



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 481 OF 2017

BILDAD KANURI KAGAI.....1ST PETITIONER

KANURI LIMITED.....2ND PETITIONER

VERSUS

IDEMIA (Formerly OT MORPHO).....1ST RESPONDENT

SAFRAN IDENTITY AND SECURITY.....2ND RESPONDENT

SCYTL SECURE ELECTRONIC VOTING SA....3RD RESPONDENT

JUDGMENT

1. Bildad Kanuri Kagai, the 1st Petitioner and Kanuri Limited, the 2nd Petitioner through their petition dated and filed on 27th September, 2017 seek declaratory orders that their fundamental rights and freedoms under Articles 27, 43, 47 and 227 of the Constitution have been infringed. They consequently seek assessment of damages for the resultant loss and also pray for costs and interest thereon.

2. OT Morpho, the 1st Respondent, Safran Identity and Security, the 2nd respondent, and Scytl Secure Electronic Voting SA, the 3rd Respondent have all opposed the petition. The 1st and 2nd respondents oppose the petition through a notice of preliminary objection dated 6th March, 2018 and a replying affidavit sworn by Yves Charvin on 8th March, 2018. The 3rd Respondent opposes the petition through a replying affidavit sworn by Silvia Caparros De Olmedo on 10th July, 2018. All the respondents also filed a notice of preliminary objection dated 22nd August, 2018.

3. The advocates for the parties filed and exchanged written submissions which they asked the court to rely on when the matter came up for highlighting submissions. The facts of the case in brief disclose that the Independent Electoral and Boundaries Commission (IEBC) in preparation for the 2017 general election contracted the 1st and 2nd respondents vide tender No IEBC/32/2016 – 2017 to provide the necessary technology relating to the Kenya Integrated Elections Management System (KIEMS). Some aspects of the tender were sub-contracted to the 3rd Respondent by the 1st and 2nd respondents.

4. Dittel Limited which was one of the bidders was aggrieved by the said procurement and lodged a complaint with the Public Procurement Administrative Review Board (PPARB). The petitioners were enjoined as interested parties. Before the dispute could be determined the same was withdrawn. The petitioners subsequently filed this petition seeking the orders already stated.

5. The 1st and 2nd respondents' attack on the petition through their preliminary objection is based on the grounds that:-

“1. THAT the Petition is contra statute, public policy and otherwise an abuse of legal process as it alleges a complaint by Petitioner for purported breach of procurement process by a procuring entity or alleged bidder and consequent losses arising therefrom which matters sections 167 and 173 of the Public Procurement and Asset Disposal Act (hereafter PPAD Act) confers jurisdiction to determine on Public Procurement Administrative Review Board (hereafter PPARB) as the forum of first instance.

2. THAT the Petitioners have failed and or ignored to exhaust other remedies available to them in accordance with law.

3. THAT the Petition is vexatious, *res judicata* and otherwise an abuse of the court process in so far as the purported cause of action arose in January 2017 and the reliefs herein were previously pleaded and sought or ought to have been pleaded or sought in a similar matter before the PPARB in Application No. 110/2016, Dittel Ltd v IEBC & the Petitioners herein over the same matter/dispute which was withdrawn without the Petitioners' protest and now re-litigated herein.

4. THAT the Petition is incompetent and otherwise an abuse of legal and court process having been filed in violation of a specific procedure contained in PPAD Act.

5. THAT the Petition is tainted with illegalities in so far as the evidential material relied upon violates Article 50(4) of the constitution.

6. THAT the Petitioners have not demonstrated with precision how their fundamental rights and freedoms under the Constitution have been violated or threatened contrary to Article 22(1) of the Constitution and as held in the locus classicus case of Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR and Annarita Karimi Njeru [1979] KLR 154.”

6. Through the replying affidavit of Yves Charvin, the in-house general counsel for the 1st and 2nd respondents, it is clarified that the 1st Respondent which was formerly known as Safran/OT-Morpho is currently known as Idemia Identity & Security France. Otherwise the 1st and 2nd respondents through the replying affidavit reiterate the contents of the notice of preliminary objection.

7. As regards the substance of the petition, the 1st and 2nd respondents' averment is that the allegation that their employees interfered with a tender document or procurement process is vexatious and false. Further, that its employees were not in a position to interfere with the tender documents of the procuring entity.

8. According to the 1st and 2nd respondents, the exhibited tender document was not of any probative value as its source was not disclosed. Further, that no evidence had been adduced to show that the three persons named as having interfered with the tender document were doing so at the behest of the respondents.

9. It is the 1st and 2nd respondents' defence that the allegations made by the petitioners are the same allegations that had been made by Dittel Limited in the PPARB application in which the petitioners had been named as interested parties. In their view therefore, this petition amounts to forum shopping and is otherwise an abuse of the court process.

10. It is the 1st and 2nd respondents' case that the tender document did not result in the award of any tender as the tendering process was cancelled and direct procurement resorted to by the procuring entity. Further, that the petitioners never challenged the award of tender to the respondents.

11. The 1st and 2nd respondents accused the petitioners of grossly misinterpreting and or misunderstanding the Supreme Court decision in the first Presidential Petition of 2017 asserting that at no time did the Supreme Court hold that the KIEMS kits were compromised or find criminal or tortious capability on any of the respondents in the election petition.

12. It is the 1st and 2nd respondents' position that the respondents executed the contract to the expectation of IEBC and in accordance with the contract terms and the petitioners' claim that they failed to execute the contract is without merit. They therefore urged the court to dismiss the petition.

13. The 3rd Respondent's notice of preliminary objection is premised on the grounds that:-

“1. The Respondents are foreign limited liability companies duly incorporated in France and Spain respectively without any presence in Kenya and non-citizens of the Republic of Kenya whose domicile is outside the jurisdiction of this Court yet the Petitioner has to date failed to seek or obtain leave of Court to serve notice of institution of the Petition or any process outside jurisdiction.

2. Failure to obtain leave of Court to serve process on the Respondents divests the Court of jurisdiction to hear and determine this Petition hence the same should be struck out in limine for want of leave to serve notice of institution of the Petition or any process thereto on Respondents out of jurisdiction of the Court.”

14. In his replying affidavit, Silvia Caparr'os De Olmedo identifies himself as the in-house general counsel of the 3rd Respondent. His affidavit party reiterates the respondents' notice of preliminary objection dated 22nd August, 2018 and for that reason he avers that the petition is defective. He further avers that the 3rd Respondent was sub-contracted by the 1st Respondent to provide the results consolidation software for the 1st and 2nd respondents and never participated in the tender process or had dealings with the procuring entity hence could not in any way commit the acts alleged by the petitioners. Further, that the 3rd Respondent has never dealt with the IEBC and there was no privity of contract between the 3rd Respondent and IEBC in respect of the impugned contract or tender award.

15. The 3rd Respondent also stated that one Richard Bezis is its senior employee working as a Pre-Sales Manager Emerging Region and has never worked with the 1st and 2nd respondents. The 3rd Respondent therefore denied the allegation that Richard Bezis together with the 1st and 2nd respondents' employees Mr. Adrian Bonhomme and Francois Rothernburger interfered with a tender document. It is the 3rd Respondent's further averment that it never participated in the tendering process or the proceedings before the PPARB.

16. The 3rd Respondent's replying affidavit also reiterated the contents of the 1st and 2nd respondents' notice of preliminary objection and replying affidavit.

17. The respondents have raised jurisdiction questions which must first be addressed before the petition proper can be delved into. In

Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR; Civil Appeal No. 50 of 1989 (Mombasa) it was held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should of that issue without further ado."

18. The respondents' notice of preliminary objection dated 22nd August, 2018 has prospects of bringing these proceedings to an end. The petitioners did not respond to this particular notice of preliminary objection.

19. The latest authority on the necessity of seeking the leave of the court to effect service on a person in a foreign jurisdiction is the decision of the Court of Appeal in **Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others** [2019] eKLR; Civil Appeal No. 188 of 2018 (Mombasa). In that case, the High Court had dismissed the appellant's notice of preliminary objection seeking to strike out the respondents' case on the ground that the leave of the court had not been obtained to serve summons outside jurisdiction. The preliminary objection was dismissed. On appeal, the preliminary objection was upheld.

20. In allowing the appeal, the Court of Appeal held as follows:-

"27. It is trite that one of the tenets of the rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with actualization of this right that the provisions for summons to enter appearance and service thereof come into play. The essence of such summons is to give notice to the party sued of the existence of the suit and invite him/her to enter appearance and defend the suit if she/he so wishes. This requirement has been reinforced in a number of decisions of this Court namely, Giro Commercial Bank Ltd vs Ali Swaleh Mwangula [2016] eKLR & Babs Security Services Ltd vs Mwarua Yawa Nzao & 19 Others [2019] eKLR.

28. Additionally, summons to enter appearance also plays another pivotal role when it comes to a defendant who is outside the court's jurisdiction. The supplemental but equally important role is that it empowers the court in question to assume jurisdiction over such a party. See Order 5 Rules 21 & 22 of the Civil Procedure Rules and this Court's decision in W K, M W K (Both suing as the Administrators of the Estate of Dr. W K) & Another vs British Airways Travel Insurance & Another [2017] eKLR.

29. The manner in which such jurisdiction is assumed by the court is that firstly, the plaintiff has to seek leave of the court to serve such summons outside the court's jurisdiction. The purposes of seeking leave is to enable the court to weigh the reasons adduced by the plaintiff and determine whether a proper case has been made out for service of summons outside its jurisdiction...

30. Secondly, upon such leave being granted, the summons has to be served upon such a defendant. It is only upon such service of the summons that a court assumes jurisdiction over a foreign defendant and not a moment sooner...

31. In our view, at the heart of this matter is whether the High Court assumed jurisdiction over the appellant as discussed herein above...

33. It did not matter that the learned Judge deemed that the application was urgent. The learned Judge was required to first assume jurisdiction over the appellant and there was no short cut to that. In our view, the learned Judge by directing service of the application before determining the issue of leave placed the cart before the horse. In the end, we find that at the time the preliminary objection was heard and a decision rendered, the High Court had not assumed jurisdiction over the appellant. Thus, there cannot be any question that the appellant was not amenable to the jurisdiction of the High Court and the preliminary objection should have been allowed on this ground alone."

21. The petitioners having failed to obtain the leave of the court to serve the respondents out of jurisdiction, it follows that this court has no jurisdiction over the respondents. It is not contested that all the respondents are foreign companies.

22. It is immaterial that the respondents have appointed advocates to represent them in this matter. In **Misnak International (UK) Limited** (supra), the appellant had filed a preliminary objection but the Court of Appeal explained that the leave of the court must be sought before suing a foreign national. There is need for the court, before granting leave for service of summons outside jurisdiction, to satisfy itself that there is a case worth entertaining.

23. In the circumstances I find the respondents notice of preliminary objection dated 22nd August, 2018 merited. The objection is upheld

meaning that the petitioners' petition dated 27th September, 2017 is struck out with costs to the respondents.

Dated, signed and delivered in Nairobi this 28th day of November, 2019

W. Korir,

Judge of the High Court