



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**PETITION NO. 8 OF 2017**

**IN THE MATTER OF ARTICLES 23, 258, 259 & 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2, 10, 19(2), & 3, 20,21, 23, 35, 46, 47, 159, 165, 201, 232, 258, AND 259 REGARDING PROTECTION OF RIGHT TO ACCESS TO INFORMATION, CONSUMER RIGHTS AND THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT NO. 33 OF 2015 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL (COUNTY GOVERNMENT) REGULATIONS, 2013**

**BETWEEN**

**ALOICE OGWENO AGER.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT**

**GEORGE AKONGO ANYONG'A.....2ND RESPONDENT**

**CORECTEC SYSTEMS AND SOLUTIONS LTD.....3RD RESPONDENT**

**RULING**

The subject of this ruling is the notice of motion dated 24th April 2017. The facts of this petition, according to the petitioner herein, is that he has established that the 2nd respondent has awarded a tender for installation of ERP for Communication Information Technology (CIT) Department in the County Government of Kisumu vide CONTRACT NO. CK/CIT/ERP/2016-2017/01-INSTALATION OF ERP

for the sum of Kshs. 165,346,516.00 vide notification of award dated 20.3.17 without adhering to the provisions of the Public Procurement and Assets Disposal Act 2015 as well as the Public Procurement and Disposal (County Government) Regulations, 2013 and that payment for the same was scheduled to be made on 21.4.17. According to the petitioner, his interest in the tender was informed by their understanding that allocation of funds that have not been budgeted for raises questions as to the legality of the contract, compliance with procurement laws and that the contract involves an huge amounts and the tax payers of Kisumu County stand to suffer economic loss by a contract that has been procured illegally.

The petitioner consequently seeks the following order:

**That pending the hearing and determination of the petition; the Honourable Court do issue a conservatory order restraining the 1st and 2nd respondents, through themselves, their appointed agents, servants, employees and/or officers from releasing to the 3rd respondent any monies on account of TENDER FOR CONTRACT NO. CK/CIT/ERP/2016-2017/01-INSTALATION OF ERP**

The application is supported by an affidavit sworn by the applicant on 24.4.17 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of notification of tender for **CONTRACT NO. CK/CIT/ERP/2016-2017/01-INSTALATION OF ERP**, an email from Minister of CIT, an illegible letter signed by Chef Finance Officer and an internal Memo from the Deputy Governor Kisumu County marked AOA 1 to 4 respectively.

The 1st and 2nd respondents on 26.4.17 filed their grounds of opposition raising two issues.

- a. That the application is misconceived , incompetent, bad in law, incurably defective, frivolous and an abuse of the process of court
- b. The court lacks the necessary jurisdiction to determine this petition by virtue of Section 96 and 100(2) of the Public Procurement and Assets Disposal Act 2015

The 1st and 2nd respondents relied on *Okiya Omtatah Okoiti & another v National Transport & Safety Authority & 2 others [2016] eKLR.*

Mr. Maganga for the applicant submitted that this was a public interest application brought under Article 258 of the Constitution and that the court should give conservatory orders to protect breach of public interest. Mr. Amondi for the 1st and 2nd respondent submitted that the applicants had failed to disclose to the required degree of precision the manner in which the enumerated provisions of the Constitution therein have been infringed and that the petition herein does therefore not disclose a *prima facie* case to warrant the grant of conservatory orders sought in the application. It was further submitted that the applicant has not demonstrated that he had sought information regarding the tender from the 1st respondent, and that the same has been denied and that the application was therefore premature. It was also submitted that the applicant has not established that the 1st respondent acted outside is scope of authority and further that the court lacks jurisdiction to determine this matter by virtue of Section 96 and 100(2) of the Public Procurement and Assets Disposal Act 2015.

I have considered the notice of motion in the light of the supporting affidavit and annexures, the grounds of opposition and on the submissions by both counsels.

Since the 1st and 2nd respondents raised the issues regarding this Court's jurisdiction, it is important that the said issue be resolved first. In *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1:*

**"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 a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

Similarly in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the same Court of Appeal expressed itself as follows:

**“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and without it, a court has no power to make 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 downs 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. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”**

On the same issue, the Supreme Court in the case of Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”**

Section 96 and 100(2) of the Public Procurement and Assets Disposal Act, 2015 cited by the 1st and 2nd respondents relate to advertisement of tender and design competition procedure and not with jurisdiction.

The crucial section that touches on jurisdiction in the Public Procurement and Assets Disposal Act, 2015 is Section 167 which provides:

**(1)Subject to the provision of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering,loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process,or disposal process as in such manner as may be prescribed**

The petitioner herein was neither a candidate nor tenderer as defined under the Act and could therefore not invoke the jurisdiction of the Board under section 167 for the resolution of this dispute. Taking into account the issues for determination herein, I find that this Court’s jurisdiction is not limited and/or restricted by the Public Procurement and Assets Disposal Act, 2015 and that this court has jurisdiction to determine the issues raised herein.

Article 258 (1) of the Constitution also grants the Petitioner the right to institute the Petition. This Article provides thus;

**“Every person has the right to institute court proceedings, claiming that this Constitution has been violated, or is threatened with contravention”.**

The Constitution is therefore clear and grants every citizen a right of access to the High Court where there is an allegation of infringement of the Constitution. That is why the Court of Appeal in the case of **Tononoka Steels Limited vs Eastern and Southern Africa Trade Development Bank- Civil Appeal No. 255 of 1998** stated as follows regarding access to Courts;

**“The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya”.**

In the result, I find that this Court has jurisdiction to entertain the petitioner’s claim.

The second issue for determination is whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

Article 227(1) of the Constitution provides that

**“When a state organ or other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.**

Article 227(2) then empowers Parliament to prescribe a framework within which policies relating to procurement and disposal of assets shall be implemented. Pursuant to this mandate, Parliament enacted the Public Procurement and Disposal Act, 2015 and the Public Procurement and Disposal (County Government) Regulations, 2013.

Section 96 of the Public Procurement and Disposal Act, 2015 provides:

**(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.**

**(2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders’ portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.**

**(3) In addition to subsection (2) a procuring entity shall—**

**(a) use Kenya’s dedicated tenders portal or any other electronic advertisements as prescribed ; and**

**(b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.**

**(4) In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.**

**(5) Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national advertising, the procuring entity shall advertise using the options available in subsection (3) (a) and (b).**

On the other hand, Regulation 10 of the Public Procurement and Disposal (County Government) Regulations, 2013 provides:

**A county procuring entity shall ensure that it complies with the provisions of the Act, all the Public Procurement and Disposal Regulations, 2006, these Regulations, the directions of the Authority and the Administrative Review Board in respect of its procurement and disposal activities.**

The Petitioner contends *inter alia* that the procurement of the tender for installation of ERP for Communication Information Technology (CIT) Department in the County Government of Kisumu vide **CONTRACT NO CK/CIT/ERP/2016-2017/01-INSTALATION OF ERP** for the sum of Kshs. 165,346,516.00 was in direct violation of the Provisions of the **Public Procurement and Disposal Act** and Public Procurement and Disposal (County Government) Regulations, 2013 for failure by the Respondents to take it through a competitive bidding process.

The allegation that in awarding the tender the subject of the legal proceedings before the Court, the relevant constitutional provisions were not adhered to, if true may justify the filing of a constitutional petition. From the foregoing, it is my finding that the issues raised in this petition raise *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage especially because the 1st and 2nd respondent have not shown that the invitation to tender was brought to the attention of those who may wish to submit tenders by an advertisement in the manner prescribed in the Act.

Article 23 of the Constitution provides:

**(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.**

**(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**

A strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In this case, the violation of fundamental rights complained of are the right to information, consumer rights and fair administrative action under Articles 35, 46 and 47 of the Constitution.

Apart from the fact that the Petitioner's *locus* seems to be derived from the provisions of Article 258 of the Constitution which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with contravention, the petitioner has not pointed out with reasonable exactitude how the rights under Article 35, 46 and 47 of the Constitution of himself or of others have been denied, violated or infringed or are threatened in order to justify the grant of conservatory orders. In my view, an applicant for conservatory order under Article 23(2) (c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that his right or fundamental freedom in the Bill of Rights have been denied, violated or infringed, or is threatened.

The petitioner contends that the public interest dictates that the orders sought be granted. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional; that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3) (c) of the Constitution.

For the reasons I have outlined, I find that the petitioner does not merit the orders sought. The notice of motion dated 24th April 2017 is considered and found to have no merit and it is disallowed. Each party shall bear its own costs.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2017**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk Felix

Appellant Mr.Maganga.

1st and 2nd Respondents N/A

3rd Respondent N/A