



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

PETITION NO.210 OF 2015

BETWEEN

WASTE AND ENVIRONMENT MANAGEMENT.....PETITIONER

ASSOCIATION OF KENYA (WEMAK)

AND

NAIROBI CITY COUNTY.....RESPONDENT

JUDGMENT

Factual Background

[1] The Petitioner is Waste and Environment Management Association of Kenya (WEMAK), an association of waste management companies in Kenya and it brought the present Petition on behalf of its members and in the public interest under **Articles 22 and 23 (3) (b) and (c) of the Constitution**.

[2] The Petitioner has alleged that its members have been operating the business of waste management within the Respondent's jurisdiction for about 30 years. During this time, the Respondent's predecessor, the Nairobi City Council, had stopped providing waste management services and that sometime in 2012 and 2013, the Respondent unveiled a master plan for waste management in Nairobi in partnership with the Japan International Co-operation Agency (JICA). The plan was to be rolled out in 2016 after consultation with the Petitioners and other stakeholders.

[3] It further alleged that at the end of 2013, the Respondent stopped the Petitioner's members from collecting garbage from the Central Business District (CBD) and this was allegedly done in order to appoint a particular company to assume the said functions and that the appointment was made without a proper and lawful tendering process and that the said company later sub-contracted other companies to undertake its contractual mandate without following lawful channels in doing so.

[4] The Petitioner also alleged that sometime in September 2014, some of its members operating in Kilimani, Kileleshwa and Lavington areas of Nairobi City had their trucks impounded by the Respondent's officials and were informed that they would no longer be allowed to operate in the area and this led the aforesaid members to file **HCCC 306 of 2014** against the Respondent which suit is still pending in the Civil Division of this Court. Further that, sometime in November 2014, the Respondent distributed letters to residents of the same areas indicating that it had introduced a franchise system of solid waste management and the Petitioner's members would no longer be allowed to carry out their business operations in the said areas.

Petitioner's case

[5] It is the Petitioner's case that the aforesaid franchise system was implemented without regard to the existing contracts between its members and their clients and that its members had authorisation letters allowing them to collect garbage and manage waste issued by the Respondent including letters issued in 2013 and 2014.

[6] The Petitioner also complained that its members had applied for 2015 authorisation letters and had to date not been issued with the same. That they were only informed towards the end of February 2015, through a letter that they will not be issued with any further authorisation letters because they had sued the Respondent in **HCCC 306 of 2014**.

[7] The Petitioner further contended that the Respondent did not follow a lawful and proper tendering process when it awarded the waste management tender and that the winning bidder was not even in existence when the tender was awarded.

[8] The Petitioner in addition alleged that the Respondent went ahead to advertise a tender for solid waste collection and transportation for zones 1,6,7 and 9 in Nairobi whereas the issue of zone 7 had not been addressed at all. Against the above background, the Petitioner alleged that its members' attempts at addressing the issue have been fruitless and that it resulted in the violation of several constitutional rights of its said members.

[9] It specifically contended that the Respondent has violated constitutional rights provided under **Articles 42, 43 and 47** of the Constitution and that the Respondent had failed to discharge its constitutional obligations under **Articles 69, 73 and 88** of the **Constitution** by?

- a. denying the members of the Petitioner association authority letters to collect and dispose of garbage which activities are the source of their livelihood and approximately 2000 other people directly employed by them.
- b. creating zones in Nairobi County yet there is no legal provision for the creating of the so-called zones and there was no proper procedure that was followed for the creation of the said zones. Specifically, that there was no public participation in the creation of the said zones and which zones do not address the issues raised by the Petitioner as they have no basis for their creation.
- c. failing to involve the Petitioner association and its members in the selection of an appropriate waste management system for Nairobi County.
- d. hurriedly implementing the waste management project without the Petitioner's involvement and which project the Petitioners' association had been informed would be implemented in 2016 with their prior involvement.
- e. punishing the members of the Petitioner association by denying them authorisation letters because they had questioned the harassment of some of its members by the impounding of their trucks for no reason yet it was the members' constitutional right to seek legal redress when their rights were violated.
- f. failing to provide a holistic solution to waste management in Nairobi County as has been proposed by the Petitioner association and implementing only the parts that favour certain private companies.
- g. appointing private companies to deal with waste management to the exclusion of the Petitioner members and yet the said private companies are not qualified to provide waste management. Specifically, that one of the private companies was not even in existence at the time the tendering process for waste collection and disposal commenced and the companies do not have the required NEMA license or the equipment that was required for waste disposal.

- h. imposing private waste collection and disposal companies on the clients of the members of the Petitioner association yet there are existing contracts which are being serviced by the members of the said association.

[10] Against the above constitutional complaints, it is now the Petitioner's case that the Respondent has breached international conventions and principles on environment and development and will continue to do so unless this Court intervenes and grants the following orders:

- “1. A declaration that the Respondent's conduct amounts to a violation of the Petitioners' fundamental rights and freedoms as enshrined in Articles 42, 43, 47, 49, 73 and 88 of the Constitution of Kenya 2010.***
- 2. A declaration that the refusal by the Respondent to issue Petitioner's members with authority letters to collect and dispose of waste within Nairobi County is unconstitutional.***
- 3. A declaration that the unilateral creation of zones within Nairobi County by the Respondent without public participation and the involvement of the Petitioner and its members is unconstitutional.***
- 4. A conservatory order be issued restraining the Respondent from preventing the Petitioners from harassing the members of the Petitioner association and preventing the Petitioners from collecting and disposing of waste within Nairobi County and harassing the members of the Petitioner association.***
- 5. A conservatory order be issued to restrain the Respondent from proceeding with the tender for solid waste collection and transportation in zones Embakasi Central Zone, Embakasi East Zone, Embakasi North Zone, Embakasi West Zone, Kamukunji Zone, Kasarani Zone, Kibra Zone, Makadara Zone, Mathare Zone, Roysambu Zone, Ruaraka Zone and Starehe Zone (outside CBD) as advertised in the daily newspaper on 13th May 2015 tender numbers NCC/DOE/T/1022/2014-2015, NCC/DOE/T/1023/2014-2015, NCC/DOE/T/1024/2014-2015, NCC/DOE/T/1025/2014-2015, NCC/DOE/T/1026/2014-2015, NCC/DOE/T/1027/2014-2015, NCC/DOE/T/1028/2014-2015, NCC/DOE/T/1029/2014-2015, NCC/DOE/T/1030/2014-2015, NCC/DOE/T/1031/2014-2015, NCC/DOE/T/1032/2014-2015, NCC/DOE/T/1033/2014-2015, NCC/DOE/T/1034/2014-2015 and in any other zones pending the public participation and the involvement of the members of the public including the Petitioner and its members as such zoning is unconstitutional.***
- 6. A declaration that the imposition of private garbage collectors upon the Petitioner's member's clients is unconstitutional.***
- 7. A mandatory order requiring the Respondent to engage in a fair and participatory process with the goal of coming up with a holistic waste management strategy for Nairobi County.***
- 8. That the humble Petitioners be awarded general and/ or other damages and / or compensation for violation of their fundamental rights for violation and contravention of their fundamental rights by the Respondents.***
- 9. The Court to assess the quantum of damages and compensation to be paid by the Respondents in paragraph 4 above.***
- 10. The Court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the enforcement of any of the provisions of Articles 10, 42, 43, 47, 69, 73 and 88 of the Constitution.***
- 11. That the Respondents do bear the costs of this Petition.”***

[11] On 26th October 2015, the Petitioner filed its Written Submissions dated 23rd October 2015 and I should say at this stage that the Submissions are largely a recitation of what is stated in the Petition and

the contents thereof warrant no repetition save the citing of several constitutional provisions and case law which need not be repeated for the purpose of this judgment. The reason for that position will be seen shortly.

The Respondent's case

[12] On 8th July 2015 the Respondent filed a Replying Affidavit dated 8th July 2015 sworn by its Chief Officer in charge of Environment and Forestry, Dr. Leah Oyake Ombis. She stated that the Respondent has the constitutional mandate to provide solid waste management service in Nairobi City and that it also mandates to put in place any legally correct systems that would guarantee the provision of efficient, effective and reliable services. Further that, under the **Repealed Local Government Act (Cap 265)** of the **Laws of Kenya**, the Respondent's predecessor's mandate was to administer the city, provide sanitary and essential services to residents and build public infrastructures. The Respondent has the same functions today.

[13] She stated further that the Respondent is also mandated to provide a wide range of services including public health and sanitation, formulate and implement solid waste management policies and strategies and provide services for the collection, transportation, treatment and disposal of solid waste.

[14] In the above regard, that between 1996 and 2010, the Respondent's predecessor had partnered with the Japan International Co-operation Agency (JICA) with a plan to create a coordinated waste management program and it invited the Petitioner's members and other stakeholders to the unveiling of the said programme and that eventually a Master Plan for Solid Waste Management services in the City was produced commonly referred to as the Solid Waste Management Plan. The Plan was to be actualised by means of a Franchise System of service delivery and that the City was divided into 9 zones for the purposes of implementing the said system. She further maintained that the division of the City into zones was a known fact to the Petitioner contrary to its contention.

[15] It was the Respondent's further case that the Petitioner's members at no time had authority to collect garbage from the Central Business District and that no company was sub-contracted to do so as alleged and that in any event the Petitioner had failed to lead evidence in that regard. Further that, the Respondent is keen to implement the integrated solid waste management plan and that does not amount to imposition of waste collection and disposal companies upon the residents of the Nairobi City County.

[16] Concerning the submission on public participation, the Respondent maintains that the procurement process leading to the awarding of the disputed tender was above board and the Petitioner was at liberty to participate in it. Further, that a proper legal procedure was followed in the awarding of the tender which was constitutionally compliant and that the Petitioner is not the only association engaged in waste collection and that the Respondent was in any event not obliged to issue the tender to the Petitioner's members solely. On the validity of the tender process generally, the Respondent argued that the process was based on equality, was competent and adhered to the provisions of the Constitution.

[17] On the allegations that the Respondent's officials impounded the Petitioner's members' trucks, the Respondent argued that if that indeed had happened, then it was because they had not been authorised or licensed to collect waste in any of the named zones.

[18] Further, the Respondent maintained that the Petitioner never approached it before instituting these proceedings and lastly, that the Petition does not disclose any cause of action against it and should therefore be dismissed with costs.

[19] In its Written Submissions dated 13th November 2015, the Respondent intimated that it relied on the Replying Affidavit the contents of which have been outlined above. Further, it formulated five issues for determination as follows:

- i. Whether the Respondent has created new zones.

- ii. Whether there was public participation in coming up with a waste management strategy by the Respondent.
- iii. Whether the Respondent is mandated to issue the Petitioner with authorisation letters to collect and dispose waste.
- iv. Whether the Petitioner's fundamental rights and freedoms under **Articles 42, 43, 47, 69 73 and 88** of the **Constitution** have been infringed.
- v. Whether the Petitioner is entitled to the reliefs sought.

[20] On the first question of the creation of zones, the Respondent indicated that in the late 1960s, the Nairobi City was divided into 8 administrative Divisions and that for the purposes of implementing an effective solid waste management system, the City was divided into 9 zones and each zone was headed by a divisional supervisor mandated to coordinate the movement of trucks used in transporting waste. Further that, upon the promulgation of the **2010 Constitution**, the zones created by the Respondent's predecessor were not disbanded but continued to exist for the purposes of implementing a solid, effective and efficient waste management system.

[21] In the above context, the Respondent dismissed the Petitioner's argument that the Respondent unlawfully created zones as unfounded and baseless. Further, the Respondent argued that the Petitioners were aware of the zone system and did not have any concerns regarding the same when they were issued with authorisation letters and that they only started to raise the issue of zoning when the Respondent advertised for new tenders under the **Constitution** and the **Public Procurement and Disposal Act**. Having lost the bid for the tender they are estopped from raising issues regarding it by way of this Petition.

[22] Regarding the issue of public participation or alleged lack of it in the formulation of the waste management strategy adopted, the Respondent argued that the Petitioner was in fact invited to participate in the process and indicated that by a letter dated 29th February 2013 the Petitioner was invited to attend a meeting to discuss the Petitioner's role in the waste management process under the new county government structure. It further referred to a Report on its 1st Stakeholders Forum meeting on solid Waste Management in which the Petitioner was shown to have participated.

[23] It further referred to a 2nd Stakeholders Forum and minutes of a meeting held on May 31st 2013 in which the Petitioner participated. On the basis of the above, it submitted that the Petitioner was at all material times involved in the process and cannot allege lack of public participation in the process. It further referred the Court to the cases of **Andrew Ileri Njeru and 34 others vs County Assembly of Embu and 3 Others [2014] eKLR; Matatile Municipality and Others vs President of the Republic of South Africa and Others (2) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** and **Kiambu County Government vs Robert N.Gakuru and Others (2014) eKLR** in support of that submission.

[24] On the question of the Respondent's mandate to issue the Petitioner's members with authority letters to collect and dispose waste, the Petitioner submitted that the Petitioner stated that its members had merely applied for authorisation letters to collect garbage and manage waste and that they had therefore failed to follow the correct procedure for attaining a contract and that the Petitioner's members, like any other service provider, ought to have made their bid during the tendering process.

[25] Further and in any event, that Petitioner has not complied with the procurement process as articulated in **Section 93(1), 94 and 100** of the **Public Procurement and Disposal Act 2005** and that the Petitioner should have taken the tender decision for review if it was dissatisfied with it.

[26] In the above regard, the Respondent argued in addition that if the Petitioner was aggrieved by the tendering process it should have followed the **Public Procurement and Disposal Act** which clearly lays down the procedure for reviewing any such decision. In that regard, it relied on **Abdalla Abubakar Miraz and Another vs Kenya Ferry Services Ltd [2015] eKLR**.

[27] It further submitted that the Constitution provides for equity of all without discrimination and that by an open procurement process, the Respondent is offering equal opportunities to all associations and companies providing waste management services and in that regard the Petitioner cannot purport to be the only body that should be contracted to offer the service on behalf of the Respondent to the exclusion of all others.

[28] On whether the Petitioner's fundamental rights and freedoms under **Articles 42, 43, 47, 69, 73 and 88** of the **Constitution** have been infringed, the Respondent argued that the Petitioner has not been able to demonstrate that the aforesaid rights have been violated. It further submitted that under **Articles 47(1) and 73**, in the spirit of fair competition, integrity and transparency and accountability, it has invited bidders and bids for advertised tenders and that the Petitioner has therefore failed to demonstrate how the Respondent has infringed the aforesaid rights by so doing.

[29] On the last question of relief, the Respondent submitted that for a party to enforce the provisions of **Article 23(3)(c)**, the following conditions must be satisfied:

- a. There must be a precise complaint.
- b. A clear provision of the Constitution has been infringed.
- c. Evidence of the manner in which the provisions has been infringed must be tendered.

[30] In the above regard, the Respondent argued that the Petitioner has simply stated that the provisions of **Articles 42, 43, 47, 69, 73 and 88** have been violated without demonstrating how they were actually violated and that consequently the Petitioner is not entitled to the orders sought. For this proposition, it relied on **Cyprian Kubai vs Stanley Kanyonga Mwenda, Nairobi HC MISC APP. No.612 of 2002 (unreported)**.

[31] On the issue of conservatory orders, the Respondent submitted that any Petitioner seeking such orders must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the said orders, there is a real danger that he will suffer prejudice. In addition whether, if the conservatory order is not granted, the matter will be rendered nugatory and that in all cases the public interest must be considered before grant of a conservatory order. On this point, it relied on **Andrew Ireri Njeru and 34 Others vs County Assembly of Embu and 3 Others (supra)**.

[32] The Respondent further relied on **Helwa Autospeaker and Distributors Ltd vs Barclays Bank of Kenya Ltd [2010] eKLR** to argue that the Petitioner has not demonstrated that it has a *prima facie* case and that there is imminent danger to warrant the grant of conservatory orders neither has the Petitioner demonstrated that the matter will be rendered nugatory if the orders are not granted.

[33] Lastly, it submitted that citizens have a right to a clean environment and that the Respondent provides the same with the aid of private parties and since the Petitioner is not a party to the enterprise providing waste management services it is therefore not in the public interest to issue conservatory orders as prayed.

[34] The Respondent for the above reasons prays that the Petition should be dismissed with costs as it was devoid of merit.

Determination

[35] I have read the Parties' Affidavits and their Written Submissions and the issues that they have formulated. I note that although a number of issues were raised in the Petition, the substratum of the Petition is the fact that the Respondent failed to issue the members of the Petition with authorisation letters to continue providing waste management and disposal services. Instead, the Respondent subjected the service provision to a tender process in which the members of the Petitioner either failed to participate in or having participated did not succeed.

[36] In that context, I am of the view that the issues in dispute between the parties and which require

resolution are the following:

- a. Whether the matter is properly before this Court.
- b. The lawfulness and constitutionality of the Respondent's cancellation of the Authorisation letters for the Petitioner's members to collect waste and garbage.
- c. The lawfulness and constitutionality of the procurement process followed by the Respondent.

All other issues raised are in my view peripheral to these three questions. I will also address them as one because they are inte-connected.

[37] In the above regard, the Respondent has argued that this Court is not, as yet, clothed with the competence to deal with the matters involved in the instant Petition and that this Court ought therefore to down its tools without making any further determination of the Petition. The Respondent argued in that regard that **Sections 93, 94 and 100** of the **Public Procurement and Disposal Act (PPDA)** requires that the Petitioner should have taken the Respondent's decision for review under the said Act and it relied on **Abdalla Abubakar Miraz and Another vs Kenya Ferry Services Ltd [2015] eKLR** in support of that contention.

[38] In that context, **Section 93(1)** of the **PPDA** that provides:

“Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed.”

[39] **Sub-section (2)** thereof provides for matters that cannot be reviewed in terms of **Sub-section (1)** and they are the following issues:

- a. *the choice of a procurement procedure pursuant to Part IV;*
- b. *a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;*
- c. *where a contract is signed in accordance to section 68; and*
- d. *where an appeal is frivolous.*

[40] The provisions are clear and in my view require no further exposition. In this case, it is not disputed that the Petitioner is largely aggrieved by the manner in which the Respondent conducted its procurement process for the waste management tender. As pointed out above, it alleged lack of public participation, favouritism and impropriety in the said process. This, in my view, clearly falls within the scope of **Section 93(1)**. Further, it seems to me that its complaint does not fall within those issues excluded under **subsection (2)** and neither did the Petitioner endeavour to demonstrate that fact.

[41] Further, **Section 100(2)** of PPDA provides that if a party is aggrieved by the decision of the Review Board, the party may appeal to the High Court. By virtue of the foregoing Section, it is clear that having found that this matter ought to have been taken for review through the designated channels, it could only come to this Court as an appeal against the decision of the Review Board.

[42] I did not hear the Petitioner to be saying that it followed any of the above procedures neither did it provide reasons why it could not do so.

[43] In addition to the above, **Section 25** of the **PPDA** which establishes the Review Board provides that the **Public Procurement Complaints, Review and Appeal Board** established under the **Exchequer and Audit (Public Procurement) Regulations, 2001** is continued under that Act as the **Review Board** and the functions or powers of the **Review and Appeal Board** are spelt out in **Section 42(5)** and it may make the following orders or grant the following remedies:

- a. **declare the legal rules or principles that govern the subject-matter of the complaint;**
- b. **prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;**
- c. **require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;**
- d. **annul in whole or in part an unlawful act or decision of the procuring entity, other than an act or decision bringing the procurement contract into force;**
- e. **revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;**
- f. **order that the procurement proceedings be terminated.**

[44] Looking at the remedies in paragraphs (b) to (d) above, it is clear to me that what the Board could effectively grant the Petitioner what it is seeking from this Court. In that regard, it is my view that this Court should not usurp the functions of the Review Board without a legitimate reason – See **The Speaker of the National Assembly vs Karume (2008) 1 KLR 426**.

[45] In making the above finding, I am conscious of the fact that this Court has unlimited original jurisdiction in matters set out in **Article 165** of the **Constitution** but even where there is no obligation to exhaust other remedies, it would be best that where a statute has specifically created a specialised mechanism for resolving a specialised dispute, it would only be logical, practical and reasonable to let that mechanism serve its purpose.

[46] I therefore concur with the Respondent's submission that this matter is not properly before this Court. To entertain it, as sought by the Petitioner would be to undermine the law maker's intention and thereby rendering the foregoing provisions nugatory.

[47] But suppose I am wrong and in fact this Court could properly interrogate all the issues raised in the Petition. In that case, I would opine as follows:

(a) Regarding issuance of authorisation letters to members of the Petitioner, where is the legal basis for their entitlement to such letters? Procurement of services within a County is competitive and based on equal opportunity. The PPDA has given an elaborate legal framework for such procurement and favouritism of days gone by cannot be perpetrated.

(b) On public participation, I have noted that the Respondent, upon its creation, engaged all stakeholders in waste management and disposal before reformulating the strategies put in place by the Nairobi City Council, its predecessor. The letters of 29th February 2013 and the meeting held on 31st May 2013 are indicative of that fact. The Petitioner has not controverted the clear evidence that it was involved in the formulation of a plan for solid waste management leading to the Report on the 1st Stakeholders Forum to guide future processes.

(c) Looking at the decisions of **Andrew Ileri Njeru & 34 Others vs County Assembly of Embu & 3 Others (supra)** as well as **Kiambu County Government vs Robert Gakuru (supra)** it is obvious to me that there was sufficient involvement of the Petitioner in all aspects of the formulation of the solid waste management plan.

(d) On the issue of zoning of Nairobi City for purposes of waste collection and disposal, the matter is moot as the zoning is tied to authorisation letters and tenders for waste collection which I have addressed above. Similarly, the question whether the Petitioner's members were entitled to collect garbage from their clients is moot in view of my findings above.

[48] It follows therefore, that I am unable to grant any of the prayers in the Petition for the above reasons.

Disposition

[53] The Petition is hereby dismissed but each Party shall bear its own costs.

[54] Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22nd DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Karanja for Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE