



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 165 OF 2019

IN THE MATTER OF ARTICLES 22(1) & (2)(C) AND 258(1) & (2)(C) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1, 2, 3(1), 10(2), 227(1), 232, AND 259(1) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24, 27, AND 47 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 102, 103 AND 104 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2015 AND SECTION 44 AND 53 OF THE ENERGY ACT 2019

IN THE MATTER OF THE ALLEGED CORRUPTION AND UNFAIR TRADE PRACTICES LEADING TO THE SUPPLY, DELIVERY, TESTING, ACCEPTANCE, STORAGE AND PAYMENT FOR SUBSTANDARD TREATED POWER TRANSMISSION WOODEN POLES

IN THE MATTER OF COMPROMISED AND FLAWED PROCUREMENT LEADING TO LOSS OF HUGE PUBLIC FUNDS

IN THE ALLEGED ABUSE OF THE PRINCIPLE OF ECONOMY IN THE PROCUREMENT OF TREATED POWER TRANSMISSION WOODEN POLES

BETWEEN

INTER TROPICAL TIMBER

TRADING LIMITED.....1ST PETITIONER/APPLICANT

GEOFFREY NGANGA KARIUKI.....2ND PETITIONER/APPLICANT

VERSUS

RURAL ELECTRIFICATION AND RENEWABLE

ENERGY CORPORATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

WOOD TREATMENT TECHNOLOGIES.....3RD RESPONDENT

SILVER WOOD TREATMENT PLANT.....4TH RESPONDENT

TRUCKS CITY.....5TH RESPONDENT

SAMFORT.....6TH RESPONDENT

TROPICAL SAWMILLS LTD.....7TH RESPONDENT

ABAO INTERNATIONAL LTD.....	8 TH RESPONDENT
LAKWOOD TREATMENT LTD.....	9 TH RESPONDENT
TIMBER TREATMENT INTERNATIONAL.....	10 TH RESPONDENT
GLOBAL WOOD TREATMENT LTD.....	11 TH RESPONDENT
SAGA E.A. LTD.....	12 TH RESPONDENT
WOOD WORLD INTERNATIONAL LTD.....	13 TH RESPONDENT
ELECTROGAS ENGINEERING & CONSTRUCTION LTD.....	14 TH RESPONDENT
MERU WOOD INDUSTRIES.....	15 TH RESPONDENT
JANWILL ENTERPRISES LTD.....	16 TH RESPONDENT
MARULA POWER POLES PLANT LTD (SOURCE: CRESTA INVESTMENTS LTD).....	17 TH RESPONDENT
LINE ENTERPRISES LTD.....	18 TH RESPONDENT
TRI-TIP.....	19 TH RESPONDENT
POLES & POSTS.....	20 TH RESPONDENT

RULING

PETITION

1. The Petitioners through a Petition dated 2nd May 2019 and filed on 2nd May 2019 supported by an Affidavit by Geoffrey Nganga Kariuki sworn on 2nd May 2019 seek the following reliefs:-

a) A declaration that the 1st Respondent acted ultra vires the Constitution, the Public Procurement and Asset Disposal Act 2015, and the Energy Act 2019 by compromising tendering for supply and delivery of Treated Power Transmission Wooden Poles and favouring the 3rd to 20th Respondents.

b) A declaration that the impugned actions and/or omissions of the respondents are fraudulently meant opt confer illegal benefits to unscrupulous suppliers being the 3rd to 20th Respondents and have grossly threatened and violated the Constitution of Kenya 2010.

c) A permanent order of prohibition prohibiting the 1st Respondent, whether by itself, or any of its employees or agents or any person claiming to act under its authority from proceeding to use in any of its rural electrification projects the subject 51,238 wooden power transmission poles currently held at its stores at Makuyu, Mariakani and Kisumu – Awasi.

d) A permanent order barring the 1st Respondent from awarding tenders for the supply of treated power transmission wooden poles to the 3rd to 20th Respondents.

e) An order quashing the 1st Respondent's decision to purport to return the 3rd to 20th Respondents the subject 51,238 wooden power transmission poles for retreatment.

f) An order compelling the 3rd to 4th Respondents to refund the sums of money paid by the 1st Respondent for the supply of the 51,238 substandard wooden power transmission poles.

g) An order that the costs of this petition be provided for.

h) Any other relief the court may deem just to grant.

APPLICATION

2. The Petitioners simultaneously filed a Notice of Motion dated 2nd May 2019 and filed on even date seeking the following orders:-

a) Spent.

b) That the Honourable Court be pleased to issue a conservatory order suspending the 1st Respondent's decision to return the 51,238 substandard Treated Power Transmission Wooden Poles currently held at its stores at Makuyu, Mariakani and Kisumu-Awasi to the 3rd to 20th Respondents/Suppliers pending the inter-parties hearing and determination of this Application and/or Petition.

c) That the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the 1st Respondent from utilising in any of its Rural Electrification projects the 51,238 substandard Treated Power Transmission Wooden Poles currently held at its stores at Makuyu, Mariakani and Kisumu-Awasi pending the inter parties hearing and determination of this Application and /or Petition.

d) That this Honourable Court be pleased to issue a Temporary order of prohibition prohibiting the 1st Respondent from awarding further tenders for supply of Treated Power Transmission wooden Poles to the 3rd to 20th Respondents pending the hearing and determination of this Application and/or Petition.

e) That this Honourable Court be pleased to issue a Temporary order of prohibition prohibiting the 3rd to 20th Respondents from supplying Treated Power Transmission Wooden Poles to Kenya Power and Lighting Company Limited and/or any other Government Institution pending the hearing and determination of this application and/or Petition.

f) That this Honourable Court be pleased to issue a Temporary Order of prohibition prohibiting the 3rd to 20th Respondents from using Kenya Bureau of Standards standardization mark permit for Treated Power Transmission Wooden Poles pending the hearing and determination of this application and / or Petition.

g) That the costs of this Application be provided for.

1ST RESPONDENT'S RESPONSE

3. The 1st Respondent filed grounds of opposition dated 18th June 2019, a Replying Affidavit dated 27th June 2019 together with Notice of Preliminary Objection dated 27th June 2019 raising 4 grounds of objection being as follows:-

a) This Honourable Court lacks jurisdiction to adjudicate the issues raised in the Petition as provided under Article 47(3)(a) of the Constitution of Kenya and Section 9 (2) & (3) of the Fair Administrative Actions Act by dint of:

i. Section 8 of the Public Procurement and Assets Disposal Act, 2015 establishes the Public Procurement Regulatory Authority with powers to investigate and act on complaints lodged against a public entity by tenderers, contractors or the general public;

ii. Section 27 of the PPDA, 2015 establishes the Public Procurement Administrative Review Board whose main mandate under Section 28 is to hear and determine of disputes relating to public procurement or as referred to by the Authority;

b) The issues raised in the petition can be dealt by statutory bodies established under Acts of Parliament, in furtherance of objectives of Article 47(3) of the Constitution of Kenya.

c) The issues raised in the Petition do not amount to constitutional issues necessitating the intervention of this Honourable Court and can adequately be addressed through enforcement mechanisms under the Sale of Goods Act and the Law of Contract.

d) The Petition is otherwise premature, incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court.

e) That from the foregoing, the Petition dated 2nd may 2019 should be dismissed with costs to the 1st Respondent.

BACKGROUND OF PETITION

4. The Petitioners allege that the 1st Respondent illegally procured supply of low quality sub-standard wooden poles in collusion with the suppliers in bid to defraud the public in line of Kshs.800,000,000.00. In view whereof the Petitioners seek the various reliefs set out in the Petition hereof.

5. The 1st Respondent in response filed the grounds of opposition and Notice of Preliminary Objection as captured herein above challenging the jurisdiction of this Honourable Court to hear and determine this suit.

ANALYSIS AND DETERMINATION

6. I have carefully considered the Petitioners Petition; the 1st Respondent's grounds of opposition, as well as the preliminary objection; parties rival written submissions and from the aforesaid pleadings and submissions there arises only one single issue for consideration thus:-

a) Whether this Court has jurisdiction to hear and determine the Petition herein.

7. The Petitioners urge that this Honourable Court has jurisdiction to hear and determine the Petition herein, insisting that **Article 165 of the Constitution** mandates and lays jurisdiction of the High Court. It is further averred the jurisdiction of the Court can only be ousted with regard to matters which should be in the Supreme Court, and the Courts established under **Article 162(2) of the Constitution**, thus ELC Court and ELRC Courts.

8. The Petitioners further contend the Respondent has laid out various provisions of the PPDA with a view to show various mechanisms for dealing with complaints and disputes, which petitioners contend is not applicable as the Petition deals with breaches of Constitution and question of contravention of National Values and Principle of Governance as enshrined in **Articles 1, 2, 3, 10, 227, 232 & 259 (1) of the Constitution**, and **Articles 22, 24, 27, 35 and 47 of the Constitution**.

9. The 1st Respondent on its part rely on the provisions of various Articles of the Constitution, which provides as follows:-

“(1) when a state organ or any other public entity contracts for goods or services, it should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effect.

(2) An act of parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following As well as Section 8, 27 and 167 of the Public Procurement and Disposal Act 2015 in urging that the Honourable Court lacks jurisdiction to hear and determine these proceedings.”

10. The Petition as drawn and filed reveal that the gist of the Petition is a complaint over the award of **Tender No. REA/2017 – 2018/NT/021** and the performance of the contract acts arising from the Tender. Looking clearly at paragraph 5 of the Petition it is averred:-

“This Petition is filed to protect the public interest in the procurement by the 1st Respondent and the supply by the 3rd to 20th Respondents of substandard treated power transmission wooden poles”.

11. From the aforesaid it can be noted that the substratum of the Petition herein is the procurement process undertaken by the 1st Respondent, resulting in the award of Tender and substandard performance of contracts thereto by the 3rd to 20th Respondents. **Article 227(2) of the Constitution** provide for establishment of an Act of Parliament to provide for polices and Regulations on the Procurement of goods and services. In compliance with this Article, the Public Procurement and Asset Disposal Act was enacted to realize constitutional principles.

12. The PPD Act as enacted provides elaborate mechanisms on receiving complaints, undertaking investigations, preparing reports and prosecution of complaints against tenderers, bidders or any other person (including the general public).

13. **Section 8 of the PPD Act** establishes the public procurement and Regulatory Authority with clear powers to ensure compliance with the Act. While **Section 9 of the Act** provides the functions of the Authority including the following:-

“to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;”

14. Perusal on **Section 35 of the Act** reveal that the Act grants the Authority the power to undertake investigations in the procurement process, on its own motion or **on request by any person or entity. These investigative powers are wide-reaching and relate to the process of procurement, method of procurement, award, contracting and performance of contracts.** Further upon completion of investigation, the Authority may undertake any action against the procuring entity including revocation of procurement proceedings, revocation of Award or debarment of the tenderers in the event of violation of procurement principles. **The Authority may also under Section 9 of the Act refer any matter that may have civil and criminal implications to the relevant agents. Section 9 (2) provides:-**

“If in the course of monitoring in accordance with Section 9(1)(a) of the Act, the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities”.

15. It is evidently clear that the Act further establishes **the Public Procurement and Regulatory Review Board under Section 10 with powers to hear and determine complaints submitted / referred to it by an individual, or by the Authority upon issuance of a report prepared under Section 35 of the Act.** The Act clearly establishes two ways under which the aggrieved party, may raise grievances. The Act has comprehensive measures of addressing any complaints relating to public procurement. The procedure set for lodging complaints with the Authority and the Review Board is elaborate and clearly sufficient to deal with the issues such as the ones raised in this Petition by the Petitioners including any complaints relating to the Procurement process which should have been investigated by the Authority as provided under the Act before any intervention by the Honourable Court.

16. In the event of disqualification from the procedure of the Review Board, third parties have the statutory right to move the Authority. It is appreciated that after filing the instant Petition, the Petitioners have invoked the jurisdiction of the Authority by submitting a complaint

thereto in relation to both processes. The Act provides that the aggrieved party may proceed to **institute judicial review proceedings against the decision** of the Authority arising from its functions or the decision of the Board upon determination of dispute referred to it under **Section 167 of the Act**.

17. **Section 167 of the Act** provides:-

“Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within Fourteen (14) days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

18. Further **Section 175 of the Act** provides:-

“A person aggrieved by a decision made by the Review Board may seek judicial Review by the High Court within Fourteen (14) days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.”

19. The Court jurisdiction to hear and determine this Petition is clear that it flows from either the Constitution or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other Written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. The issue to whether a Court of Law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.

20. As I consider the issue of jurisdiction to hear and determine this Petition it is clear in my mind that it is imperative that proper procedure laid down by an Act of Parliament should be strictly followed and failure to invoke the relevant statutory provision on dispute resolution is fatal to the Petitioners’ Petition, that cannot be cured by the much-cited **Article 159(2)(d) which provides that justice shall be administered without undue regard to procedural technicalities**. Further it is also of paramount importance to bear in mind that the **Fair Administrative Action Act** acknowledges the importance of exhausting alternative remedies before resorting to the Honourable Court. **Section 9 (2) and (3) of the Fair Administrative Actions Act** provides:-

“(2) the High Court or subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless mechanisms including internal mechanisms for Appeal or review and all remedies available under any Written Law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

21. To buttress the above mentioned proposition the 1st Respondent sought reliance in the decision of the Court of Appeal in **Speaker of National Assembly v. Njenga Karume [1992] eKLR** where the Court held that:-

“In our view there is considerable merit... that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

22. I have carefully considered the reliefs sought in this Petition and the facts thereto and I find that the Petitioners grievances could be sufficiently addressed through the Authority or the Review Board, as provided under the Act. In this respect, I find support in the decision of Supreme Court of Kenya in **Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR** where the Court succinctly held as follows:-

“Although the 1st, 2nd and 3rd Respondents have argued that a party cannot reasonably be expected to raise constitutional claims before the Public Procurement Administrative Review Tribunal, and therefore a Petition in the High Court regarding their constitutional rights was in order, we find nothing to suggest that the matters raised in the High Court could not have accompanied the fundamentals of the grievance the very item before the Tribunal. The Public Procurement and Disposal Act, indeed, does not preclude parties from raising constitutional issues touching on their complaints. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution.” (Emphasis mine)

23. The Courts have time and again in unison agreed and confirmed that where there is a procedure, derogating from the procedure in the guise of Constitutional petition is an abuse of the process of Court. It should be noted that the Constitutional Petition do not elevate the Constitutional dispute above any other dispute and be a justification for substitution for normal procedure as clearly laid down by statutes. In the case of **Godfrey Paul Okutoyi v Habil Olaka & Central Bank of Kenya [2015] eKLR** the Court issued a caution in determining suits framed as constitutional petitions where there are alternative dispute resolution mechanisms. The Court echoed the principle laid down in **Harrikissoon v. Attorney General of Trinidad and Tobago [1990] AC 265** as follows:-

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by ... the constitution is fallacious. The right to apply to the High Court...for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant

to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (Emphasis added).

24. Similarly in agreeing with the position the Court in the case of *Cod & Another v. Nairobi City Water & Sewerage Company [2015] eKLR* the Court held:-

“The Constitution cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of the Constitution, where it is possible to decide any case or dispute, Civil or Criminal, without reading a Constitutional issue then that is the course that should be followed. The Court sitting as a Constitutional Court must through the doctrine of avoidance steer clear of determining disputes as if there were constitutional questions being raised...It is an abuse of the process of the Court and the inherent jurisdiction of the Court ought to be prompted to prevent such abuse.” (Emphasis mine)

25. In the instant Petition I find that it is not in dispute that the Petitioners are aggrieved by the manner in which the decision to award the Tender was arrived at and specifically states that it was contrary to the provisions of the Public Procurement and Asset Disposal Act 2015. I find the proper forum where Petitioners should have proceeded to ventilate any alleged contravention of the provisions of the Act arising from the procurement process, award and performance of contracts thereto vests with the Authority and or the Review Board, as the Petitioners may elect but not before this Honourable Court, as at the time of filing the Petition. The proper procedures was clearly stated in the case of *Daniel Muthama Muoki vs. Ministry of health & another; Shenzhen Mindray Bio-Medical Electronics Co. Ltd & 5 others (Interested Parties) (2020) eKLR* where the Court upheld a similar objection on the premise that the Petitioners had failed to exhaust the remedies available under the Public Procurement and Disposal Act. The Court stated:-

“I am alive to the fact that the styling of a Suit as a Constitutional Petition with a view to circumventing the mandatory constitutional and statutory process amounts to abuse of the process of the Court, and in such circumstances, the Court is called upon to exercise its inherent powers by considering striking out such a Petition and subsequently referring the respective issues to appropriate dispute resolution forum. Myrands of judicial precedents are clear that Courts will turn away unscrupulous litigants who tend to be unnecessary litigious under the pretence of public interest litigation where their pleadings are found to be unmeritorious.”

26. Having carefully considered the rival submission and authorities in support, I find the preliminary objection meritorious. I have no alternative but to exercise the doctrine of Constitutional avoidance as there are other statutory sanctioned avenues in which the Petitioners complaints can be addressed. It is noted that this Petition is improperly before this Court. It is also noted that, as the Petitioners filed a complaint with the Public Procurement Regulatory Authority dated 22nd July 2019 on similar issues to those raised in the present Petition, this is a clear case of abuse of the Court process.

27. **In view of the findings that I have come to in respect of Preliminary Objection, I find that This Court lacks the requisite jurisdiction to hear and determine this Petition in light of the Constitutional and Statutory procedures stated in this Ruling. The matters raised in the Petition can sufficiently be addressed by the Authority and the Board as constituted under the Public Procurement and Assets Disposal Act. Accordingly I uphold the Preliminary Objection dated 27th June 2019. The Petition is struck out and in view of the nature of the Petition having been filed to protect public interest in procurement by 1st Respondent and not in private interest of the Petitioners I direct each party to bear its own costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY, 2021.

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J. A. MAKAU

JUDGE