



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CIVIL SUIT NO. 7 OF 2018

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

STEPHEN SANGA BARAWAH T/A MEDISCOPE AGENCIES.....1ST DEFENDANT

SERAH MUSYIMI2ND DEFENDANT

BARRAWAH LIMITED 3RD DEFENDANT

DAVID KISOI NDUNDA T/A DANKIES AGENCIES.....4TH DEFENDANT

TIMOTHY MALINGI KOE5TH DEFENDANT

GILBERT M.S. BAYA6TH DEFENDANT

GABRIEL MAJIWA MKARE.....7TH DEFENDANT

ALEX KITHEKA MWONGELA8TH DEFENDANT

ANDREW KITHI KOMBE.....9TH DEFENDANT

SOPHIA MNYAMANYI MWANAWIRO.....10TH DEFENDANT

RAPHAEL KIOLI MUTISO11TH DEFENDANT

BENJAMIN KAI CHILUMO12TH DEFENDANT

RIZIKI MATANO CHOGA.....13TH DEFENDANT

MWATELA MWASEWU.....14TH DEFENDANT

JUSTIN NDIRANGU NGURE.....15TH DEFENDANT

JULIUS MWAIKIZA MUNGA16TH DEFENDANT

PAUL TEIDO MWANZO17TH DEFENDANT

RICHARD POLE MWASAMBU18TH DEFENDANT

EQUITY BANK OF KENYA19TH DEFENDANT

BARCLAYS BANK OF KENYA20TH DEFENDANT

CO-OPERATIVE BANK OF KENYA21ST DEFENDANT

RULING

1. The question before me for determination is firstly: whether this court has jurisdiction to entertain the suit herein and secondly; whether there is a reasonable cause of action disclosed against the 1st and 3rd respondents. Vide a Notice of Motion dated 25th September 2018 and filed on 27th September, 2018, the 1st and 3rd respondents/applicants prayed for dismissal of the suit for lack of jurisdiction on grounds that the transaction which is the subject of this suit arose out of a procurement process which was legally conducted to completion and that only the procurement authority or procurement oversight authority can question its legitimacy and not the court. At paragraph 17 of the 1st and 3rd defendants' defence filed on 7th June 2018, they also raised the issue of lack of court's territorial jurisdiction arguing that the cause of action having arisen in Kilifi which falls within Malindi High Court, the same should be heard in Malindi.

2. The application is filed pursuant to Article 227 of the Constitution, Sections 27 and 28 of the Public Procurement and Asset disposal Act No. 33 of 2015, Order 2 rule 15 (1) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. It is premised upon grounds on the face of it and affidavit in support sworn by Stephen Sanga Barawah on the 25th September 2018.

3. It is the 1st applicant's case that sometime in April 2015, while trading in the name of Mediscope Agencies and as director of Barawah Ltd (3rd applicant), he won a restricted tender award for the supply of 6000 pieces of long lasting insecticide treated nets to Kilifi County Government. That he duly supplied the said nets and was paid Kshs.8,820,000 being the contractual sum. He further averred that on 26th May 2015, he was again issued with another local purchase order to supply a similar amount of nets valued at the same amount under similar arrangements which they supplied and payment made on 24th September 2015.

4. It is the applicant's contention that the entire process was done overboard and that if there was any complaint regarding the tendering process, the same should have been referred to the Public Procurement Administrative Review Board and not the court which lacks jurisdiction abinitio. The applicants therefore prayed for orders dismissing the suit against them, lifting of the orders freezing the 3rd applicant's bank account and that the 3rd applicant's money amounting to Kshs. 307,000/= held in the frozen account be released to them forthwith.

5. In response, the respondent (plaintiff) filed grounds of opposition arguing that the court has jurisdiction to entertain the suit under Section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act No. 22/2011 which provides the plaintiff the mandate to institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures. The respondent further asserted that claims of fraud, corruption, unjust enrichment and legality of procurement/tendering process which are matters of fact should be ventilated before court and a determination made on merit.

6. During the hearing, counsels agreed to canvass the application orally. Mr. Otury counsel for the applicants basically adopted the averments contained in the affidavit in support of the application. It was Mr. Otury's argument that a party aggrieved to a procurement process must first exhaust the laid down mechanism through other mandated state organs for redress e.g. public procurement and administrative oversight authority before resorting to court.

7. Learned counsel urged the court to find that jurisdiction is only acquired after the statutorily mandated agencies would have played their role. Mr. Otury questioned how the plaintiff would challenge the legality of the tendering process long after its completion and payment made without appealing to the necessary bodies as provided under the Procurement Act.

8. Mr. Mbaka for the plaintiff/respondent reiterated their grounds of opposition filed on 12th October 2018 stating that this court has jurisdiction and that the plaintiff has powers to institute proceedings for recovery of illegally acquired public funds.

9. According to the plaintiff, there was no lawful contract between the first applicant and the county government for the supply of nets as the bid documents tendered by the 1st applicant were missing. That the purported tender was not budgeted for in the county government of Kilifi work plan and even the amount paid was for goods not supplied inclusive of VAT thus fraudulent and corrupt activities. That all the payments were made contrary to regulations 6 (1) &(2),7,8,9 and 10 of the Procurement and Disposal (County Government) regulations 2013, Sections 31 (1) (c) 40(1), 42(1), 64, 67 (1) and 68 of the Public Procurement and Asset Disposal Act 2005. That as a result of the corrupt and fraudulent activities orchestrated by the County Government officials and Ifmis staff at Central bank, the government lost Kshs.26,460,000 being the total sum paid for four similar transactions irregularly awarded to the applicants.

10. I have considered the preliminary objection herein and rival submissions by both counsels. It is incumbent upon this court to make a determination whether it has jurisdiction to entertain the suit or not and whether there is a reasonable cause of action disclosed.

11. It is my humble duty to determine the Preliminary Objection which if allowed will dispose the matter in totality. What is a preliminary objection and its consequence if upheld? A preliminary objection is defined in the Black law dictionary 10th Edition as:

“in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary”.

12. In the case of **Mukhisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (1969) E.A. 969**, the court had this to say:

“.....a Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the either side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

13. A similar position was held by the Supreme Court in the case of Hassan Ali Joho and Another vs Suleiman Shabal and 2 others (2014) eKLR where the court held:

“..... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

14. The applicants herein are relying on two points of law to have the suit dismissed inter alia, lack of jurisdiction and absence of reasonable cause of action. Where a court lacks jurisdiction, there is no capacity to act or even attempt to make any pronouncement on the matter. The court is simply bound to fold its hands and dismiss the suit as the artery and therefore the life in litigation process is punctured and no further movement can be sustained.

15. This position was clearly captured in the case of Owners of Motor Vessel “Lillians” vs Caltex Oil (Kenya) Ltd (1981) KLR where Nyarangi JA stated that:

“I think 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 make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

16. Jurisdiction is a creation of the constitution or statute hence a court cannot acquire jurisdiction where it is not provided for. **(See in the matter of Interim Independent Electoral Commission (2011) eKLR.** Article 165(3) provides that subject to Clause 5, the High Court shall have unlimited jurisdiction over civil or criminal matter.

17. Under Section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act, the commission is empowered to institute or conduct proceedings in court for purposes of recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures. To operationalise this mandate, the commission is empowered to institute such proceedings before the high court pursuant to Section 56 of the Anti Corruption and Economic Crimes Act. To that extent the high court can assume jurisdiction to hear and determine matters related to procurement process where allegation of corruption and related dealings are alleged.

18. Does failure to prosecute the perpetrators of corrupt dealings in procurement process in question bar the commission from instituting civil proceedings? The answer is no. It is trite that both criminal and civil proceedings can proceed separately or concurrently if they arise from related transaction.

19. How does failure to refer the complaint to the Public Procurement Administration Review Board dislodge High Court’s jurisdiction? The functions of the Public Procurement Review Board are well set out in Section 28 of the Public Procurement and Asset Disposal Act No. 33 of 2015 (PPDA). Section 28 (1) of the PPDA principally entails reviewing, hearing and determining tendering and asset disposal disputes and to perform any other function conferred to the review board by the Act. Under Section 167 (4), the Review Board has no power over a signed contract under Section 135 of the Act or on choice of procurement method.

20. In the instant case, the tender in question was restricted meaning it was single sourcing hence no competitive bidding. The review board would not then have jurisdiction over it. Section 174 of the PPDA provides that a request for review is in addition to any legal redress. Regarding the tender in this case, there was no third party affected to lodge a dispute challenging the award. If there was a dispute, then the right procedure would have been a complaint lodged with the review board before coming to court.

21. The situation in this case is different. This is because, there is no 3rd party involved in the restricted tender process hence chances of a complaint arising was not there. The people who raised the tender documents are the same people who processed payment. They would not have complained against themselves in case of any irregularity or illegality. It then follows, payment would be made without being noticed hence no dispute to be preferred to the review board.

22. The key question is, what would happen where members of staff collude to irregularly raise a tender, award through single sourcing and then pay? Will that mean that the tender is regular or legal? What will happen when the commission discovers that such an illegality or irregularity had been committed and the perpetrators decided to keep quiet? Obviously the commission will act by way of instituting proceedings for recovery of the lost money. The commission can pursue both civil and criminal proceedings concurrently or at different times.

23. This was not a case for the review board because there was no dispute during the award process. The process is already complete, signed and payment made hence the review board’s mandate is overtaken by events. The commission cannot reverse the clock to undo a contract that has already been executed. The commission therefore is properly before court for redress. In any event High Court jurisdiction is not limited and there will be no prejudice to any party in hearing this case before this court. That does not mean that the high court can assume jurisdiction as a matter of principle where there are clearly prescribed mechanisms of legal redress by either recognised institutions or organisations such as the review board before resorting to court. For those reasons, I am satisfied that this court has jurisdiction to entertain the suit.

24. Does the suit disclose any cause of action? In the case of D.T. Dobie & Company (Kenya) Ltd vs Joseph Mbaru Muchina and another (1980) eKLR, the court of appeal held as follows:

“no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

Unless a case is outrightly hopeless, a court should sparingly resort to dismissal of a suit on grounds of lack of a reasonable cause of action.

25. In this case, the plaintiff has raised very pertinent triable issues and questions challenging the legality of the tendering process, non delivery of goods, illegal payment without even deducting VAT and raising a tender when there was no provision for it in the budget and work plan. I find this to be serious issues of fact which can only be ventilated when parties are given a hearing and therefore a party cannot be prematurely shut out of the corridors of justice. To allow such would amount to a travesty of justice.

26. Regarding lack of territorial jurisdiction as raised in paragraph 17 of the defence, this court has unlimited jurisdiction to hear criminal and civil suit from all over the country. However, the element of territorial jurisdiction is for convenience purposes which are complementary to Article 165 (2) of the Constitution.

27. The authority to have Nairobi High Court Anti-Corruption Division hearing all corruption related cases in Nairobi is solely an administrative issue where the Chief Justice vide gazette notice No. 10263 of 2016 directed as such. I am alive to the fact that there is a pending suit challenging the directive hence it will not be necessary to make any substantive determination on that issue. Suffice to say, the High Court has unlimited jurisdiction to hear any civil or criminal proceedings hence the applicants will not suffer any prejudice by this court hearing the suit herein.

28. For the above reasons stated, it is my finding that the preliminary objection herein is not merited as the same has failed to meet the threshold required hence dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF OCTOBER, 2018.

J.N. ONYIEGO

JUDGE