REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO. 53 OF 2018

BONIFACE MWANGI GITHAE..PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIAMBU....................................RESPONDENT

CONSOLIDATED WITH

PETITION NO 49 OF 2018

LYDIA KAHUHO & ANOTHER... PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIAMBU....................................RESPONDENT

CONSOLIDATED WITH

PETITION 37 OF 2017

TIMOTHY KANAGI & NJOROGENGOIMA (T/A TECHMASTER

GENERAL SERVICES)...PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KIAMBU....................................RESPONDENT

J U D G M E N T

1. On 28/5/18 the court ordered that the above Petitions be consolidated, the lead file being Petition No. 53 of 2018. The background to the Petitions can be stated in summary as follows. The Petitioners in Petition No 49 of 2018 are officials of **Wajuuzi Self Help Group.** The Petitioner in Petitioner in Petition 53 of 2018, has approached the court in his capacity as the chairman of a self-help group described as **Thika Chicken and Eggs Self-Help Group**. The Petitioners in Petition No. 37 of 2017 describe themselves as persons engaged in business and trading in the name and style of **Tech Master General Services.**

2. It appears that prior to 2014, **Tech Master General Services** [hereinafter Tech Master] was engaged by the County Government of Kiambu (the Respondent), under a public-private partnership to manage the public facility described as **Mama Ngina Gardens Public Toilet No. 002**. In May 2014 the said partnership was renewed for a further period of 3 years *vide* Public Private Partnership (PPP) agreement **No. CGK/WENR/2014 – 17/002**. Before the expiry of the said agreement, **Tech Master** by a letter dated 9/3/17 (the year is erroneously stated to be 2027) sought renewal of the contract, which was apparently granted and an agreement (entitled Form of Agreement) executed on 3rd April 2017 between Tech Master and the Respondent, for a further period of 3 years.

3. On 24th November 2017 the Respondent's County Secretary, **Dr. Martin N. Mbugua** wrote to the Petitioners revoking the said agreement with immediate effect, on grounds that the Petitioners were operating Mama Ngina Gardens Public Toilet contrary to the conditions attached in the form of agreement paragraph 2 (iii).

4. Wajuuzi Self Help Group had similarly entered into a public private partnership with the Respondent in respect of the Public Toilet in Thika town described as **Christina Wangari Toilet No. 006** *vide* an agreement **No. GK/WENR/2014 – 2017 006**. Under the agreement, the Self-Help Group was to manage the public facility until 2017, but prior to the expiry of the agreement period, the group sought by a letter dated 2nd May 2017, to renew the contract for a further term of 3 years. Apparently, their request was accepted and an agreement **No. CGK/WENR/6/2017 – 2020** was executed between the group and the Respondent on 18th May 2017. The agreement was to commence from 1st June 2017 for a period of 3 years. On 10th April 2018 the Respondent's County Secretary gave notice to terminate the agreement on grounds inter alia, that the agreement was not preceded by a tendering process and was in violation of the Public Procurement and Asset Disposal Act.

5. Thika Chicken and Eggs Self-Help Group entered into an agreement No. **CGK WENR/13/2017 – 2020** with the Respondent on 18th May 2017 in respect of the group's management of the Public Toilet described as **Jamuhuri Market Public Toilet No. 13,** for a period of 3 years commencing on 1st June 2017. On 10th April 2018 the County Government gave notice to of terminate the agreement on the same grounds as those cited in respect of the Petitioners in **Petition 49 of 2018**. The Petitions herein were prompted by the said notices of termination by the County Secretary of the Respondent.

6. In Petitions **No. 49 and 53 of 2018,** the Petitioners dispute that the Public Procurement and Disposal Act (PPDA) applies to their agreement, and assert that the governing law is the Public Private Partnership Act (PPPA). They further complain that the termination notices violate their right to fair administrative action as they were not given an opportunity to be heard prior to the decision, that their "economic interests" and the legitimate expectation that their contracts would run the full course have been adversely affected. In **Petition No.37 of 2017** the Petitioners raise the latter complaint and assert further that, the notice of termination did not specify any mechanism for the redress of any grievance related to the decision. All the petitions are supported by affidavits sworn by the respective officials/parties.

7. In a Replying Affidavit responding to all the Petitions, filed on 9th August 2018, **Dr. Martin N. Mbugua** the County Secretary of the Respondent deposed *inter alia* that:

- The initial contracts (prior to 2017) between the parties were preceded by a tendering process.
- That the manner in which the contracts running from 2017 – 2020 were renewed was irregular as the purported extension thereof was not done through a tendering process, and that the purported extended agreements were irregular as they went beyond the period of 3 years prescribed in Section 114(2) of the PPDA.
- The initial agreements and the PPDA did not contemplate any renewal.
- That the issues raised by the Petitions are contractual/commercial in nature and ought not to be entertained in a constitutional petition, but should be resolved by way of a civil claim or referred to arbitration.
- That the transactions giving rise to the petitions consist of illegalities from which the Petitioners should not benefit.

The deponent urged the court to dismiss the Petitions.

8. In a joint Further Affidavit filed on 14th September 2018, the Petitioners asserted that they have approached the correct forum for the resolution of the dispute; that the contracts before the court are governed by the PPPA and therefore excluded from the operation of the PPDA; that the material contracts have not been declared illegal by the relevant tribunal under the law; and that under the contracts the Petitoners were assisting the Respondent carry out a public duty, namely provision of public sanitary services as empowered by the relevant legislation.

9. The Petitions were argued before me on 19th September 2018. Counsel for the Petitioners opened his submissions by stating that the Petitions were brought pursuant to the PPPA whose object was said to be public participation in the maintenance of public facilities. He cited Sections 19 and 21 of the Act and the Respondent's public-private partnership Policy Document, attached to affidavits of the Petitioners, which he asserted provide for the procurement process and duration of contracts for service. He asserted however that the relationship between the contracting entity and contractor is vertical and not horizontal as the former retains supervisory authority and sets fees charged for services. With particular regard to Petition 37 of 2017 counsel took issue with the reasons given in the notice asserting that the notice did not comply with Section 21 of the PPPA, and with regard to Petition 49 of 2018 submitted that the notice was in essence an order to vacate, and therefore invalid as the PPDA did not apply to the PPPA agreement by dint of Section 4 of the PPPA.

10. He also complained on behalf of the Petitioners in Petition 52 of 2018 that the Respondent attempted arbitrarily to enforce termination of the agreement before invoking the redress clauses contained in the Policy Document. He asserted that the unconstitutional element in the Respondent's actions was non-compliance with Article 47 of the Constitution. He invited the court to quash the notices as empowered to do under Articles 22, 23(3) c and 165(3) of the Constitution.

11. For the Respondent, counsel asserted that the Respondent had exercised its right to terminate the agreements, and that such termination was not a constitutional issue; that breach of contract does not give rise to a constitutional cause; that the agreement provided at clause 14 of the Policy Document for a dispute resolution mechanism, namely arbitration. Admitting that there is a dispute between the parties, he asserted that this court was the wrong forum for its resolution; that courts do not make contracts for parties and that in this case the Petitioners appear intent on rewriting the contract through the orders sought. In this regard, counsel relied on the decision of the High Court in **Five Forty Aviation Ltd v Lufthansa Technik Aero Algey GMBH [2011] e KLR.**

12. Referring to clause 12 of annexture **"LV4"** (standard Policy Document) to supporting affidavit in Petition 49/18 he argued that termination was provided for but no period stipulated in respect of notice. He took the position that that dispute before the court was contractual in nature. He cited the decision of the High Court in **Roshanara Ebrahim V Ashleys (K) Ltd and Another [2016] e KLR** to bolster his arguments. Asserting that the Petitions are predicated on the right to fair administrative action, he faulted the Petitioners' failure to seek redress by way of arbitration.

13. In rejoinder, counsel for the Petitioners argued that the Respondent ought to have availed themselves of the arbitration mechanism for the resolution of disputes rather than terminate the contracts. He contended that the parties' relationship unlike that in the Respondent's authority – **Five Forty Aviation Ltd** case -- was vertical, with the Respondent wielding coercive power, and that the Respondent appears to prevaricate on the question of the validity of the agreements.

14. Once more he took issue with the content and manner of service of the notices. He sought to distinguish the facts of this case from the authorities cited by the Respondent on grounds that the relationships of the parties in the said authorities were horizontal.

15. The court has considered the pleadings, affidavit material and arguments raised by the parties. The Petitions before me were principally brought on the basis of the right to fair administrative action as guaranteed in Article 47 of the Constitution, even though the Petitioners also allude to the Respondent's decision to their "economic interests". In particular, the repeated complaint in all three Petitions is that the Respondent's decision/action was taken without giving the Petitioners a hearing. Although the Petitioners have expended much energy on the law applicable to their contracts and the alleged wrongness of the Respondent's decision/actions in revoking or terminating the disputed agreement, that of itself is a matter of the merit of the decision and is not a constitutional question. By parity of reason, the question whether the disputed contracts were valid, governed by the PPDA or PPPA and whether the Respondent was entitled to revoke or terminate the same as they did is not itself a constitutional question.

16. There is no dispute however that the Petitioners and Respondent entered into agreements, rightly or not, by virtue of which the Petitioners in **petition 37 of 2017** were to operate a public facility (toilet) for a period of 3 years from 2017, even though the agreement states that the agreement would terminate in 2019. As for the other Petitioners they were to operate the relevant public facilities from April/May 2017 to the year 2020. By their Petition, affidavits and arguments, the Petitioners stake their case upon the said agreements and the standard Policy Document which was a part thereof, as annexed to their respective affidavits and marked **"TN4" (in Petition 37/17), "LV4"** (in **Petition 49/18) and "BMG 4" (in Petition 53/18).**

17. I understood the Petitioner's case as presented to be that based on the applicable procurement law the said agreements were unlawfully or unfairly revoked/terminated, and more so as the Respondent did not accord them a hearing. Also the Petitioners claim, albeit vaguely, that their economic "interests" were adversely affected by the impugned decision. They contend that the balance of power between the parties to the agreement was skewed in favour of the Respondent because the Respondent wields coercive power; and therefore the relationship is vertical. In my own view, from the Petitioners' argumentation, the relationship in this case is predominantly private and horizontal even through the Respondent is admittedly a public body.

18. In **Roshanara Ebrahim v Ashleys Kenya Ltd and Others [2016] e KLR Muriithi J** had this to day about the horizontal/vertical application of the Bill of Rights.

> "The three judge High Court bench in ***Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others*** [2014] eKLR while accepting that the Bill of Rights had horizontal application to bind private individuals as well as state actors, took the same view as follows:
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> "In this regard, we must hasten to place a caveat that horizontal application of fundamental rights and freedoms is not an open cheque and whether and to what extent the Court will exercise jurisdiction will be informed by the circumstances of each individual case. For instance, ***if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction.*** *In the case of* ***Isaac Ngugi v Nairobi Hospital & 3 Others (supra)*** *the court held as follows regarding the application of the Constitution to private relationships;*
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> **[22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013] eKLR). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case….**
>
> **[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly."[Emphasis added]**

19. I associate myself entirely with the foregoing. In these Petitions, the Petitioners have for the most part emphasized the validity of their respective contracts with the Respondent and conditions attached thereto. At the same time, they assert that the Respondent was under a duty to accord them a hearing before taking adverse action in respect of the said agreements. The particular right that the Petitioners seek principally to enforce is the right to fair administrative action as enshrined in Article 47 of the Constitution. The Fair Administrative Action Act was enacted *"to give effect to Article 47 of the Constitution, and for connected purposes"*

20. Section 2 of the Fair Administrative Action Act (FAAA) describes an administrator as a person who takes administrative action or makes an administrative decision. An administrative action is defined as including –

> **"i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals or**
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> **(ii) any act, omission of decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates."** (emphasis added)

21. Section 3 of the FAAA provides that:

(1) This Act applies to all state and non-state agencies, including any person—

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or cision relates.

22. Section 4(3) (b) of the Fair Administrative Action Act provides that:

"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

a. …..

b. An opportunity to be heard and to make representations in that regard, notice of a right to a review or internal appeal against an administrative action."

23. This court may be prepared to accept the Petitioner's contention that the Respondent was for purposes of the transactions in question, acting in an administrative capacity and its decision an administrative action, and that, notwithstanding the terms of the contract between the parties, the Respondent was obligated, prior to the decision/action complained to accord some sort of hearing to the Petitioners. Even then , that in no way means that any and every trifling violation of the contract would automatically attract constitutional sanction.

24. In so far as the Respondent's failure in that regard is concerned, the Petitioners, had the first option under the contracts to refer this dispute to arbitration, or to file a suit for breach of contract. Superior courts in Kenya have frowned upon the recent trend by litigants to eschew the use of ordinary civil mechanisms for addressing common grievances and instead seeking resolution of such grievances through constitutional petitions.

25. In **Benard Murage V Fine Serve Africa Ltd and 3 Others [2015] e KLR** the court stated that:

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law. Then it is desirable that such a statutory remedy should be pursued first."

(See also **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd [2013] e KLR)**

26. In the case of **Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265** which has been cited often in our superior courts, Lord Diplock decried the tendency by litigants to rush to file constitutional petitions over mundane and common disputes. I associate myself completely with his Lordship's exhortation which was to the following effect:

"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)

See also the decision of the Tanzania Court of Appeal in **Attorney General V S.K. Dutambala Cr. Appeal No. 37 of 1991.**

27. In this case, most of the Petitioners' argumentation and material was taken up with the question of the validity, under the respective law, of their agreements with the Respondents, rather than a demonstration of the severity of injury resulting from the alleged violation of their right to fair administrative action or to their economic interests. Indeed no evidence was tendered as to the exact nature of injury suffered by the Petitioners as a result of the alleged violation, beyond plain depositions. I agree therefore with the observation made by counsel for the Respondent that the Petitioners were pre-occupied with the enforcement of their agreements. In my own assessment, the Petitioners invitation to the court to apply the Constitution directly and vertically against the Respondent appears unjustified in this case. More so as the complaint made out by the Petitioners in this case is not to my mind serious enough to warrant constitutional sanction.

28. In the case of **Communications Commission of Kenya and 5 Others V Royal Media Services and 5 Others [2014] e KLR,** which was cited in **Roshanara's case**, the Supreme Court of Kenya observed at paragraph 257 that:

> **“Similarly the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was some other basis upon which the case could have been disposed of *(Ashwander V Tennessee Valley Authority, 297 US 288, 347 (1936)* …..**
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> **In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in any other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation. We reiterate that the first port of call should always be suitable statutorily underpinned forums for resolution of such disputes.”** (emphasis added)

29. The Petitioners moved this court seeking orders to review the Respondent’s action of terminating/revoking their mutual agreements. Section9(2) of the Fair Administrative Action Act provides that:

> **“The High Court ….. shall not review an administrative action or decision under this Act unless the mechanism for appeal or review and all remedies available under any other written law are first exhausted.”**

30. There is no evidence that the Petitioners had exhausted other remedies available to them in redressing their grievance. Under clause 14 of the Terms and Conditions contained in the Policy Documents which is part of the contracts that the Petitions seek to enforce, (annextures **TN 4, LV 4** and **BMG 4** respectively), disputes arising out of the partnership which could not be resolved amicably between the parties were to be referred by either party for arbitration.

31. The public policy consideration underlying this clause is not too difficult to discern: litigation often exposes public entities to expenditure of scarce public resources on legal fees, in addition to being a likely impediment through delays, to the achievement of time-bound objects of public-private partnerships. The Petitioners have not advanced any serious reason for avoiding the mechanism prescribed in the Policy Document in the resolution of the present dispute. Instead, they assert that the Respondent ought to have invoked the said mechanism before making its decision. At that point, there was no dispute in the true sense of the word, and hence the Petitioners’ riposte rings hollow. Equally there is no demonstration that the remedy of filing suit for breach of contract was inadequate or unavailable to address the Petitioners’ grievance.

32. All in all, my considered view is that the petitions before me do not demonstrate any serious constitutional violation, and secondly, that the dispute between the parties ought to have been resolved through arbitration (as provided in the contract terms) or through civil litigation. Accordingly, the Petitions are dismissed. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF AUGUST 2019.

C. MEOLI

JUDGE

In the presence of:

Mr. Wanda holding brief for Mr. Ranja for the Respondent

Petitioners – Absent

Court Assistant - Kevin