



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO. 241 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 38, 47, 48, 50, 88, 159 AND 165 OF  
THE CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES 227 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33  
OF 2015**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006**

**AND**

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

**AND**

**IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE  
REVIEW BOARD DATED 19<sup>TH</sup> DAY OF MAY 2017**

**AND**

**IN THE MATTER OF TENDER NO. IEBC/48/2016-2017**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

CECIL JAMES OYUGI.....PETITIONER

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD .....1<sup>ST</sup> RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION .....2<sup>ND</sup> RESPONDENT

**JUDGEMENT**

**Introduction**

1. This Court by an order issued on 13<sup>th</sup> February, 2017 in Misc. Application No. 637 of 2016 – **Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy** – which decision was confirmed by a majority judgement of the Court of Appeal, I issued the following orders:

- 1) **An order of certiorari removing into this Court for the purposes of being quashed the decision of the 1<sup>st</sup> Respondent to award Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited of Dubai which decision is hereby quashed.**
- 2) **The 1<sup>st</sup> Respondent is at liberty to restart the tender process for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers and the same be done in compliance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws.**
- 3) **Having granted an order of certiorari, it is not necessary to grant the order of prohibition in the manner sought'**
- 4) **I however decline to issue the order sought against the 2<sup>nd</sup> Respondent.**
- 5) **Being public interest litigation, each party will bear own costs of these proceedings.**

2. Pursuant to the said orders the 2<sup>nd</sup> Respondent herein commenced what in its view was a procurement process in compliance with the said decision. However midway through the process it seems to have ran into problems when the 3<sup>rd</sup> Respondent herein commenced proceedings in the nature of a request for review before the 1<sup>st</sup> Respondent challenging the manner in which the process was being carried out substantially on the ground that the process was not in accordance with the provisions of the ***Public Procurement and Asset Disposals Act*** as read with Article 227 of the Constitution.

3. At the hearing of the said request certain objections were raised by *inter alia* the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents herein and all but one were dismissed by the 2<sup>nd</sup> Respondent. Accordingly, the 1<sup>st</sup>

Respondent allowed the Request for Review, declared the entire process commenced by the Procuring Entity in respect of the Tender No. IEBC/48/2016-2017 incurably flawed and declared the same void and proceeded to terminate the same. It further proceeded to direct the 1<sup>st</sup> Respondent to re-tender and procure afresh the materials the subject of the tender using such method as it may consider appropriate taking into account the time left between now and 8<sup>th</sup> August, 2017 and all such other factors as it may consider necessary. The 2<sup>nd</sup> Respondent was further directed to prepare a fresh tender document that sets out clear and unambiguous provisions and criteria taking into account the nature of the procurement in question.

4. The petitioner herein who is aggrieved by the said decision but who was not a party to the said proceedings has challenged the said decision in these proceedings

5. It was clear from the Petitioner's case as presented before this Court that the Petitioner agrees that the procurement process which was commenced by the 2<sup>nd</sup> Respondent was flawed. His beef with the decision however was that the 3<sup>rd</sup> Respondent not being a candidate, bidder or tenderer had no capacity to move the Board. The 1<sup>st</sup> Respondent however found that based on the material placed before it, the 3<sup>rd</sup> Respondent qualified as a candidate and a bidder. In these proceedings, **Mr Kenyatta** however submitted that the 2<sup>nd</sup> Respondent by allowing the 3<sup>rd</sup> Respondent to purchase the bid documents deliberately set out to frustrate the whole process and give the 3<sup>rd</sup> Respondent an opportunity to challenge the procurement process.

6. If I understood **Mr Kenyatta** learned counsel for the Petitioner properly, the 3<sup>rd</sup> Respondent was, whether properly or not permitted to qualify as a candidate in the said process. It cannot therefore be successfully argued that it had no *locus* to file the proceedings before the 1<sup>st</sup> Respondent.

7. I have considered the analysis by the 1<sup>st</sup> Respondent on the issue and I respectfully find that the 1<sup>st</sup> Respondent in its well-reasoned decision arrived at the correct finding on the issue and cannot be faulted

8. It was however contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents set out to frustrate the procurement process in order to justify single sourcing for the same. As rightly submitted by **Mr Bitta** for the 1<sup>st</sup> Respondent, no serious allegation was made against the 1<sup>st</sup> Respondent in this regard and I am unable find to fault the 1<sup>st</sup> Respondent.

9. With respect to the 2<sup>nd</sup> Respondent, whereas I agree that the manner in which it set out to procure the materials in question leaves a lot to be desired as was found by the 1<sup>st</sup> Respondent, to contend that it intends to single source for the material in question is at this stage speculative and amounts to conjecture. This Court, where it is alleged that there is a threatened violation of the Constitution, which is what I understood the Petitioner to be saying, must rely on concrete grounds and is not expected to rely on mere conjectures. In other words the Petitioner must place before the Court facts which show that there is a probability as opposed to mere possibility of such contravention.

10. As it is admitted that the process commenced by the 2<sup>nd</sup> Respondent was flawed, even if I was to agree with the Petitioner, the only option would be to make the same orders as were given by the 1<sup>st</sup> Respondent which were a reflection of the orders of this Court issued in Miscellaneous Application No. 637 of 2016.

11. In other words, I agree with **Mr Kamau Karori** for the 2<sup>nd</sup> Respondent that this petition was clearly unnecessary and ought not to have been instituted at this stage. If and when the 2<sup>nd</sup> Respondent proceeds in a manner that violates the law and the Constitution a party aggrieved would be at liberty to move the 1<sup>st</sup> Respondent and the Court appropriately. For now that stage has not been reached and this Court cannot be expected to cross a bridge before arriving thereat.

12. For now let the IEBC carry out its mandate as provided by the law and as directed by this Court in the

Miscellaneous Application No. 637 of 2016 and by the Public Procurement Administrative Review Board.

13. I must however remind the 2<sup>nd</sup> Respondent of the provisions of Article 129 of the Constitution that executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. The 2<sup>nd</sup> Respondent is therefore not expected to deliberately set out to frustrate the will of the Kenyans in an elective process by undertaking its work in a shoddy manner.

14. In its decision the 1<sup>st</sup> Respondent expressed itself as hereunder:

**“The process was to say the least a sham and embarrassing and was conducted with such casualness, and lack of diligence at the level that leaves the Board wondering whether the Procuring Entity’s procurement department appreciated the enormity of the assignment and the gravity of the matter at hand.”**

15. I cannot agree more. The 2<sup>nd</sup> Respondent seems to have forgotten that in 2008 this Country was nearly torn apart due to what was perceived to be a flawed manner in which the elections were conducted. Kenyans expect nothing but the best from the 2<sup>nd</sup> Respondent this time round.

16. In the premises whereas I dismiss the Petition, as the 2<sup>nd</sup> Respondent cannot escape the blame, I decline to award costs of these proceedings.

17. Orders accordingly.

**Dated at Nairobi this 27<sup>th</sup> day of May, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Mwangi for the Petitioner***

***Mr Bitta for the 1<sup>st</sup> Respondent***

***Mr Kamau Karori with Miss Odari for the 2<sup>nd</sup> Respondent***

***Mr Kiprono for the 3<sup>rd</sup> Respondent***

***CA Mwangi***