this Court on 15/7/2020. Mr. Kyandih who appeared for Applicant herein expressly indicated that he has no objection to the Nairobi Petition being transferred to Mombasa and even indicated intention to file a formal Application to that effect.

e) That this Petition has progressed substantially here in Mombasa and parties have filed all their documents, the Petition is ready for hearing and disposal and its transfer to Nairobi is likely to derail it. Further, unlike the Nairobi Petition, there are conservatory orders in this Petition.

f) That the instant Petition is substantially different from the Nairobi Petition which ha the 2nd Respondent, Public Procurement Regulatory Authority

g) That the allegations levelled against him on non-disclosure are baseless since he was not aware of the existence of the Nairobi Petition at the time he filed his Petition, and even if he was aware, he was under no obligation to make any disclosure of its existence because he was not a party thereto.

6. The Petitioner proposed that after consolidation, the instant Petition be selected as the lead file.

Submission

7. The application was canvassed through written submissions. The Applicant filed submissions on 16/12/2020, while the Petitioner filed submission on 20/1/2021. **Mr. Kiyadih** learned counsel for the Applicant/Respondent reiterated the contents of the Applicant's Supporting Affidavit and argued in his submissions that a transfer of the instant Petition to Nairobi shall not occasion any loss whatsoever to the Petitioner herein. On the contrary, the transfer and consolidation will afford the Petitioner herein and all the parties in the Petition at Nairobi ample audience of the Court for their issues to be heard and determined in a unitary manner. Counsel Cited **Kimani Waweru & 28 others v Law society of Kenya & 12 others [2014] eKLR** where the Court held that engaging two courts of concurrent jurisdiction to deliberate on the same or similar issues is not proportionate utilization of judicial resources but rather wasteful duplication which is bound to create uncertainty as to the binding effect of either Court's decision in the event of conflict.

8. The Petitioner on the other hand reiterated the contents of his Replying Affidavit and Further Affidavit in response to the Application for transfer of the suit to Nairobi and submitted that the right place where any Court cases challenging the Respondent's subject tender is Mombasa.

Determination

9. I have carefully considered the Application and submissions. It is evident that the issue of consolidation of this instant Petition and Nairobi Petition No. 200 of 2020 is not disputed and it is common ground that the two Petition need to be consolidated. Therefore, the sole issue remaining for determination is Whether the Applicant has met the threshold to justify the transfer of this petition as sought in the application dated 13/7/2020.

10. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides: -

“8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.

11. It is evidently clear, that a petition shall be instituted in the High Court within whose jurisdiction the alleged violation took place notwithstanding any High Court may receive such a petition.

12. The cause of action herein arose in Mombasa where the Applicant/Respondent is situate therefore, the present Petition is properly before this Court pursuant to Rule 8(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. It is not in dispute that the petition herein and the one filed in Nairobi High Court raise similar set of issues, save for the fact that petition in Nairobi also has the Public Procurement Regulatory Authority as the 2nd Respondent. In fact, the parties have agreed that the two suits ought to be consolidated. However, despite the fact that the Petitioner herein is in the right fora, I am inclined, for the sake of saving scarce judicial resources, to allow the transfer of this matter to be heard and determined in Nairobi with Nairobi Petition No. 200 of 2020 which was filed earlier in time.

13. In the upshot, the application before the Court is allowed as prayed. There will be no order on costs.

Dated, Signed and Delivered at Mombasa this 28th day of April,

2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Ojwang for Petitioner

Ms. Kamau holding brief Kendi for Respondent

Ms. Peris Court Assistant