



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**HC.CIVIL CONST. NO. 2 OF 2015**

**SIMON SAMBIGI MUKURIA & ANOTHER ..... APPLICANT**

**-VERSUS**

**GOVERNOR COUNTY OF NYANDARUA & 3 OTHERS .....RESPONDENT**

**RULING**

1. **SIMON SAMBIGI MUKURA** and **NAPHTALI MUNGAI MUREITHI** are the two petitioners in this matter. The four respondents are member of the County Government of Nyandarua.
2. The petitioners stated that they are residents of Nyandarua County. They bring this Constitutional Petition seeking the following relief;

*44. A declaration that the Principles Enshrined in Articles 10,174, 196 and 201 of the Constitution have been and continue to be violated by the Respondents.*

*45. A declaration that there has been violation of the Access to Information right under Article 35 of the Constitution*

*46. A declaration that the Contract for consultancy and the manner in which it was procured is illegal and therefore unconstitutional to the extent that it violates clear statutory and Constitutional provisions.*

*47. A permanent injunction prohibiting any payments by the Respondents under an illegal contract.*

*48. A Conservatory Order prohibiting any payments by the Respondents under an illegal contract pending the hearing and determination of this petition.*

*49. This honourable court to issue such further orders and give such directions as it may deem fit to meet the ends of ends of justice and the protection of the constitution and in the context of the declarations made.*

3. The petitioners stated that it was reported in the Star Newspaper, of 2<sup>nd</sup> May, 2014, that the government of the county of Nyandarua( the county government) signed a contract with an entity known as Tahal group International, an Israel company. The said company was contracted by the County Government to develop a water master plan for the country and a design review of Olkalou town Sewerage system. That Tahal was paid Kshs. 25 Million as a down payment by the

county government. That a letter dated 24<sup>th</sup> May, 2014 addressed to the governor of the county government written by the 2<sup>nd</sup> petitioner, requested the governor to supply to the said petitioner documents relating to the agreement between Tahal and the county Government. In his response by his letter dated 27<sup>th</sup> May, 2014, the Governor wrote stating that there would be public participation relating to the aforesaid contract. The allegation of the petitioners is that there was no public participation.

4. Further the petitioners stated that the contract with Tahal was signed without regard to legal opinion by an advocate J M Mwangi whereby the said advocate directed that certain clauses of the contract be amended. Petitioners stated that the opinion of the said advocate brought to light the lack of compliance with Public Procurement and Disposal Act Specifically Section 29 (3) 74 92) and 75 of that Act.
5. Following what the petitioners referred to as shortcomings of the contract with Tahal the Anti – corruption Commission was requested by some citizens of the county to inquire and investigate whether there was corruption in respect to that contract.
6. Petitioner also raised the issue in this petition on that fact that the auditor general by this report of 29<sup>th</sup> May, 2015, in respect to period of 1<sup>st</sup> July 2013 to 30<sup>th</sup> June, 2014 for the county, had raised concern with lack of competitive bidding, and failure to follow procedure under the the Public Procurement Act in particular Sections 28(1), 7(d), 24(1) and 16 (1) of that Act.
7. Petitioners also stated that the Hansard report of the county’s assembly highlighted the aforesaid short comings of the contract with Tahal.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent raised a preliminary objection to this petition. That objection is dated 6th January, 2016. It is in the following terms:
  - i. *The matters raised have nothing to do with the constitution. The constitution has been cited in subterfuge, wrongly, dishonestly and to create a wholly wrong impression in pursuit of very local and banal politics. The petition is nothing more than frivolous, reckless and destructive politics disguised as a constitutional battle.*
  - ii. *At best, the matters raised concern procurement which is elaborately provided for under the law for which exist comprehensive and elaborate public funded institutions to deal with the same. It is not suited in the High Court.*
  - iii. *The contract complained of is substantially performed and the proceedings in the High court will serve no useful purpose.*
  - iv. *The petition seeks orders that will affect parties who have neither been joined nor served*
  - v. *The matter has been dealt with by the County Assembly*
9. The 1<sup>st</sup> and 3<sup>rd</sup> respondents, the movers of the preliminary objection, were represented by learned counsel Mr. Nyakundi. In his submissions before court Learned Counsel trimmed his objection only to one objection to effect that the petitioners ought to have filed their action before the organ recognized under the Public Procurement and Disposal Act as provided under Section 93 to 96 of the that Act. In this regard the case **ABDALLA ABUBAKAR MIRAJ & ANOTHER – V- KENYA FERRY SERVICES LTD [2015] eKLR** was referred to. In that case the same objection, similar to what is before court, was raised. the court had this to say in its determination of that objection

***``[T] The Public Procurement and Disposal Act 2005 contains very clear provisions with regard to public procurement. Should there be violation of its provisions that does***

***not amount to a violation of constitutional provisions. As submitted by Counsel for the 1<sup>st</sup> Respondent, Mr. Waweru Gatonye, once a claim is based on the Public Procurement and Disposal Act, one brings oneself within its provisions and any dispute pertaining to procurement must go before the Public Procurement Administrative Board; the law being that once a procedure is prescribed by law; one should use that procedure unless there are special circumstances to show that the matter is best dealt with in the High court. I am therefore unable to find any violation of the public procurement law.***

10. Learned counsel Mr. Nyakundi submitted that what has been brought before this court by the petitioners was nothing to do with Constitutional violation but that it was dispute relating to procurement. Hence he submitted the petitioners should have referred their dispute to the organ provided in the Act that should have been referred to the Public Procurement Administrative Board. In this regard counsel referred to the case **ANNE WANGUI NGUGI & 2,222 others – v- EDWARD ODUNGO, C E O RETIREMENT BENEFIT AUTHORITY [2015]eKLR** as follows:

*“[109] An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint,. It must first given an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in hast, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution.”*

*[110] Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”(emphasis added)*

11. The 1st and 3rd respondents in view of the matters raised in their objection sought the dismissal of the petition with costs.

12. Learned Counsel Mr. Karanja appearing for 2<sup>nd</sup> and 4<sup>th</sup> respondents associated himself with the submissions of learned counsel Mr. Nyakundi. Mr. Karanja submitted that there was no clear constitutional issue raised by the petitioners. He therefore sought the striking out of the petition.

13. Mr. Kanyoge Learned Counsel for the petitioners apposed the objection on the ground that it failed to meet the threshold of **MUKISA BISCUIT MANUFACTURING CO. LTD – V- WEST END DISTRIBUTORS LTD [1969] EA 696**. In that case preliminary objection was stated to consist of the following:

*“ so far as I am aware, a preliminary objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit.”*

In the judgment of Sir Charles Newbold in the same case he stated:

*“ The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary Objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”*

14. Mr. Kanyonge submitted that the matters raised in the petition were constitutional in nature. He

referred to Article 174 of the Constitution and submitted that the object of the devolved government called for democratic and accountable exercise of power. That the constitution of Kenya had enhanced checks and separation of power.

15. In his submissions Learned Counsel Mr. Kanyonge referred to Article 227. He submitted that considering the provisions of that Article the acts of the respondents in relation to the project were constitutionally and legally indefensible.
16. Further that the 1<sup>st</sup> respondent had failed to ensure that there was public participation in the project before the contract was signed which contravened Article 35.
17. Further the issues of short comings of the contract raised by the advocate J M Mwangi and by the auditor general failed to be addressed before the contract was entered into. That the governor signed the contract instead of the mandated officer that is the accounting officer of the county government. And that the contract was signed before it was tabled before the county's National Assembly.

### ANALYSIS AND DETERMINATION

18. I have considered the submissions for and against the objection raised. My consideration of this matter brought to my attention the new Act relating to matters of Procurement. There is now a Public Procurement and Asset Disposal Act No. 33 of 2015 which commenced on 7<sup>th</sup> January, 2016. It is however clear to me that the objection raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondent was based on The Public Procurement and Disposal Act which commenced on 1<sup>st</sup> January, 2007 that is Cap 412 C.
19. Under Cap 412 C and particularly Section 93, an aggrieved party to any procurement was required to seek review before the Review Board set up under that Act. It is only after the Review Board has delivered itself of grievance that a party so desiring could seek judicial Review of that decision before the High Court. Such Judicial Review ought to have been filed within 14 days of the Review board's decisions.
20. With that in mind was the grievance of the petitioner one that fell within the purview Cap 412 C bearing in mind part B of the petition I have formed the opinion that indeed what the petitioners are aggrieved with in this petition fell squarely within the provisions of Cap 412 C because they wholly relate to matters of procurement which led the county government awarding Tahal the subject contract. To highlight why I so find, I will reproduce paragraph 7 and 8 of part B of the petition as follows;

*“The petitioner submits to the Honourable court that despite clear regulations on procurement, the 1<sup>st</sup> and 3<sup>rd</sup> respondents proceeded to procure and enter into a contract for consultancy in clear disregard of these regulations.*

*The petitioner submits to this honourable court that the continued disregard on regulations on public procurement public private partnerships and principles of good governance and public participations effectively an infringement and violation of provisions of the Constitution of Kenya, 2010 (**the Constitution**)”*

21. Although the petitioners cited Articles 10, 22, 23, 35, 174, 196, 201, 258, 259 of the Constitution the underlying complaint is that the procurement that led to the award of the contract to Tahal was flawed. Their dispute therefore should have been taken to the Review Board Contemplated under Cap 412 C. In this regard the following passages in the case **ABDALLA ABUBAKAR** (Supra) are useful to consider, viz:

*“It is trite law since **SPEAKER OF THE NATIONAL ASSEMBLY – V- KARUME** [2008] 1 KLR (EP) 425 that where the constitution or statute sets out a procedure or mechanism*

*for dealing a particular grievance or dispute that procedure should be strictly followed. According, a contention that an act of procurement is not done in accordance with the Constitution must be under stood as an assertion that the provisions of the Act, which gives effect to the constitutional principle have not been complied with. In such circumstances, the correct procedure for enforcement is the mechanism prescribed in the Statute. The test whether any act done in public procurement is constitutional may then only be launched as a constitutional petition outside the mechanism of the Public Procurement and Disposal Act if it can be shown that the Act does not make provisions on the matter or that the provision of the Act made is contrary to the principles set in the Constitution.*

22.The petitioners Learned Counsel submitted that the respondents failed to abide by the provisions of Article 227 of the constitution. It is on that ground that then they sought their reliefs before this court by a constitutional petition. In my view, and it is a position shared by Justice Edward M. Muriithi when deciding the case ABDALLA ABUBAKAR (supra), the requirements of that Article were underpinned in the Cap 412 C. It is on that ground I find I am not persuaded by the case of ERIC OKEY V COUNTY GOVERNMENT OF KISUMU & 2 OTHERS (2014) eKLR. If there is doubt in any one's mind about my finding their doubt should be allayed by the new statute Act No. 33 of 2015. Section 3 of that Act sets out the guiding principle as follows:

**“Public procurement and asset disposal by state organs and public entities shall be guided by the following values and principles of the constitution and relevant legislation.**

- a. **The national values and principals provided for under Article 10;**
- b. **The equality and freedom from discrimination provided for under Article 27;**
- c. **Affirmative action programmes provided for under Article 55 and 56;**
- d. **Principles of integrity under the leadership and Integrity Act, 2012, No. 19 of 2012**
- e. **The principles of Public finance under Article 201;**
- f. **The values and principles of public service as provided for under Article 232;**
- g. **Principles governing the procurement profession, international norms;**
- h. **Maximization of value for money;**
- i. **Promotion of local industry, sustainable development and protection of the environment;**  
**and**
- j. **Promotion of citizen contractors.**

The above principles clearly spell out, to those who doubted that Act 412 also had the same principle as in Article 227 what would guide the Public Procurement Administrative Review Board provided under section 27 of Act No. 33 of 2015. That is the Board which is set up to review procurement disputes.

23.It follows that the petitioners, if they doubted Act 412C adequately provided for the review of their dispute with the respondents their doubt are now allayed by the new Act which clearly spells out its guiding principles which principles fully accommodate all the rights in the constitution, as can be seen above.

24.Having made that determination it now is necessary to visit the issue raised by the respondents where they faulted the petitioner who when they appeared before the deputy registrar at High Court Nyeri, sought and obtained an order that was contrary to that issued by Justice Odunga in this matter.

25.On 25<sup>th</sup> August 2015 when the petitioners appeared before Justice Odunga the judge noted that Tahal was neither a party in this action and were also not served. This is what the learned judge ordered:-

**“That the application (interlocutory) be served on the Respondent and the same (sic) Tahal Group International of Israel for hearing interpartes before the vacation judge of the High Court in Nakuru.”**

26. The matter after it was transferred to Nakuru was transferred to Nanyuki High Court . On 2<sup>nd</sup> October 2015, when the Nanyuki High Court was not sitting, this file was taken to Nyeri High Court by Deputy Registrar of Nanyuki High court to be placed before a judge. It is not clear why the matter ended up before the Deputy Registrar Nyeri High Court, but it did. On that occasion it was only the petitioner’s learned counsel who was before the said deputy registrar. The respondents stated from the bar that they were not informed that the matter would be referred to Nyeri High Court. The deputy registrar at Nyeri High Court, who I believe was not informed by the petitioners learned counsel of the order made by Odunga J. proceeded to make an order whose effect was to review the learned judge’s previous order. The deputy registrar on that date made the following orders:-

**“1. That the interim orders issued herein by Hon. Justice Odunga on 26<sup>th</sup> August 2015 inter alia be and are hereby extended pending hearing inter partes on 22<sup>nd</sup> October 2015 before the High court sitting in Nanyuki.**

**2. That service be effect upon Tahal Group International of Israel through the Nyandarua County Government.”**

Clearly the deputy registrar has no power to review or set aside an order of the High Court. The order therefore made on 2<sup>nd</sup> October 2015 was made without jurisdiction. It is subject therefore to the supervisory jurisdiction of the High Court as provided under Article 165 (6). **Under that supervisory power I do hereby set aside the order made on 2<sup>nd</sup> October 2015.**

27. In the end the petition for reasons given above is hereby struck out with costs to the respondents. The interim orders of 25<sup>th</sup> August 2015, and the extensions thereafter are hereby vacated.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

Mr. Konyonge for petitioner .....

Mr. Nyakundi for 1<sup>st</sup> and 3<sup>rd</sup> Respondent .....

Mr. Karanja for 2<sup>nd</sup> and 4<sup>th</sup> Respondent .....

**COURT**

Ruling read in open court.

**MARY KASANGO**

**JUDGE**