



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 238 OF 2019

JOHN WAIGI MIGWIPETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

NOUVETA LTD.....2ND RESPONDENT

R U L I N G

1. In the petition dated 18th June, 2019, the Petitioner, John Waigi Migwi named Nairobi City County Government as the 1st Respondent and Nouveta Ltd as the 2nd Respondent. The 1st Respondent subsequently filed the Preliminary Objection dated 24th June, 2019 seeking to strike out the Petitioner's pleadings dated 18th June, 2019 on the grounds that:-

“1. The Notice of Motion application dated 18th June 2019 and the Constitutional Petition herein ought to be struck out and dismissed with costs to the 1st Respondent as this Honourable Court stands divested of jurisdiction pursuant to Article 227(2)(c) of the Constitution of Kenya to entertain the said process.

2. The Petitioner/Applicant has failed to invoke the mandatory laid down procedure under Section 9(1)(h) of the Public Procurement and Asset Disposal Act, 2015, to levy his claim via the Public Procurement Regulatory Authority.

3. The Petitioner/Applicant acted in breach of Section 9(4) of the Fair Administrative Action Act, and no leave has been sought prior to the inception of the Petition, necessitating this Honourable court to strike out the Notice of Motion and Petition dated 18th June, 2019.

4. No Petition has been presented by the Petitioner/Applicant to the 1st Respondent under Article 37 of the Constitution as a first port of call remedy prior to invoking this Court's jurisdiction.

5. The Petitioner/Applicant has thus failed to abide by the Doctrine of Exhaustion as laid out in various decisions of the hierarchy of Courts, including the Supreme Court of Kenya by reason of which this Honourable Court cannot entertain the proceedings

6. Pursuant to, and under Section 43 of the Leadership and Integrity Act the Petitioner/Applicant ought to have levied his claim to the persons specified in Section 43(1) of the said Act, and hence this Court cannot entertain these proceedings at all, as the said for a constitute the laid down forums conveniens.

7. The relief sought under Article 35 and 47 of the Constitution of Kenya are incapable of grant absent a formal demand/request by the Petitioner to the 1st Respondent for action and/or specified information.”

2. The 2nd Respondent supported the Preliminary Objection while the Petitioner, as expected, opposed it. The Petitioner and the 1st Respondent filed and exchanged submissions which they adopted at the hearing.

3. Through the submissions dated 10th July, 2019 and the supplementary submissions dated 7th October, 2019 counsel for the 1st Respondent submitted that this court’s jurisdiction is ousted by Section 9(1)(h) of the Public Procurement and Asset Disposal Act, 2015 which required the Petitioner to submit his claim to the Public Procurement Regulatory Authority. The decision in the case of **Owners of Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** is cited as establishing the principle that a court without jurisdiction cannot render judgment.

4. Counsel for the 1st Respondent submitted that the Public Procurement Regulatory Authority which is established by dint of Section 8 of the Public Procurement and Asset Disposal Act, 2015 is empowered by Section 9(1)(h) 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. Counsel submitted that the Petitioner did not state why he did not resort to that procedure. It was counsel’s firm view that this procedure for resolving issues touching on procurement and disposal of assets by public entities is mandatory and this court cannot override it by purporting to enforce the principle of the rule of law pursuant to Article 10(2)(b) of the Constitution. The decision in the case of **John Kakindu Makau v County Government of Makueni & 6 others [2018] eKLR** was cited in support of this proposition.

5. It was further the submission of counsel for the 1st Respondent that this petition is an attempt to oust the statutory jurisdiction of the Public Procurement Regulatory Authority and this court has no authority to do so. The decision of the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR** was cited as enunciating the principle that a court should not lightly interfere with the statutory mandate of a statutory body.

6. The second statutory provision upon which the Preliminary Objection is premised is Section 9(2) of the Fair Administrative Action Act, 2015. Counsel submitted that the Petitioner’s case violates the said provision which bars courts from reviewing an administrative action or decision unless the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any written law, are first exhausted.

7. According to the 1st Respondent’s counsel, the Petitioner has failed to demonstrate that he sought exemption under Section 9(4) of the same Act to bring these proceedings without first complying with the laid down dispute resolution mechanism provided by Section 9(1)(h) of the Public Procurement and Asset Disposal Act, 2015. Counsel for the 1st Respondent stressed that exemption by the court under Section 9(4) of the Fair Administrative Action Act, 2015 must first be obtained before the institution of proceedings. On this statement, counsel found support in the case of **Krystalline Salt Limited v Kenya Revenue Authority [2015] eKLR**.

8. The third ground cited by the 1st Respondent in support of the Preliminary Objection is that no petition has been presented to the 1st Respondent by the Petitioner pursuant to Article 37 of the Constitution. According to the 1st Respondent, this is the first remedy that should be resorted to before the court’s

jurisdiction can be invoked. Counsel for the 1st Respondent stressed that the Petitioner should have resorted to Article 37 of the Constitution which gives a right to every person to, among other things, present petitions to public authorities before rushing to court.

9. It's the position of counsel for the 1st Respondent that in the circumstances of this case the Petitioner has failed to abide by the doctrine of exhaustion hence this court cannot entertain these proceedings. Counsel urged the court to follow the decision in the case of **Peter A Imwatok (MCA) v Nairobi City County & 9 others [2018] eKLR** where a petition alleging irregular and corrupt procurement of medical insurance services by the Nairobi City County Government was struck out for want of jurisdiction.

10. The decisions in **Kimani Wanyoike v Electoral Commission, Civil Appeal No. 213 of 1995 (UR); International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR; Diana Kethi Kilonzo & another v Ahmed Isack & another [2014] eKLR; and William Kabogo Gitau v Ferdinard Ndung'u Waititu [2016] eKLR** were cited as stating and upholding the doctrine of exhaustion of alternative dispute resolution mechanisms before the courts can be resorted to.

11. Counsel for the 1st Respondent submitted that another reason why the preliminary objection should succeed is the failure by the Petitioner to present his claim to the persons specified in Section 43(1) of the Leadership and Integrity Act, 2012 prior to instituting these proceedings.

12. Counsel for the 1st Respondent urged that the Petitioner's prayers for reliefs under Articles 35 and 47 of the Constitution are premature since he has totally abrogated and overridden the provisions of Section 8(1) of the Access to Information Act, 2016 which required him in mandatory terms to first request in writing for any specific information required from the 1st Respondent. Counsel posited that the request for information is a mandatory prerequisite prior to any court process and that Section 9(1) of the Act has indeed provided for timelines within which the public entity must act. Further, that where a request for access to information is refused, a complaint of non-compliance is channeled to the Commission on Administration of Justice as provided by Section 14(1) of the said Act.

13. Counsel for the 1st Respondent contended that the Petitioner's application and petition cannot be salvaged by any kind of amendment and the solution is to strike them out for want of jurisdiction. Counsel for the 1st Respondent cited the decision in the case of **Republic v Kenya Revenue Authority Commissioner for Investigation and Enforcement Department Ex-parte Centrica Investments [2019] eKLR** as emphasizing the principle that failure to comply with Section 9(2) and (4) of the Fair Administrative Action Act, 2015 should result in the dismissal of the petition.

14. In what appeared to be an attack on the merits of the case, counsel for the 1st Respondent stated that the 2nd Respondent was incorporated on 10th February, 2017 and is wholly owned by a company known as Nouveta Holdings Limited which was incorporated on 15th August, 2018 long after the incorporation of the 2nd Respondent. Further, that the decision by the 1st Respondent to award the 2nd Respondent a contract to collect revenue violates the provisions of the Public Finance Management Act, County Government Act and the Public Procurement and Asset Disposal Act.

15. Through the submissions dated 1st October, 2019, counsel for the Petitioner urged this court to dismiss the 1st Respondent's Preliminary Objection stating that this court has jurisdiction to hear the application and the petition. The Petitioner's case is that the decision by the 1st Respondent to award the 2nd Respondent the contract to collect revenue without any competitive bidding is unlawful, illegal and in contravention of the provisions of the Constitution and in particular Article 227(1) which requires State organs and public entities to contract goods and services using fair, equitable, transparent, competitive and cost-effective systems.

16. Counsel submitted that the Petitioner is not aware of any advertisement put out by the 1st Respondent requesting for bids for collection of revenue. According to counsel for the Petitioner, the decision of the

1st Respondent therefore violated the Petitioner's legitimate expectation that before an award of any tender is made, there ought to be public participation and or consultation.

17. Counsel submitted that the decision of the 1st Respondent had denied the Petitioner the benefits and rights of a transparent, efficient, fair, equitable and cost-effective procurement process. Further, that the 1st Respondent had refused or declined to accord the Petitioner a right to a fair hearing or an explanation as to why the 2nd Respondent was contracted to collect revenue.

18. Turning specifically to the question as to whether this court has jurisdiction to hear the petition, counsel for the Petitioner agreed with the pronouncement in **Owners of Motor Vessel "Lillian S"** (supra) that a court without jurisdiction has no authority to determine a dispute before it. It was counsel's position, however, that there are conditions to be met before the general principle of exhaustion of administrative remedies can be applied to a particular case. Counsel submitted that there are exceptions to the general rule which are applicable to the case herein. Counsel urged that in order to determine whether the exception rule applies, the court is expected to undertake an extensive analysis of the facts, the regulatory scheme involved, and the nature of the interests involved and the polycentricity of the issue.

19. Counsel for the Petitioner submitted that Section 165(1) of the Public Procurement and Asset Disposal Act provides that the persons who may seek administrative review are a candidate or a tenderer, who claims to have suffered or risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the regulations under the Act. Counsel stated that Section 2 of the Act defines a candidate to mean **"a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"**, whereas a tenderer refers to **"a person who submitted a tender pursuant to an invitation by a public entity."**

20. Counsel went ahead and submitted that there was no procurement leading to the appointment of the 2nd Respondent to collect revenue for the 1st Respondent. Counsel also urged that the Petitioner does not fit the definition of either a candidate or a tenderer and could not therefore seek administrative review. Counsel relied on the case of **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex-parte National Super Alliance Kenya and 6 others [2017] eKLR** as establishing that a person who did not participate in procurement proceedings can approach the court through a constitutional petition.

21. Counsel further submitted that the 1st Respondent single-sourced the 2nd Respondent to undertake revenue collection and the Petitioner could not approach the Review Board hence the alternative remedy was unavailable to him. Therefore, the only remedy available to him was the filing of this constitutional petition. In support of this assertion counsel cited the decision of **Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 others [2016] eKLR** as having held that **"any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights."**

22. Counsel urged this court not to shirk from its constitutional mandate of ensuring the fulfillment of the right under Article 50(1) of the Constitution for any person to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal. In support of this argument, reliance was placed on the decision in **Misc. Application No 637 of 2016 Republic v Independent, Electoral and Boundaries Commission and others Ex-parte Coalition for Reform and Democracy**.

23. Counsel stressed that the petition raises issues which are outside the application of the Public Procurement and Asset Disposal Act and which requires the determination of this court through the proper interpretation and application of certain provisions of the Constitution. Reliance was once again placed on the decision in **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex-Parte National Super alliance (NASA) Kenya and 6 others [2017] eKLR** as explaining the duty of the court in determining whether there are exceptions to the exhaustion principle and for stating that the **"exception requirement is particularly likely where a party pleads issues that verge on**

Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

24. Entering into a new area, counsel for the Petitioner submitted that statutory provisions purporting to oust jurisdiction of the court should be construed strictly and narrowly. The statement of Lord Reid in **Anisminic Ltd v Foreign Compensation Commission [1969] 1 2AC 147** that “**a provision ousting the ordinary jurisdiction of the court must be construed strictly**” is cited in support of the said proposition.

25. Another defence taken up by the Petitioner in opposition to the 1st Respondent’s challenge to this court’s jurisdiction is the principle that requires the exercise of the discretion to strike out a pleading or a suit to be exercised sparingly and cautiously. Counsel relied on the case of **DT Dobie & Company (K) Ltd v Muchina [1982] KLR 1** and submitted that the petition herein is not so hopeless, as it raises several triable issues including the question whether the 1st Respondent undertook procurement as known to the Public Procurement and Asset Disposal Act in appointing the 2nd Respondent to collect revenue.

26. Counsel for the Petitioner submitted that striking out the pleadings would leave the Petitioner without remedy and this would amount to a travesty of justice. Counsel cited the decision in the case of **Republic v Returning Officer of Kamukunji Constituency & the Electoral Commission of Kenya HCMCA No. 13 of 2008** as establishing, among other principles, the principles that the High Court has the responsibility of maintaining the rule of law; that there cannot be a gap in the application of the rule of law; and that the court must at all times embrace a willingness to oversee the actions of the executive; and that the court should refuse to countenance behavior that threatens either basic human rights or the rule of law.

27. Pressing home this particular point, counsel submitted that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court, the court is perfectly within its rights to investigate the allegations. Further, that a court of justice has no jurisdiction to do injustice. The decisions in **M. Mwenesi v Shirley Luckhurst & another, Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd v Transland Shoe Manufacturers Ltd & 2 others, Civil Application No. Nai. 364 of 1999** were cited to bolster these arguments.

28. Counsel also referred to the case of **Bollinger v Costa Brava Wine Co. Ltd [1960] 1 Ch. 262** and contended that the law may be thought to have failed if it cannot offer a remedy against the deliberate acts of one person that injures another. Counsel therefore urged the court to find no merit in the 1st Respondent’s Preliminary Objection and dismiss it with costs.

29. In the supplementary submissions, counsel for the 1st Respondent pointed out that the Petitioner had in his submissions acknowledged the doctrine of exhaustion and admitted non-compliance with the doctrine. Further, that the Petitioner’s claim that he did not resort to the alternative dispute resolution mechanisms because he could not obtain the tender documents was disingenuous since he did not demonstrate that he had attempted to use the alternative dispute resolution mechanisms and was turned away.

30. Counsel urged that Section 99(d) of the Public Procurement and Asset Disposal Act, 2015 provides that the Public Procurement Administrative Review Board may grant leave to “**such other persons**”, as the Petitioner herein, to seek a review of the procurement decision and have the Review Board’s intervention in such a matter but the Petitioner did not avail himself of this statutory mechanism of intervention.

31. Counsel for the 1st Respondent contended that the decision in the case of **Elias Mwangi Mugwe v Public procurement Administrative Review Board & 5 others [2016] eKLR** had been misquoted by the Petitioner since the Court dismissed that case as unmerited for failure to follow the statutory

procedure provided by Section 99 of the Public Procurement and Asset Disposal Act, 2015.

32. Counsel further contended that Article 50(1) of the Constitution which was invoked by the Petitioner as a defence cannot waive the mandatory requirement of the doctrine of exhaustion. According to the 1st Respondent's counsel, the decision in the case of **Republic v IEBC Ex-parte National Super Alliance Kenya & 6 others [2017] eKLR** does not help the Petitioner since the Court of Appeal overturned the decision when it went on appeal as **Independent Electoral and Boundaries Commission v National Super Alliance (NASA) & 6 others [2017] eKLR**.

33. Counsel for the 1st Respondent wrapped up his reply to the Petitioner's submissions by terming as unfortunate the Petitioner's claim that the Fair Administrative Action Act is unconstitutional. According to counsel, the said Act cannot be unconstitutional as it is mandated by Article 47 of the Constitution itself.

34. Upon perusal of the submissions of the parties in this case, I reach the conclusion that the only issue for the determination of this court is the applicability of the exhaustion principle to the facts of this case. The doctrine of exhaustion of administrative remedies requires a person challenging the decision of a public entity to first pursue the remedies available by statute before seeking the intervention of the courts. The principle promotes an efficient justice system and reduces the workload on the courts. Most Acts of Parliament now provide alternative dispute resolution mechanisms.

35. The exhaustion doctrine was restated by the Court of Appeal in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** as follows:-

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed.”

36. In **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**, the Court noted that the principle has exceptions. This is what the Court said:-

“46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative

Review Board, in an earlier suit involving an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation.”

37. I will at this stage point out that although the said decision was overturned when it went on appeal as **Independent Electoral & Boundaries Commission (I.E.B.C.) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**, the holding of the High Court that it had jurisdiction to entertain the matter was not faulted by the Court of Appeal. With respect to counsel for the 1st Respondent, the law on the exceptions to the exhaustion principle remains valid as stated by the High Court. The question that needs to be answered in this case therefore is whether the Petitioner has established any exception that would deny the court the mandate to apply the exhaustion principle to his case.

38. Counsel for the Petitioner made submissions at length on why the court should not allow the 1st Respondent's Preliminary Objection. He was of the view that agreeing with the 1st Respondent will deny the Petitioner access to justice and will leave him without a remedy. It is presumed that every advocate like every judge knows the law. Whenever a client approaches an advocate with instructions, the advocate is expected to give honest advice to the client, and if a suit is recommended, it will be filed at the right forum. If the advocate files the suit before the wrong court or tribunal, the court or tribunal cannot be taken on a guilt-trip and told that party will be left without a remedy.

39. It is important to appreciate that the exhaustion principle does not strictly oust the jurisdiction of the court. What it does is to simply delay the engagement of the court's dispute resolution mandate. The objective of the principle is to first subject a dispute to a specialist organ, in most cases a tribunal.

40. Indeed any person who has taken his/her grievance through the procedure provided by the Public Procurement and Asset Disposal Act can appeal all the way to the Court of Appeal, and even to the Supreme Court, with leave or if a constitutional question is involved. The statement of Lord Reid in **Anisminic Ltd** (supra) is therefore misplaced. Ditto the principle governing the striking out of pleadings as stated in **DT Dobie & Company (K) Ltd** (supra). A person who by-passes the administrative remedies and dashes straight to court cannot turn around and claim that they have been left without a remedy if the case is struck out for failing to adhere to the exhaustion principle.

41. Before proceeding to apply the law to the facts of this case, it is important to state that Article 37 of the Constitution does not provide an alternative dispute resolution mechanism. It only provides the right to assemble, demonstrate, picket and present petitions to public authorities. It would indeed be absurd and a travesty of justice for the courts to tell those who seek justice that they should petition public authorities, who in the first place have violated their rights and fundamental freedoms, for remedies.

42. I will now proceed to apply the law to the facts of this case. In his petition, the Petitioner lists the grounds upon which he seeks relief as follows:-

“i. The 1st respondent's award of the contract of collection of revenue to the 2nd respondent contravenes the petitioner's rights of a transparent, efficient, fair, equitable and cost effective procurement process.

ii. The award is contrary to public interest, policy, arbitrary, unlawful and disregard to due process of the law.

iii. The petitioner's legitimate expectation to a fair administrative action has been threatened by the 1st respondent

iv. The award of the revenue collection contract to the 2nd respondent has created an inefficient system, massive confusion and has led to loss of revenue to the 1st respondent.

v. **The platform being used is discriminatory as payment is being done through one financial institution.**

vi. **The petitioner is therefore apprehensive that unless this honourable court intervenes, the petitioner's rights as enshrined in the constitution will continue to be infringed."**

43. The Petitioner then goes ahead to seek the following reliefs:-

"a) A declaration that the actions of the 1st respondent to award the 2nd respondent a contract for collection of revenue is unlawful, arbitrary, unreasonable, contrary to good governance and without regard to the petitioner's legitimate expectation for fair administrative action.

b) A declaration that the actions of the 1st respondent to arbitrarily award the 2nd respondent a contract to collect revenue without tendering violates the Constitution, Public Procurement and Disposal Act 2015, Public Finance Management Act and County Government Act and is therefore null and void.

c) A declaration that the award of contract for collection of revenue is unlawful, unreasonable and unconstitutional in so far as the same was single-sourced.

d) A permanent injunction restraining the 2nd respondent by themselves, their agents, its employees and/or servants howsoever from collecting revenue on behalf of the 1st respondent.

e) The honourable court do issue such other orders and give such further directions as it may deem fit and just to meet the ends of justice.

f) The costs of the petition be awarded to the petitioner."

44. Procurement and disposal of assets by State organs and public entities is governed by the Public Procurement and Asset Disposal Act, 2015. The Act and the regulations promulgated thereunder provide a complete legal regime on matters touching on procurement and disposal of public assets. It is therefore only in very rare occasions like in the **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** that the court will entertain direct complaints on procurement proceedings. The danger in allowing constitutional petitions on matters procurement is that disgruntled candidates and tenderers will deluge the court with procurement matters in the pretext of public interest litigation or protection of the Constitution. Opening the doors of the courts to such litigants will render the scheme of things as set out by the law useless. Litigation on the matters of procurement will consequently be attended by chaos and unpredictability.

45. The Petitioner claimed that the actions of the 1st Respondent violated his right to participate in the procurement proceedings. In **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** the Court of Appeal discussed at length the place of public participation in the procurement of goods and services by State organs and public entities and held that:-

"The main issue in this appeal is to determine the proper application of public participation in the context of Articles 10 (2) and 227 of the Constitution to procurement of goods and services under the Public Procurement and Asset Disposal Act, 2015...

We find and hold that subject to limited exceptions such as provided in Sections 4 (2), Sections 6, 91 (2) and Section 155 (2) in Part XII of the Public Procurement and Asset Disposal Act, 2015 and pursuant to Section 3 of the Act as read with Articles 10 (2) (b) and 227 of the Constitution, public participation is a mandatory requirement in all procurements

by a public entity...

Public participation in procurement process is achieved largely through invitation of members of the public to bid and submit tenders for procurement of goods, works or services. The invitation is ordinarily done through competitive and open advertisement to the public... A common theme when alternative procurement procedure is adopted is that the scope of public participation through competitive bidding is reduced and progressively eliminated as we approach the direct procurement method...

The progressive reduction of the scope and degree of competitiveness in alternative methods of procurement amongst other reasons lead us to find that public participation is not a mandatory requirement prior to a procuring entity making the decision to opt for direct procurement.”

46. The 1st Respondent is therefore correct that this is not a matter for prosecution through a constitutional petition. The Petitioner’s case is however unique. His pleadings appear to suggest that there was no procurement at all. He conceded that the only tender he was aware of was the one advertised in February, 2019 which invited tenders for supply, installation, configuration, customization, testing, commissioning and maintenance of an integrated city revenue management system. He averred that the advertisement did not mention anything about revenue collection. In such circumstances the Public Procurement & Asset Disposal Act, 2015 is not applicable and the remedies provide therein are not efficacious.

47. The respondents are yet to file their responses and the court cannot speculate what their defence will be. The Petitioner has made serious allegations and those allegations need to be interrogated by the court. In the circumstances of this case, I find that the Petitioner has succeeded in establishing an exemption to the application of the exhaustion principle to his case. That exemption is that the procurement of the 2nd Respondent’s services by the 1st Respondent is not one known to the law.

48. As a result of what I have stated in this ruling, it follows that the 1st Respondent’s Preliminary Objection dated 24th June, 2019 fails and the same is dismissed. The costs shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

W. Korir,

Judge of the High Court