



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO E378 OF 2021**

**IN THE MATTER OF ARTICLES 2(4), 2(5) & 2(6), 10, 19, 20, 21(1) & 21(3), 22, 35, 43, 47, 48, 55, 73, 75, 153, 155, 201, 227, 232, 258, & 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
ENSHRINED IN ARTICLES 35, 43, 47, 48 AND 55 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 3, 134 AND 135  
OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

**AND**

**IN THE MATTER OF TENDER NO. MOE/SEQIP/NCB/14/2019-2020- CONSTRUCTION OF  
CLASSROOMS, LABORATORIES AND SANITATION FACILITIES IN TARGETED  
PRIMARY AND SECONDARY SCHOOLS UNDER SEQIP**

**BETWEEN**

**SAMAHA COMPANY LIMITED.....1<sup>ST</sup> PETITIONER**

**COLUMBIA DEVELOPERS LIMITED.....2<sup>ND</sup> PETITIONER**

**PACIFIC GENERAL WORKS LIMITED.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF EARLY**

**LEARNING AND BASIC EDUCATION.....3<sup>RD</sup> RESPONDENT**

**RULING**

## **APPLICATION**

1. The Petitioners/Applicants through a Notice of Motion dated 24<sup>th</sup> September 2021 seek the following orders:-

*a) Prayer No. 1 spent.*

*b) Prayer No. 2 spent.*

*c) Pending the hearing and determination of this application and the Petition, an order does issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from taking any further adverse action in respect of the contract, to wit, an action of cancelling or terminating the contracts or entering into contracts with third parties in respect of the subject contract.*

*d) Prayer 4 dispensed with in the application.*

*e) The Respondent's pay the costs of this application.*

2. The Application is premised on the grounds on the face of the application and supportive affidavit by Hussein Ibrahim sworn on 24<sup>th</sup> September 2021.

## **APPLICANT'S CASE**

3. The Petitioners contend that they are aggrieved by the decision of the Respondents to perpetually hold in abeyance and without communication the conclusion of the contracting processes and discharge of the Respondent's' obligation under the Constitution, **the Public Procurement and Assets Disposal Act, 2015** and under Contract Number MOE/EEQIP/NCB/14/2019-2020 for construction of Classrooms, laboratories and sanitation facilities in Targeted Primary and Secondary School under SEQIP (hereinafter referred to as "The Contract").

4. It is Petitioners case that having participated in the public procurement process and emerged successful, they were awarded various lots under the tenders and issued with letters of awards which letters specified that they would serve as contracts pending formal issuance of detailed contract. While the awards were done in November and December 2020, the Respondents have completely refused to proceed with their obligations to issue formal contracts or to issue instructions to the Petitioners to execute the various tasks assigned to them, thus exposing the Petitioners to commercial losses as well as risks of financial defaults of their obligations already incurred towards meeting their share of the contractual obligations.

5. The Petitioners assert that the Respondents in abruptly and perpetually withholding their obligations under the contract, a process under the **Public Procurement and Assets Disposal Act, 2015** constitute gross violation of the national principles enshrined under the Constitution as well as fundamental rights of the Petitioners and principles of public finance and public procurement set out under **Articles 201 and 227 of the Constitution**.

6. In view of the aforesaid it is the Petitioners averment that they are already exposed to imminent risks of insolvency and debt attachments by various financial institutions that financed their contracts through provision of performance guarantees and advancement payment guarantees which financial obligations were a prerequisite to the Petitioners being granted rights to proceed with their other contractual obligations under the Contract.

7. It is contended that the Respondents on the other hand have no justification to act in the manner they have done and have in fact acted contrary to principles of public service, national values and leadership and integrity principles all enshrined under the Constitution.

8. The Petitioners further states that unless the honourable Court issues conservatory orders compelling the Respondents to act positively to discharge their contractual and statutory obligations towards the Petitioners, the Petitioners are at imminent risks of foreclosures and attachments by financial institutions that supported their contractual execution of their obligations enshrined above and which financial obligations they have now defaulted in due to the Respondents' wanton disregard of the law.

9. The Petitioners additionally urge that there is further risk of huge amounts of public finances being lost due to the contained violation of the law by the Respondents hence the urgency in compelling the Respondents to act positively and ensure that the various contracts affecting the Petitioners are executed without further delay.

10. Lastly it is contended by the Petitioners that if orders are granted as prayed no prejudice shall be occasioned on the Respondents in this matter.

## **RESPONDENTS RESPONSE**

11. The Respondents filed grounds of opposition setting out the following 8 grounds of opposition:-

*a) The instant application is bad in law and unmeritorious.*

*b) The Applicants have not demonstrated sufficient grounds to warrant the grant of the orders sought in the Motion.*

*c) The Application has not met the judicially set criteria for the grant of the restraining orders sought.*

d) *The Application does not disclose any impropriety on the part of the Respondents as regards the gender in question.*

e) *The Respondents have processed the tender in question strictly in accordance with the World Bank procurement rules and regulations and the instructions contained in the tender documents.*

f) *Whereas the Petitioners/Applicants' bids with respect to the tender in question were responsive, the instant Application has been prematurely instituted as the procure process is yet to be completed since no formal contracts have been signed in respect of the impugned tender.*

g) *The Respondents will complete the procurement process and sign the formal contracts once availability of funds is confirmed, since the project in respect of the impugned tender is a World Bank funded project.*

h) *The instant Application forms a classical description of an abuse of the due process of this Honourable Court.*

#### **ANAYLSIS AND DETERMINATION**

12. I have carefully considered the application, grounds of opposition, rival counsel oral submission and from the same the issue for consideration is as follows:-

a) *Whether the Applicants/Petitioners have met the threshold for granting of conservatory orders sought herein.*

13. The guiding principle upon which court can grant conservatory orders are well settled within the framework of **Article 23 of the Constitution**, in which the Courts are called upon to uphold and enforce the Bill of Rights

14. **Article 23(1) and (3) of the Constitution** provides:-

**“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

(2) .....

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction;**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.”**

15. The Court at this stage is not called upon to make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the Applicant has made a prima facie case with likelihood of success and further whether declining to grant the orders will prejudice the Applicants.

16. It is trite that for conservatory orders to be granted in a constitutional Petition the Applicant is required to demonstrate a prima facie case with probability of success and further that unless the Court grants such orders there is a real danger that the Applicant will be prejudiced by refusal to grant the order.

17. I am in regard of the above proposition guided by a decision in the case of **Centre for Rights of Education and Awareness (CREAW) & 7 others vs. Attorney General Nairobi High Court Petition No. 16 of 2011, (2011) eKLR**, where Justice Musinga, as he then was, stated:-

**“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will not therefore delve into a detailed analysis of facts and law. At this state, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”**  
(Emphasis added)

18. Further reliance is placed in the decision of the **Supreme Court** where the importance and scope of a conservatory order in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** was stated as follows:-

***“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

19. In the instant application, there is no dispute that the contract is funded by the World Bank and that the Applicants were successful. The tender was guided by the World Bank guidelines. That there is no dispute that there is a binding contract between the Applicants and the Respondents. The Respondents have perpetually decided to hold in abeyance and without communication conclusion of the contract process and discharge of their obligation under the Constitution, the **Public Procurement and Assets Disposal Act, 2015** and under contract for construction of classroom, laboratory and sanitation facilities in Targeted Primary and Secondary Schools under the contract.

20. The Petitioners/Applicants have demonstrated that they participated in Public Procurement process and emerged successful and subsequently awarded various lots under tenders and issued with letters of award. However the Respondents have completely refused to proceed with their obligation to issue formal contracts or to issue instructions to the Petitioners to execute their various tasks assigned to them, thus exposing them to commercial losses. The Respondents actions constitute to gross violation of the national principles under the Constitution and principles of public finance and public procurement.

21. The Petitioners have further demonstrated that they are exposed to imminent risk of insolvency and debt attachment by various financial institutions, that financed their contracts through the provision of payment guarantees and advance payment guarantees, which financial obligations were a prerequisite to Petitioners being granted rights to proceed with their other contractual obligations under the contract.

22. In the instant Application, it is clear that the Respondents have not disputed the facts as pleaded in Petitioners’/Applicants’ Application. There is no affidavit controverting the matters alluded to in the Petitioners supporting affidavit.

23. Upon consideration of the pleadings herein, Counsel oral rival submissions, I find that the Applicants have demonstrated a prima facie case with likelihood of success as regard the violations of the Petitioners/Applicant’s rights and fundamental freedoms as provided in the Constitution. I note further it has been demonstrated that if conservatory orders sought are not granted the Applicants will be prejudiced. The Respondents on the other end have not shown what prejudice they would suffer if the orders sought herein are granted.

24. ***In view of the conclusion I have come to, I find merit in the Applicants’/Petitioners’ Application dated 24<sup>th</sup> September 2021. I proceed to grant prayer No.3 of the Notice of Motion as follows:-***

***i. An order be and is hereby issued to the effect that pending hearing and determination of the Petition herein, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s be and are hereby restrained from taking any further adverse action in respect to the contract to wit:- an action of cancelling or terminating the contracts or entering into contracts with third parties in respect of the subject contract.***

***ii. Applicants/Petitioners granted costs of the application.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF OCTOBER, 2021.**

.....

**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**