



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

PETITION NO. 257 OF 2015

**IN THE MATTER OF THE MATTER OF ARTICLES 2,10,19,22,227 AND 260 OF THE
CONSTITUTION OF KENYA AND**

IN THE MATTER OF THE PUBLIC PROCUREMENT & DISPOSAL ACT, 2005

BETWEEN

GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY

LTD.....PETITIONER

VERSUS

THE ATTORNEY GENERAL1st RESPONDENT

CABINET SECRETARY IN CHARGE OF TREASURY.....2ndRESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....3rdRESPONDENT

JUDGMENT

Introduction

1. The Petitioner, a co-operative society with limited liability duly registered under the Co-operative Societies Act (Cap 490) of the Laws of Kenya, filed the instant Petition contesting the validity and constitutionality of Section 3 of the Public Procurement & Disposal Act, 2005 (“**the PPDA 2005**”) and various circular letters issued by the Respondents between 29 November 2011 and 15 January 2015. The said statutory provisions as well as the circular letters include the Petitioner, amongst other co-operative societies, as a public entity for purposes of the provisions of Article 227 of the Constitution as well as other relevant public procurement and disposal of assets laws and regulations. The Petitioner contends that such inclusion has inhibited the Petitioner’s right to freedom of contract and is discriminatory.
2. The Petitioner consequently sought no less than sixteen reliefs, including a rather rhetorical declaratory relief that, the Respondents being State organs are bound by various provisions of the Constitution.
3. The Petition was opposed by the Respondents.

Parties and Background facts

4. The 1st Respondent is the chief legal advisor of the government and has been sued pursuant to Article 156 of the constitution whilst 2nd Respondent is part of the executive arm of the government. The 2nd Respondent is in charge of the National Treasury, which is responsible for the implementation and promotion of Article 227 of the Constitution as to public procurement of goods and services.
5. The 3rd Respondent is a body corporate headed by a director general. The 3rd Respondent is under a statutory compulsion to ensure that the provisions of the PPDA ,2005 and all regulations made thereunder are all complied with. The 3rd Respondent also enforces regulations under the PPDA, 2005.
6. The facts leading to the Petition are largely uncontested. The fulsome petition and the affidavit sworn by Charles Ndichu Mworira on 18 June 2015 in support of the petition, detail the facts as follows.
7. The Petitioner has been in existence for over fifty years. It was registered under the Co-operative Societies Act (Cap 490) in 1961. The members are mainly dairy farmers. It currently commands a membership of over 20,000 members. The Petitioner's turnover for the year 2014 was nearly Kenya Shillings Six and half billion. It owns a milk processing plant where milk produced by the members is delivered daily. The members are however paid the proceeds for the milk processed and milk products on a monthly basis. The Petitioner retains some of the proceeds as its earnings. The Petitioner's operations are funded by the retained earnings and commercial borrowing.
8. Prudently, the Petitioner is continuously involved in capital and operational expenditure as it seeks to expand its production capacity and profits as well as respond to market demands and competition. The Petitioner also obtains goods and services from third parties, ordinarily through competitive tenders and bids. The Petitioner spends at least a couple of billions of shillings in both capital and operational or recurrent expenses every year.
9. In 2013 , the 2nd Respondent issued a circular. It was dated 29 September 2013. It was directed to among others, all co-operative societies. The circular sought to implement a presidential directive that 30% of all tenders by the government and other public bodies be awarded to the youth, women and other persons living with disability (together "**the disadvantaged groups**").
10. The circular letter drew the concerned entities' and addressees' attention to Legal Notice No.114 of 2013. The circular letter read partly as follows:

"H. E. the President directed that 30% of all Government Tenders be awarded to youth, women and Persons with Disabilities. Following this directive, the Public Procurement & Disposals (Preferences and Reservations) Regulations were amended vide Legal Notice No. 114 of 2013. Regulation 31(1) of the referenced amendment stipulates that 30% of all Government Tenders are to be awarded to this target group.

The regulations are in line with Article 227 of the Constitution of Kenya 2010 which require state organs or any other public entity to be fair in contracting for procurement of public goods and services, including the development of provisions to designate categories of preferences in allocation of contracts , and the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination."

11. In addition the circular letter also directed the registration by all entities of the disadvantaged groups dealt with. It also directed that specified tenders be reserved and preferred for the disadvantaged groups. The circular exhorted the application and strict adherence to the PPDA, 2005 and the regulations there under. The Petitioner like all other co-operative societies was expected to strictly adhere to the circular as well as the PPDA, 2005.
12. In January 2014, the Petitioner was again served with two circular letters. These originated from the 3rd Respondent. They were dated 29 September 2011 and 29 January 2014. Once again the circular letters included and reiterated the fact that co-operative societies were some of the entities bound by the provisions of the circulars as well as the PPDA 2005. The circular letter of 29 January 2014 reiterated the 30% rule as applicable to the disadvantaged groups. Amongst other requirements, the circular letter reminded the Petitioner alongside other co-operative societies of the mandatory reporting on procurement to the 3rd Respondent.

13. Bothered by the directive that it was to comply with the provisions of the PPDA 2005 as well as the various circulars issued by the 3rd Respondent, the Petitioner had on 28 October 2013 written to the 3rd Respondent. The Petitioner had simply sought clarification as to whether the Petitioner was a public entity, in view of the fact that the Petitioner never drew any government funds. No riposte came from the 3rd Respondent.
14. On 26 February 2015, the Petitioner again wrote to the 3rd Respondent. The Petitioner sought clarification on various issues, including issues it had raised in its letter of 28 October 2013. Once again, no response was forthcoming from the 3rd Respondent.
15. All the while, the Petitioner had been endeavoring to comply and had indeed complied with the provisions of the PPDA 2005 as well as all the regulations and circular letters.
16. In 2014, a legislative Bill had been tabled in Parliament. The Bill sought to promote the provisions of Article 227 of the Constitution. It now excluded co-operative societies from the definition of public entities for purposes of both the legislation and the Constitution. It is known as the Public Procurement and Disposal of Assets Bill, 2014.
17. It was the 3rd Respondent's lack of response to the Petitioner's inquiries as well as the Respondents' continued insistence that the PPDA 2005 and the regulations thereunder, including any circular letters, continue to apply to the Petitioner by virtue of Section 3 of the PPDA 2005 that prompted the instant Petition.

The Petitioner's case

18. The Petitioner's case is contained in the two affidavits of Charles Ndichu Mukora. I will, at the risk of being indicted for over-simplifying the Petitioner's case, sum it up as follows.
19. The Petitioner contends that it is not a public entity for purposes of Article 227 of the Constitution. Consequently legislation, regulations and circular letters intended to promote Article 227 of the Constitution should not be made applicable to the Petitioner. The Petitioner's main assertion in this respect is that the Petitioner does not receive any funds from the government for it to rank as a public entity or State organ.
20. The Petitioner further contends that by virtue of the Respondents' treatment of co-operative societies including the Petitioner as public entities, the Petitioner's basic rights as well as constitutionally guaranteed rights and freedoms have been violated. The Petitioner states that it has been denied the right to freedom of contract as envisaged and protected under Article 19(2) and that the Petitioner's rights under Article 40 have also consequently been severely and unconstitutionally restricted. The Petitioner also states that it has been discriminated against contrary to Article 27 of the Constitution in so far as the Respondents have failed to apply the public procurement laws equally to the Petitioner's competitors.

The Respondents' case

21. The Respondents' case can be pulled together from the various paragraphs of the affidavit of Maurice Juma sworn in reply to the Petition. The affidavit was filed on 30 July 2015.
22. The Respondents contend that Section 3 of the PPDA 2005 has expressly defined a "public entity" to include co-operative societies registered under the Co-operative Societies Act (Cap 490) Laws of Kenya. The Respondents contend that the government regulates and controls co-operative societies through the Registrar of Societies as well as the Commissioner of Co-operatives. Such regulation, it is contended, strengthens the position that co-operative societies are public entities. The Respondent further states that the government provides consultancy services as well as technical officers and development policies to co-operative societies, effectually, making them public entities.
23. The Respondents finally contend that the PPDA 2005 is in compliance with Article 227 of the Constitution and further that the Respondents have not violated the Petitioner's rights or freedoms as alleged or at all.

Issues

24. From the arguments by the parties as well as the pleadings filed, I would isolate the core question in this Petition to be: What constitutes a “public entity” under Article 227 of the Constitution ?
25. Corollary to the core question is whether Section 3 of the PPDA 2005 is *ultra vires* Article 227 and 260 of the Constitution, and if so, whether the Petitioner’s rights under Articles 27 and 36 of the Constitution as well as under Article 40 have been violated by the application of the PPDA 2005 to co-operative societies, like the Petitioner.

Arguments in court

26. The respective parties’ arguments were made by the medium of written submissions. These were highlighted before me on 21 October 2015. Dr. G.K. Kuria SC appeared for the Petitioner, whilst Ms. Anne Mwangi , a Litigation Counsel with the State Law Offices urged the Respondents’ case. The submissions were lengthy.
27. I mean no insolence to counsels’ arguments if, in my summary below, I do not consider or wholly refer to all the submissions advanced in writing. This is in view of the issues already isolated above and which clearly emerged during the oral arguments in court.

Petitioner’s submissions

28. Dr. Kuria’s extensive arguments were to the effect that the Petitioner is an independent corporate body formed by private citizens and members of the public pursuant to Article 36 of the Constitution. This Article guarantees the right to freedom of association.
29. Senior Counsel submitted that the Petitioner is not a public entity as envisaged under Article 227 of the Constitution as the phrase ‘public entity’ has basically the same meaning as the phrases ‘public office’ or ‘public officer’, who are basically funded or remunerated by the government from the Consolidated Fund. The Petitioner, Counsel added, independently funded itself. Further it was submitted that the State has indeed now admitted that co-operative societies are not public entities. The admission, it was stated, is contained in the proposed legislation namely the Public Procurement and Asset Disposal Bill, 2014. The Bill does not include co-operative societies in the definition of public entities.
30. Dr Kuria then continued that the application of the PPDA 2005 to the Petitioner infringes on the Petitioner’ right to freedom of contract as the PPDA 2005 compels the Petitioner to conduct business with disadvantaged groups contrary to the tenets of freedom of contract where one chooses who to deal with and on what terms. For this assertion, Counsel referred the court to the eighth edition of Professor Lawrence H Tribe’s treatise **American Constitutional Law**.
31. Counsel also referred the Court to the Indian case of **Thailappalam Ser Coop Bank Ltd -v- State of Kerala, SCI, Appeal No 9017 of 2013** for the proposition that a co-operative society which is not government funded is not a public body or authority. Finally, Counsel referred to the case of **George S. Onyango -v- Numerical Machine Complex Ltd & 2 Others[2014]eKLR** for the proposition that only the Petitioner’s Charter ought to guide its operations and that State organs could not make decisions for the Petitioner as in so doing the State would be interfering with private rights.
32. Counsel then submitted that there was discrimination being fetched upon the Petitioner as the law was not equally protecting the Petitioner in so far as procurement legislation was not applied to the Petitioner’s competitors. This, it was stated, was contrary to Article 27 of the Constitution.
33. Dr Kuria concluded his submissions by stating that the Constitution was supreme and so long as Section 3 of the PPDA 2005 defined public entities to include co-operative societies then it was inconsistent with the Constitution and consequently null and void. For completeness, Counsel submitted that the duty was always on the state to promote and ensure achievement of rights under Article 43 and this duty could not be delegated to private entities like the Petitioner through unconstitutional statutory provisions.

The Respondents’ submissions

34. Ms. Mwangi, foremost pointed out that the Public Procurement and Asset Disposal Bill, 2014 referred to by the Petitioner to support the contention that the Petitioner as well as other co-

operative societies were not public entities, was not yet law. It was still a Bill and consequently, the point was not justiciable. Secondly, counsel also pointed out that the orders sought were blanket in nature and covered all co-operative societies yet the Petition was not public interest litigation.

35. Counsel then continued that the Petitioner like other co-operative societies was a public entity which benefited from public funds and is also regulated by the State. The funds, it was stated, came in the form of technical assistance and programs.

36. Counsel concluded by stating that the impugned Section 3 of the PPDA 2005 was clear and explicit that co-operative societies were public entities and thus the Section was in conformity with Article 227 of the Constitution. According to the Respondents, the motive behind the PPDA 2005 was not only to encourage competition but also to maximize efficiency in the economy whilst encouraging transparency and accountability in the sector of co-operative societies. According to the Respondents, the Petitioner had also failed to prove violation of any rights.

Petitioner's rejoinder

37. In a brief rejoinder, Dr Kuria reiterated that freedom of contract is essential and central to any economy. Counsel submitted that the government is entitled to regulate but not to interfere with the day to day operations of private enterprises.

Analysis and Determination

Constitutional and statutory provisions

38. Various constitutional and statutory provisions were referred to by the parties. I only found the following to be relevant for the purposes of my decision.

39. Section 3 of the PPDA 2005. It, *inter alia*, reads as follows:

“ Public entity “ means-

(a)...

(g) a co-operative society established under the Co-operative Societies Act.”

40. Article 19 of the Constitution, in so far as is relevant, declares under Article 19(3)(b) that rights and freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the constitutional provisions on the Bill of Rights.

41. Then Article 27 of the Constitution on the other hand provides as follows:

27.(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) ...

(7) ...

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

42. Then Article 36 runs as follows:

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

43. Article 227 of the Constitution reads as follows:

“(1) When a State organ or any 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.”

44. Article 260 is the definitive interdict of the Constitution and under it various words terms and phrases have been assigned their constitutional and legal meanings.

Principles of interpretation and burden of proof

45. It would be appropriate to first point out that the burden of proving, on a balance of probabilities that there has been an actual violation of a fundamental right, is on the person alleging such violation: see **Anarita Karimi Njeri -v- R (1979) KLR 154, The Attorney General -v- Butambala (1992) LRC 496** and also **Matiba -V- Attorney General (1990) KLR 666**.

46. The complainant has to satisfy an evidential burden to show or establish that the specific right existed and that it had been restricted or violated and then the burden fell on the State to prove on a balance of probabilities that such violation or alleged violation was saved by the Constitution: see **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993]2LRC (Const) 279 at 290** where Gubbay CJ stated as follows:

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”

See also **Riley -v- Attorney General of Jamaica [1982]3 All E R 469** where the Privy Council clearly stated that it was on the person attacking the death penalty as unconstitutional to prove on a balance of probabilities that it is a cruel, inhuman and degrading punishment.

47. Where legislation is contested, the Petitioner also, in my view, need only raise the matter (evidential burden) that a particular piece of legislation is ex-facie ultra vires the Constitution, then the onus moves to the State to justify the legislation. In **Attorney General of Trinidad & Tobago v Morgan [1985]LRC (Const) 770 at 797**, Braithwaite JA captured the position as follows:

“Where an Act is passed into law...and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such an Act, all that an individual is required to do is to show that one or more of his rights has been restricted. Having done so, because of the expressed constitutional policy the burden is then shifted to the proponents of the Act to show that the provisions of the Act restricting such rights and freedoms are reasonable restrictions. If the proponents fail to discharge this burden then a court of competent jurisdiction may pronounce against the validity of the impugned Act”

48. I would agree and adopt such an approach. It has a constitutional underpinning under Article 24 and has also been applied locally as well as in other jurisdictions: see for example **Obondi Victor and Others -v- Law Society of Kenya [2015]eKLR**, **Ndyanabo -v- Attorney General [2001] EA 495, R -v- Oakes [1986]1SCR 103, R-v- Big Drug Mart [1985]1 SCR 295** as well as **S -v- Zuma & Others [1995] 2 SA(CC)642**. In **S -v- Zuma & Others (supra)**, the court held that a party alleging a violation of a constitutional right or freedom must demonstrate that the exercise of fundamental freedom has been impaired, infringed or limited and having done so it is for the party who would benefit from the limitation to justify the limitation.
49. The questions raised by the Petitioner not only allege violation of the Petitioner's constitutionally guaranteed rights and freedom but also call for an interpretation of certain provisions of the Constitution. It would also consequently be appropriate to point out certain general guiding principles of interpretation.

General guiding principles of interpretation

50. The general rule is that a Constitution and especially the Bill of rights must be given a generous and purposive construction to give individuals the full measure of the guaranteed rights and freedoms. Any law which limits fundamental individual rights ought to be strictly construed in order to protect those rights: see **Re: The Matter of the Interim Independent Electoral Commission SCK Const. Appl. No. 2 of 2011 [2011]eKLR**, especially at [51].
51. Secondly, Article 259 of the Constitution provides a sub-embargo that the Court in considering the constitutionality of any issue before it ought to interpret the Constitution in a manner that promotes its purpose, values and principles and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
52. Thirdly, where the interpretation of the Constitution has been invited because the constitutionality of an Act of Parliament is challenged, then no better guidance can be retrieved from elsewhere save the case of **U.S -v- Butler 297 US 1 [1936]** where the Supreme Court of the United States of America gave a studious expression of the law as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

53. I agree with and am guided by the above principles.

Justiciability

54. Before undertaking a discussion of the core issue, it would be appropriate to shortly address the issue as to ripeness of the dispute. The issue appears to have been raised in passing during the oral arguments when learned counsel for the Respondents Ms. Mwangi stated that the issues touching on the proposed Public Procurement and Disposal of Asset Bill 2014 were not justiciable. The Respondent's counsel appeared, as I understood her, to allude to the fact that the matter was pending in Parliament and consequently there was no proper issue to be examined by the Court.
55. It is not necessary to give a repertory of the principles and concepts related to justiciability and in the circumstances of this case I intend to be very short on this issue.
56. The Petitioner has foremost the requisite standing. That has not been denied. The Petitioner is aggrieved by a statute which had been in force since 2005. The Petitioner is aggrieved that this statute has impaired its rights and is also discriminatory. The Petitioner then made reference to the PPDA Bill which was still pending in Parliament to help illustrate the point that the Bill seeks to rectify the flaws complained of by the Petitioner.
57. I do not see how the Petitioner's claim is not ripe for determination. It is not a hypothetical case,

neither is it merely of academic interest. There is in my view raised by the Petition a “ real , earnest and vital controversy” as per Brandeis J in **Ashwander v Tennessee Valley Authority 297 US 288[1936]** which is worthy of trial and determination by the Court.

Of public bodies, entities and corporations

- 58.The core question in this Petition is what is the meaning to be ascribed to the expression, “ public entity” under Article 227 of the Constitution.
- 59.Neither the Petitioner nor the Respondents referred the Court to any decisive authority defining what a ‘ public entity” for purposes of Article 227 of the Constitution means. The Constitution itself does not give any definition of what the phrase “public entity” means.
- 60.The Constitution under Article 260 however gives a definition of what the phrase ‘a state organ’ means. It also defines ‘ public officer’ and ‘public office’. A public officer is defined as a person who is a State officer or any person who holds a public office. The Article also goes further to bestow a list of state offices which are specific with the only omnibus being an office established and designated as a state office by national legislation.
- 61.On the other hand , under Article 260 of the Constitution, a “public office” refers to:

“ an office in the national government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament”

62. In the cases of **Kenya Tea Development Agency Ltd v Ismael Ombati Ochieng & 9 Others [2015]eKLR** and **Kenya Union of Domestic , Hotels, Education & Allied Workers v- Salaries and Remuneration Commission [2014]eKLR** it was stated that the criteria for determining whether one is a public office or public officer “ *is clear and requires no more than a literal interpretation*”. Both courts identified the criteria; firstly, the person must be holding an office in the mainstream central government or devolved county government or public service. Secondly, the remuneration and benefits of that officer should be payable directly from the Consolidated Fund or directly out of money provided by Parliament.
- 63.The criteria was affirmed by the Supreme Court of Kenya in **Fredrick Otieno Outa –v- Jared Odongo Okello & 4 Others [2014] eKLR** where the majority stated as follows:

‘[148] Strictly speaking the proper meaning of ‘public officer’ is that embodied in Article 260 of the Constitution. ... The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedent over the said Constitutional provisions. And thus the proper meaning of ‘public officer’ currently is: (i) the person concerned is a State Officer, or (ii) any other person who holds (sic) ‘public office’ – an office within the National Government, County Government or Public Service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.’ (emphasis by the Supreme Court)

- 64.Both Dr. Kuria and Ms. Mwangi seemed to pick cue from the above definition. Dr. Kuria urged me to find that the Petitioner was not a public entity, as public entities are those bodies which benefit directly from funds from the exchequer yet the Petitioner did not finance its Capital and operational expenditure from any funds by the Government. For the Respondents, it was urged that the Petitioner was not only regulated by the State but benefitted from State funds through technical officers and trainings offered and extended to the Petitioner, like all other co-operative societies by the State.
- 65.The criterion laid out by the Supreme Court was strictly confined to Article 260 of the Constitution. It is certainly instructive and directive. The Court was dealing with a specific Article of the Constitution known as the interpretation clause. As appropriate, words and phrases already defined ought not to be unnecessarily redefined by the Court. I am however not dealing with a phrase or word already defined. It is a phrase occurring in the body of the Constitution. I also hold the view that certain words and phrases are not defined under Article 260 of the Constitution for the reason that their definition would not require a narrow and literal approach. I must

consequently be conscious of the interpretation principles even as I seek to define the phrase.

66. While A.W Bradley and K.D. Ewing in their treatise '*Constitutional and Administrative Law*,' 14th Ed. Longman at pg 301, hold the view that there is '**no single agreed definition**' of public bodies or public entities, Black's Law Dictionary in its 9th Ed. (2009), defines a public entity to mean:

'A governmental entity such as a State government or one of its political subdivisions.'

67. The history and reasons for the creation of public entities, corporations and bodies would however lead to an immediate conclusion that Black's Law Dictionary's definition is pretty limited. Public corporations and non-governmental bodies trace their origins to the 18th Century and were mainly established to ensure a combination of vigorous and efficient business management with an appropriate measure of public control and accountability. Another reason for the establishment of public bodies or corporations was to simply entrust an activity to an autonomous body and thereby reduce the scope of public interference. For an elaborate discourse of the reasons for establishment of public entities see W.G. Friedmann and J.F. Garner (ed.) , *Government Enterprises*, 1970 and also C. Hood, O. James, C. Scott [2000] 78 *Public Administration* at pg 283. The aim, it is apparent, was to ensure an efficient delivery of public services and also management as well as generation of public resources and revenue.

68. In my view, the diverse nature of public services rendered by public bodies or corporations as well as the wide range of activities exercised by public bodies and corporations would make any attempt to classify them with certainty an exercise in futility. Besides, most public corporations and bodies once established exist independent of the Government unless the establishing instrument states otherwise. The services offered by such corporations and bodies are however public services and which, by the better reason, make them public authorities: see **Tamlin -v- Hanaford [1951] K.B. 18, 24.**

69. It is therefore apparent that a public entity is simply not a body which draws support for both its operations and capital expenditure from the public exchequer but additionally, its purpose ought to be amongst other things, to render public service whether delegated or otherwise.

70. In the context of Article 227 of the Constitution, it is to be noted that the phrase 'public entity' falls under the portion of the Constitution dealing with Public Finance- Chapter 12. The chapter imposes a wide premium on transparency and accountability on issues of public finance. The Constitution does not in any way deal and neither did the draftsmen intend to deal with private enterprises and private funds under public finance and funds, even though transparency and accountability may be fetched on private enterprises under Article 10 of the Constitution.

71. In my judgment, when Article 227(2) of the Constitution empowered Parliament to enact legislation to promote and '*prescribe a framework within which policies relating to procurement and assets disposal is to be implemented...*' it was intended that only public finances would be involved in such procurement or disposal. It was to do with such organs and bodies which utilize public funds to procure goods and services and, dispose of public assets and are therefore not only regulated by the State but funded through the public exchequer. Any legislation under Article 227 ought to be within such context. In my view, it would lead to simple absurdity if it was to be held that such legislation as contemplated under Article 227 also contemplated regulating private enterprises in procuring goods and services as well as disposing of private property or assets.

72. I come to the conclusion that the phrase 'public entity' in Article 227 of the Constitution should receive an extended meaning and not the restricted interpretation ascribed to 'public office' or 'public officers' under Article 260 of the Constitution. The phrase 'public entity' under Article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies, all bodies financially supported by the State and operating in close cooperation with State authorities and also any private bodies fulfilling key functions under state supervision.

73. It is not in dispute that the Petitioner is incorporated under the Co-operatives Societies Act (Cap 490). It runs its own show, its own business. The State is not involved and does not fund its capital or operational expenses. Evidence to that effect, provided by the Petitioner was not contested. The Petitioner is not in the ultimate control of the State and neither does it operate in close cooperation with the State.

74. Arguments that the Petitioner receives funding in the form of government supervision and policies, capacity building and acquisition of required capital appear to me to be simply pleonastic. Such arguments also lack evidentiary patronage. I am unable to accept that the Petitioner receives any direct financial support from the State or operates in close cooperation with the State or fulfills any key function under State supervision to help it run as a public entity.
75. Arguments have been advanced that the Petitioner is regulated by the State hence making it a public entity. I find no favour in those arguments in the circumstances of this case. I would agree with Dr. Kuria when, citing the case of **Thalappalam Ser Coop Bank Ltd & Others -v- State of Kerala & Others SCI Civil Appeal No 9017 of 2013**, he submitted that on the criterion of regulation there was need to be shown to the court that the State's regulation of any entity had to be such functional and pervasive control as to leave no doubt that the entity was a public entity.
76. There is no doubt that the State expends a considerable amount of resources in regulating social and economic affairs. Even the banking sector is regulated. However the fact of regulation does not necessarily render such entities or bodies part of the State. The regulation, unless otherwise shown, does not give the State any direct or indirect control over the affairs of the various organs registered as private entities. The same is applicable to the instant situation. The State exercises no functional control over co-operative societies except for those where the State is also a majority shareholder.
77. I find that the Petitioner is not a public entity for purposes of Article 227 of the Constitution by reason of the fact that it is neither funded by the State nor functionally controlled and regulated by the State.

Violation of rights and freedoms

78. The Petitioner urged the court to find that by being deemed a public entity had led to its rights being violated. In particular, the Petitioner pointed out that its right to freedom of contract had been unfairly impaired. Further the Petitioner argued that there was no equal protection of the law in so far as the application of the PPDA 2005 was concerned. The PPDA 2005 was being applied to the petitioner but not its competitors or persons engaged in the same business. Reference was made to Articles 19(3) and 27 of the Constitution.

Freedom of Contract

79. The doctrine of freedom of contract basically means the freedom of a party to choose with whom to contract and on whatever terms it may consider advantageous to its interest or to choose not to contract. It is a concept of common law jurisdictions. As Lord Diplock remarked in the case of **Photo Production Ltd -v- Securicor Transport Ltd [1980] AC 827,848**

“ A basic principle of the common law...is that the parties are free to determine for themselves what primary obligations they will accept”

80. The will of the parties, it is said, is what dictates contractual liability and there ought to be no liability without consent embodied in a valid contract: see **Constantine -v- Imperial Hotels Ltd [1944] AC 693**.
81. As a result of developments in modern social life and policy, the concept of freedom of contract, no doubt has today been weakened for both economic and social reasons. Statute law has made inroads into the concept. In **Musundi & Others -v- S. E. F.Co Ltd [2007]1 EA 219 :**

“There are great interventions in many jurisdictions by the legislature to rein in the freedom [of contract] eg Business Premises Rent Law, Rent Restriction Laws, Laws on Housing and mortgages and policies underpinning Housing Laws”

82. One may also add employment laws and consumer rights laws.
83. Besides statute law, private contracts of adhesion have also eroded the concept of freedom of contract. Courts have also not been left behind. Courts have consistently, where they deem it 'objective', implied terms to contracts and also declared express terms unenforceable or

- unconscionable.
84. Courts have also not hesitated to interfere with a party's freedom to contract when it would interfere with Constitutional gains and rights.
 85. Thus in **Jones -v- Alfred H. Mayer Co [1968] 392 US 409**, the Respondent, a white Caucasian real estate developer, as a matter of policy, refused to sell housing or land to blacks, leading to the Plaintiffs, J.L. Jones and his wife, to sue. The respondent argued that a congressional statute which proscribed private discrimination in the rental, lease or sale of real and personal property interfered with his constitutional freedom to freely contract. The court held that Congress could through statute interfere with private conduct to protect a social order in which justice and socio-economic rights are paramount. The Supreme Court of the United States of America reasoned that the impugned statute was connected with eradicating slavery, racial inequality and servitude and indeed was broad in the protection of civil rights. The State was not in any way involved in the transaction.
 86. In summary, it is clear that in many areas of contract, freedom of contract in the classical sense of the yester years is now truly and patently lacking. In my view, freedom of contract can no longer be regarded to have some special and supervening juristic value.
 87. Within our jurisdiction, the concept still exist. Subject to statutory and common law exceptions, it will apply to valid contracts. Our Constitution however does not expressly recognize the concept as a right or freedom under the Bill of rights.
 88. The Petitioner contended that its right to freedom of contract is founded under Articles 19(3) and 40 of the Constitution. While Article 40 guarantees an individual or association the right to property, Article 19(3) simply provides that the Bill of Rights is not exclusive. All other rights and freedoms recognized by the law are still preserved. The Respondents did not contest this approach.
 89. I have no doubt that the Bill of Rights intended to extend and add to other common law rights. By Article 19(3), the common law concepts and principles which guaranteed certain freedoms and rights were embraced and 'subsumed' by the Constitution. The concept of freedom of contract, which assists in the exercise of property rights was one of the subsumed rights.
 90. It was further the Petitioner's case and argument that in defining a public entity under the PPDA 2005 to include co-operative societies and thereby making the provisions of the PPDA 2005 and all regulations made thereunder applicable to the Petitioner, the Respondents had effectively caused the violation of the Petitioner's right to Property. In particular, the Petitioner pointed to the Public Procurement and Disposals (Preference and reservations) Regulations, 2013. These were contained in Legal Notice No 114 of 2013. Regulation 31 introduced the requirement that all procurement entities under the PPDA 2005, do reserve 30% of their budget allocations to the disadvantaged groups (women, youth and persons living with disabilities). Subsequently, circular letters No 14/ 2013 of 25 September 2013 and No 10/ 20 of 29 November 2013 were issued by the 2nd and 3rd Respondents to promote and give effect to Regulation 31.
 91. The Petitioner argues that through the regulations and the circular letters which ought not to have been made applicable to the Petitioner, the Petitioner's rights to property were violated. Further, the Petitioner argues that in so far as the same Regulations and circular letters were not made applicable to the Petitioner's competitors, the Petitioner was being discriminated against.
 92. The right to property under Article 40 ought to be understood in the context of what is meant by 'property'. Certainly the word has a range of meanings. In the context of Article 40, the word 'property' could refer to the physical property itself. This can be gathered from Article 40(3) (a)&(b) which refer to acquisition of land for a public service. The definition of property provided under Article 260 could also point to the property in its physical stature. The spirit behind Article 40 however was not to simply protect the physical property, it was also to protect the individual owners relationship with the physical property. That relationship consist of the right to acquire and own property (Art. 40(1)) of any description and all rights appurtenant to ownership. These rights include the right to use the property, right to alienate it as well as right to exclude other people from it.
 93. Given a liberal and purposive interpretation, it is easy to conclude that property in the context of Article 40 is not limited to the definition assigned by Article 260 to the word, but includes the physical property and all known common law rights appurtenant to ownership.
 94. Clearly too Article 40 is not absolute. The Constitution itself has provided the claw-back if the deprivation of such right is through (i) statutory provision (ii) for a public purpose or in the public

- interest(iii) is carried out in accordance with the Constitution and (iv) is subject to prompt and just compensation.
95. It was the Respondents' position that the relevant statute namely the PPDA 2005, is over ten years old now and further that the inclusion of the Petitioner in the regulated framework for procurement of goods and services was necessary as it also achieved the public purpose of ensuring that the disadvantaged group was afforded extra opportunities by co-operative societies. The Respondents also advanced the position that the statute was in accordance with the Constitution particularly Article 227. The Petitioner whilst acknowledging that there was in place a statute did not accede to the argument that the statute was intended to achieve a public purpose or that it was in the interest of the public that the Petitioner's constitutional right to property was being interfered with. The Petitioner insisted that the PPDA 2005 in so far as it included the Respondent as well as other co-operative societies as public entities was unconstitutional. Further, the Petitioner stated that it was not the duty of private entities to ensure that economic and social rights of citizens were realized. Rather, this duty was solely on the door steps of the State.
96. I have already found that the common law freedom of contract is no longer absolute. I have also determined that the common law freedom of contract is not just one of the unannounced rights under Article 19(3) of the Constitution but is part and parcel of property rights under Article 40. Finally, I have also determined that co-operative societies in so far as they are not funded by the government and do not perform any public functions on behalf of the State are not public entities. The consequent result is that even though the Respondents could, under Article 227, regulate public procurement, they could only do so in so far as it concerned procurement by State organs and public entities. It could not extend to procurement in the private sphere whatever the reason save to criminalize particular conduct.
97. I would also agree with Dr Kuria that it is the State's responsibility to not only protect the socio-economic rights of its citizens but also promote and ensure the realization of the same. None other than Article 21(2) of the Constitution captures this position better when it states that:

“The State shall take legislative policy and other measures, including the setting of standards to achieve the progressive realization of the rights guaranteed under Article 43.”

The language and tenor of Article 21(2) above is plain and clear and need no further intrusion. The meaning of the Article would not be undermined with any such plain and literal reading.

98. The same theme as to the State's obligations also runs in the **International Covenant on Economic Social and Cultural Rights**, to which Kenya is a signatory.
99. In promoting such rights however the State and every State organ, including the Respondents must respect and observe the provisions of the Constitution. No legislation intended to promote social and economic rights should be unconstitutional. In the instant case, I have found that a section of legislation which the Respondents argue is intended to help "address the needs of vulnerable groups" is to the extent that it considers Co-operative societies as public entities unconstitutional.

Discrimination

100. The Petitioner alleges that, it is disadvantaged relative to other private entities especially those in the same business. According to the Petitioner, this amounts to discrimination.
101. Article 27 of the Constitution, *inter alia*, guarantees every person equality before the law as well as the equal protection and equal benefit of the law without discrimination. Article 260 states that 'person' includes a company, association or other body of persons whether incorporated or unincorporated. Consequently the Petitioner is a person for purposes of Article 27.
102. In the Canadian Supreme Court case of **Andrews -v- Law Society of British Columbia [1989] 1 SCR 143**, McIntyre J defined discrimination as :

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or

limits access to opportunities, benefits, and advantages available members of society”

103. Further, in the case of **Peter K. Waweru -v- Republic** [2006]eKLR discrimination has been defined as

‘... A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured’.

104. Under South African Law, the **Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000** states that discrimination,

‘means any act or omission, including a policy, law, rule practice, condition or situation which directly or indirectly-

- a. *imposes burdens, obligations or disadvantages on; or*
- b. *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.’*

105. In certain instances, discrimination can be fair. Thus, it has been stated that discrimination is fair where it reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. See section 14(2) (c) of the **Promotion of Equality and Prevention of Unfair Discrimination Act** (*supra*).

106. In pleading discrimination, the Petitioner stated that it is disadvantaged relative to other private entities especially those in the same business. Apart from this assertion, the Petitioner does not provide further particulars to support its assertion. As was stated in **Andrews -v- Law Society of British Columbia** (*supra*) discrimination should have the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or withhold or limit access to opportunities, benefits, and advantages available members of society.

107. Thus for an inference of discrimination to be ascertained, the Petitioner has to furnish the Court with better particulars of what it alleges to amount to discrimination. The Court cannot and should not be drawn into determining whether certain ‘acts’ amount to discrimination without such particulars being furnished to the court.

108. On this issue, I am therefore of the considered opinion that, the Court is inadequately furnished to determine the issue of discrimination.

109. Secondly, it has not been shown that there was arbitrary differentiation. It must be understood that the principle of equality does not require everyone to be treated the same but simply that people in the same position from a moral point of view should be treated the same. Often, the State will classify people and treat them differently for various legitimate reasons. Many laws differentiate between persons and not every differentiation will equate discrimination. If that was to be so, the entire set of laws would have to be reviewed by the court. In the instant case, it has been argued that the whole purpose of including the Petitioner as a public entity was to continue with its regulation as well as the regulation of all co-operative societies. I see no fault in that reasoning except as I have already found the Petitioner ought not to be a public entity. In the circumstances, I do not find that there is unfair discrimination with an unfair impact.

110. Finally, it was argued that the inclusion of co-operative societies including the Petitioner under the public procurement laws and regulations was to ensure that the run-away sleaze is curbed so that “money belonging to hardworking Kenyans does not go to the wrong pockets during procurement and disposal of assets”. I would not deem that to be sufficient reason for the inclusion. The regulation of Co-operative societies is already adequately provided for under the Sacco Societies Act (Cap 490B). Under Part V of this statute, the independent Sacco Societies Regulatory Authority (SASRA) has powers to intervene and regulate co-operative societies and prescribe prudential standards to the societies. The SASRA may also intervene where it deems it that the business of a Sacco society is being conducted in a manner detrimental to the members or members of the public. The framework is already available for such intended regulation.

Conclusion

111. I have addressed the core issues in the Petition. I need however point out that subsequent to the parties' arguments and long after I had reserved the judgment herein and drafted the same, an important matter came to my attention. The Public Procurement and Asset Disposals Act, 2015 was enacted as law. The Act was assented to on 18th December 2015 and came into operation just under three weeks ago. The preamble to the Act states that the Act gives effect to Article 227 of the Constitution of Kenya and also provides procedures for procurement and assets disposal by public entities. Effectively, the transition is now complete. The PPDA 2005 has since been repealed and the application of Section 7 of the Sixth Schedule to the Constitution is unnecessary.
112. I must point out that under the recently legislated Public Procurement and Asset Disposal Act 2015; co-operative societies are not included in the definitive clause of the statute as public entities. For purposes of Article 227 of the Constitution, co-operative societies are also not public entities.
113. I, accordingly, conclude as follows.
114. I am unable to find for the Petitioner on the issue of discrimination. Not enough evidence was placed before me to show how the Petitioner was unfairly discriminated against, vis-à-vis the Petitioner's competitors and other private entities. To simply state that the law applies to one group of people and not another group is not adequate to prove discrimination as the government may actually classify people and treat them differently from others for legitimate reasons. Besides it would be impossible to regulate affairs of people without differentiation.
115. I however find for the Petitioner that for purposes of Article 227 the Constitution, co-operative societies of the Petitioner's ilk are not public entities. Regulatory laws legislated to promote and advance the provisions of Article 227 should not apply to the Petitioner. I also find that the right to freedom of contract, though not absolute, is protected under Article 19(3) of the Constitution and in so far as the PPDA 2005 was made to apply to the Petitioner, the Petitioner's right to freedom of contract was violated by the Respondents.

Appropriate reliefs and orders in disposition

116. Accordingly, I make the following orders of the declaratory orders sought:
- a. It is hereby declared that the freedom of contract and the prerogative of an enterprise to run its business as it pleases is a fundamental right and is preserved by Article 19(3)(b) as read together with Article 40 of the Constitution save only as it may be limited or abridged by recognized law which is justifiable in a democratic society;
 - b. It is hereby declared that section 3 of the Public Procurement and Disposal Act, 2005 in so far as it included and defined co-operative societies, such as the Petitioner, as public entities for purposes of Act was ultra vires Article 227 of the Constitution; and
 - c. It is hereby declared that Article 43 of the Constitution does not impose on the Petitioner the duty to provide social security or any of the economic, social and cultural rights to disadvantaged groups.

Costs

117. The Petitioner has been largely successful in this Petition. I see no reason why the Petitioner should be denied costs and I accordingly award the costs of the Petition to the Petitioner.

Dated, signed and delivered at Nairobi this 26th day of January, 2016.

J.L.ONGUTO

JUDGE