



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CONSTITUTIONAL PETITION 1 OF 2017

POKOT CONTRACTORS ASSOCIATION.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF WEST POKOT.....RESPONDENT

RULING

The petitioner filed a petition in this court dated 10th January, 2017 seeking the following reliefs:-

1. A declaration that the construction of a tourist hotel (tender number WPCT/115/2014/2015), construction of an office block for the department of Education and ICT (tender number WPCT/117/2014/2015) and the construction of a tuition block for Agriculture Training College in Keringet (tender number WPCT/122/2014/2015) is illegal and unconstitutional.

2. A permanent order of injunction be issued to restrain the respondents by themselves, or their agents, servants or personal assigns from carrying on with the construction of tourist hotel (tender number WPCT/115/2014/2015), construction of an office block for the Department of Education and ICT (tender number WPCT/117/2014/2015) and the construction of tuition block for Agriculture Training College in Keringet(tender number WPCT/122/2014/2015).

The said petition was filed together with a Notice of Motion seeking temporary order of injunction ex parte pending the hearing and final determination of the application; and of the petition.

The Notice of Motion and the petition challenges the propriety and legality of the tendering process carried out by the respondent in the stated construction projects.

The respondent on 8th day of March raised a preliminary objection to both the petitioner's application and the petition, on the ground that the court lacks requisite primary jurisdiction to hear and determine the application and the petition.

The preliminary objection was argued on 19.10.2017 and was not opposed. Mr. Kenei for the Respondent argued that tendering process disputes, falls under **section 27 of the public Procurement and Assets Disposal Act**, of which grants the power to hear disputes to the board. The court only intervenes where there's contest of the board's decision, and does it by way of Judicial Review. He averred that the petitioner should have gone to the Board and not the court of which lacks jurisdiction.

I have looked at **Public Procurement and Asset Disposal Act number 33 of 1975. Section 8(1)** is about

establishment of the Public Procurement Regulatory Authority of which functions includes under **section 9(1)(h)**, to investigate and act on complaints receive on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

Section 27(1) is about Establishment of the Public Procurement Administrative Review Board. Its functions are indicated under **section 28(1) as follows:-**

- a) Reviewing, hearing and determining tendering and asset disposal disputes; and***
- b) To perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***

In the cited case, by the respondent, of ***Republic versus Kajiado Lands Dispute Tribunal and others ex-parte Joyce Wambui and Another (2006)1EA 318***, the court held that the High Court should not entertain those matters that other inferior tribunals has jurisdiction over but they have failed to exercises such powers unless the issue has come before the court as a way of judicial review.

In another yet relied on authority, of ***Republic versus Public Procurement Administrative Review Board and Another ExparteSelexSistemiIntegrati (Nairobi HCMA No. 1260 of 2007[2008] KLR 728)***, the court indicated that where a given statute creates ways in which a dispute can be resolved, the court can only sit in the same matter by way of a Judicial Review or by way of an appeal from the decision made by the inferior tribunal.

From the foregoing considerations it's clear that the **Public Procurement and Asset Disposal Act Number 33 Of 1974**, establishes mechanisms under which disputes arising from tendering process should be resolved. The petitioner did not utilize the availed mechanisms before coming to court. He came by way of a petition and not Judicial Review or appeal as should be the case if dissatisfied with the finding of the inferior tribunal, in this case the public procurement regulatory authority or the public procurement administrative review board. The petition and the Notice of Motion are therefore wrongly before this court, of which lacks jurisdiction to entertain them. I accordingly find the preliminary objection raised, merited. The petition and the application are struck out with costs to the respondent.

S. M. GITHINJI

JUDGE

16.11.2017