



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**PETITION NO.12 OF 2016**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND**  
**DISPOSAL ACT NUMBER 3 OF 2005 (“THE ACT”)**  
**BETWEEN**  
**JOSEPH C. KIPTOO.....1ST PETITIONER**  
**SAOS SECURITY SERVICES LTD.....2ND PETITIONER**  
**VRS**  
**KERICHO WATER AND**  
**SEWERAGE COMPANY.....RESPONDENT**

**RULING**

1. The petitioners have filed the present proceedings to challenge the award of the respondent on a tender in respect of security services. The petitioners argue that the actions of the respondent were in violation of the Constitution and of the law. In their application dated 6th July 2016, the petitioners seek the following orders:

**1. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.**

**2. That pending the hearing and final determination of the Notice of Motion application herein, conservatory orders in the form of interim injunction be granted restraining the Respondents either jointly or severally or through their agents and or servants or any person claiming under or through them; from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or concluding a contract agreement between the respondent with any bidding/awarded company as regards tender No. KEWASCO/3/2016/2017 for provision of security services and or assuming the awarded roles.**

**3. That pending the hearing and determination of petition filed, conservatory orders in the form of injunction be granted restraining the respondents either jointly or severally or**

**through their agents or servants or any person claiming under or through them, from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or conducting a power purchase agreement between the respondent with any bidding/awarded company as regards Tender No. KEWASCO/3/2016/2017 for provision of security services and or assuming the awarded roles.**

**4. That the respondent respectively be ordered to provide copies of documents to the Petitioner in terms of its requests dated 1st July 2016 addressed to the 1st Respondent and annexed as exhibit “JCK 1” in annexures of the supporting affidavit.**

**5. That the application be heard inter parties on such date and time as the Honourable Court may direct.**

2. The application is based on the following grounds:

**a) Some of the tender bids had different figures during the opening and the closing.**

**b) On realizing that the only remaining company as top contender was above market price, the respondent went ahead and adjusted the figures unprocedurally whereas the same should have remained absolute as it is according to the Act.**

**c) Article 227 of the constitution demands that 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.**

**d) Article 41 demands that everyone has a right to fair labour practices, which means that the workers under the wing of the Petitioner is protected by the Constitution and if these orders are not granted they might suffer irreparable harm.**

3. The application is supported by an affidavit sworn by the 1<sup>st</sup> petitioner, Mr. Joseph Kiptoo the Managing Director of the 2nd petitioner, on 6th July 2016. Mr. Kiptoo deposes that the petitioners had bid for the tender for provision of security services with the respondent, being tender number KEWASCO/3/2016/2017, but had been disqualified under unclear circumstances. The 2<sup>nd</sup> petitioner had been providing security services to the respondents.

4. The 1st petitioner further deposes that he noted that there was an assault on the Constitution as the figures of one of the contending firms were adjusted unprocedurally, and they therefore requested the respondent for the report of the evaluation committee.

5. It is his deposition further that he is of the view that the adjustment of the figures was in conflict with Chapter 6 and Article 227 of the Constitution which require that the respondent upholds integrity. In his view, no bid should be awarded when there is a flawed process, and he opined that the whole process should have been cancelled.

6. In his submissions on behalf of the petitioners, Learned Counsel, Mr. Sang, submitted that the petitioners were seeking conservatory orders under Articles 10, 22, 23, 41 and 227 of the Constitution as well as the provisions of the Public Procurement and Disposal Act. He submitted further that the petition and application are precipitated by events surrounding tender reference No. KEWASCO/3/2016/2017 for provision of security services to the respondent.

7. Mr. Sang submitted that the petitioners had requested the respondent for information regarding the evaluation committee report, and that the respondent had, in its replying affidavit, annexed the evaluation committee report as “JKT5”. The petitioners invited the Court to peruse the report and note that it was neither signed nor dated.

8. According to the petitioners, the evaluation committee report is a pivotal document and the nerve centre of the procurement process. In their view, what the respondents had produced before the Court was a document that appears to have been quickly conjured up and brought before the court. Their submission was that without the evaluation report, the whole tendering process was hollow, and it appears that in the present matter, there was no procurement process.

9. Mr. Sang submitted further that midway through the tendering process, the 2nd petitioner received a letter disqualifying it from the process on the basis that there were missing documents in its tender. The 2nd petitioner wrote to the respondent seeking more information relating to the missing documents but received no response. It was his submission that the situation was worrisome for the petitioners as they offer a service that involves manpower in terms of security guards and that there were 33 guards in number, all of whom were in danger of losing their livelihood if a flawed process is allowed to stand.

10. Mr. Sang submitted that the core of the petitioners' case is that there is no evaluation committee report. It was his submission further that if the orders sought in their application are not granted, the guards working under the 2nd petitioner are likely to lose their jobs, and further, that there is a likelihood that the loss suffered by the petitioners will be insurmountable in monetary terms.

11. With respect to the question of jurisdiction, Mr. Sang submitted that the Constitution gives this Court wide jurisdiction under Article 165 (3) (d) (ii) and 258 to grant the orders that the petitioners were seeking.

12. In addition, it was the petitioners' submission that the 1<sup>st</sup> petitioner is a private citizen who, while he did not in his private capacity participate in the pre-qualification process and is therefore not a candidate as defined under the Public Procurement and Disposal Act, the law allows him to come before this Court by way of a constitutional petition. Mr. Sang submitted that all statutes are quasi-constitutional and complementary to the Constitutions, that a statute is not a substitute for the Constitution and only complements the Constitution, and he urged the Court to grant the orders that the petitioners were seeking.

## **The Response**

13. In response, the respondent opposed the petition in reliance on an affidavit in reply sworn by Mr. Joseph K. Terer, the Managing Director of the respondent, on 12th July 2016.

14. In his affidavit, Mr. Terer conceded that the 2nd petitioner had submitted a bid for the tender the subject of this petition. Its bid was duly considered by the respondent's Evaluation Committee and found to be incompetent and/or non – responsive to the set criteria, and was rejected at the preliminary stage. Mr. Terer has set out in his affidavit the grounds for the rejection, which the Court need not go into for present purposes. According to Mr. Terer, the 2<sup>nd</sup> petitioner was given in detail the reasons for the rejection of its bid. The respondent therefore avers that the petitioners' allegation of a lack of transparency and irregularities in the tender process have no factual or legal basis.

15. Mr. Terer denied the allegations by the petitioners that the tender sum raised by one of the bidders was illegally altered, and he avers that in any event, the respondent had convinced the successful bidder in subsequent negotiations to lower its asking monthly contract price from kshs.542,080/- to kshs.421,080/-

16. In any event, according to the respondent, the **Public Procurement and Asset Disposal Act, 2015** provides an elaborate dispute resolution mechanism to be followed by bidders aggrieved by any decision taken by a procuring entity, which is the process that the petitioners should have followed before invoking the jurisdiction of the Court. He further deposes that the present petition raises no constitutional issue.

17. Oral submissions were made by Mr. Koech on behalf of the respondent. In his submissions, Mr. Koech raised two points in opposition to the petition and the application. It was his submission, first, that the jurisdiction of the Court had been wrongly invoked by the petitioners as the issues underlying the petition are purely procurement issues which are the subject of the dispute resolution mechanism set out

at Part XV of the Public Procurement and Asset Disposal Act 2015. Mr. Koech submitted that the petitioners had ignored the said mechanism and filed the present petition.

18. He argued, secondly, that the petition and the supporting affidavit do not raise any constitutional issues for determination by this Court. Mr. Koech observed that the petitioners have only cited a myriad of constitutional provisions alleged to have been breached by the respondent without citing particulars to demonstrate their breach.

19. With respect to the submission that the 1st petitioner is a private citizen with the right to approach the Court as he has done in this petition, the respondent conceded that this was indeed the case. However, in its view, the 1st petitioner had come to Court agitating purely procurement issues raised by the 2nd petitioner which had lost in a procurement process undertaken by the respondent. It was the respondent's submission therefore that the petitioners have not established a prima facie case with a probability of success to warrant the injunctive orders sought.

20. Finally, with respect to prayer 3 of the petitioners' application for conservatory orders in which they sought orders to bar the respondent from entering into any agreement with any company awarded the tender, it was the respondent's case that the prayer had been overtaken by events as a binding contract had already been executed between the successful bidder and the respondent. It prayed that the application be dismissed with costs.

### **Petitioners' Rejoinder**

21. In his submissions in reply, Mr. Sang observed that the contract was a creation of a flawed process and there is a likelihood that it is null and void. He also observed that a perusal of the contract shows that the signatures of the awarded firm were not the ones who signed the contract, as it is signed 'for' the said firm. It was also his submission that no prejudice would be occasioned if the orders sought are granted.

### **Determination**

22. I have considered the pleadings of the parties and the submissions made on their behalf by their respective Counsel. The application before me seeks conservatory orders, and as I understand it from Mr. Sang's submissions, the petitioners' case is grounded on the right of the 1<sup>st</sup> petitioner as an individual, private citizen to lodge a petition before the Court alleging violation of constitutional rights under Article 22 or violation of the Constitution as provided under Article 258 of the Constitution.

23. In considering the application before me, I bear in mind that I am not required to enter into a consideration of the merits of the matter before me. What I am required to do is to consider whether I should grant conservatory orders to preserve the subject matter of the petition pending the hearing of the petition. In doing this, I am guided by various principles on which the Court will grant conservatory orders in a constitutional petition which, I believe, are fairly well settled.

24. First, the petitioner must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. In **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011**, the Court (Musinga J (as he then was) stated as follows:

**“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law.**

**At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”**

(Emphasis added)

25. In **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No. 7 of 2011**, Ibrahim J (as he then was), after citing the words of Musinga J in the CREAM case set out above stated as follows:

**“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”**

26. In the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014** the Court expressed itself as follows with respect to the grant of conservatory orders:

**[59]”In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”**

**[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.**

**[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.**

27. In addition, the Court must consider the public interest principle in determining whether or not to grant conservatory orders. With respect to this principle, the Supreme Court (Ojwang and Wanjala, JJSC) in **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** stated as follows:

**[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes” .**

**[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”**

28. It is these principles that I am required to apply to the facts of the matter now before me.

29. It is not in dispute that the facts giving rise to this application arose out of a procurement process by the respondent, in which the 2<sup>nd</sup> petitioner was a bidder. The 2<sup>nd</sup> petitioner, being dissatisfied with the manner in which the process was conducted, which it alleges was in contravention of the Constitution, has, together with its Managing Director, filed the present petition alleging violation of the Constitution.

The 1st petitioner takes the position that he is a private citizen and is therefore entitled to bring a claim under Article 22 and 258 of the Constitution.

30. The question is whether the petitioners have established a prima facie case that would entitle them to the reliefs that they are seeking at an interlocutory stage. To establish such a case, they must, in my view, overcome two hurdles.

31. The first is a jurisdictional hurdle. As this matter arises out of a procurement process, can the petitioners bring a constitutional petition to challenge the decision of the procuring entity, the respondent? They allege violation of Article 227, which provides as follows:

**227. (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 costeffective. (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—**

**(a) categories of preference in the allocation of contracts;**

**(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;**

**(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and**

**(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.**

32. It is undisputed that the law that governs procurement in Kenya is the Public Procurement and Asset Disposal Act, No. 33 of 2015. The Act states in its preamble that it is **“AN ACT of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.”** I believe this is conceded even by the petitioners, who have in the heading of their case invoked its provisions. Thus, it is clear from the legislation that the Act of Parliament contemplated under

Article 227 has been enacted, and its provisions govern all matters related to procurement in Kenya.

33. As submitted by the respondent, Part XV of the Act sets out an elaborate procedure for dealing with disputes arising out of the procurement processes of public entities. Section 167 which is titled **“Request for a review”** provides as follows:

**(1) Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

34. With respect to the role of the High Court, and generally with regard to the options open to a party dissatisfied with the decision of the Review Board, section 175 of the Act titled **“Right to judicial review to procurement”** provides as follows:

**(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.**

**(2) The application for a judicial review shall be accepted only after the aggrieved party**

pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

**(3) The High Court shall determine the judicial review application within forty-five days after such application.**

**(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.**

...

35. It has been stated time and again that where an Act of Parliament provides a mechanism for resolution of disputes, that mechanism must be strictly followed. In its decision in **The Speaker of the National Assembly vs Karume [2008] 1KLR (E.P) 425**, the Court of Appeal observed that:

**“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”** See also **Kipkalya Kones vs Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291.**

36. In the Case of **Francis Gitau Parsimei & 2 Others –vs- National Alliance Party & 4 Others Petition No. 356 of 2012 (Consolidated with Petition No 359 of 2012**, the Court also took the view, which I agree with, that where the Constitution or a statute establishes a dispute resolution procedure, that procedure must be followed.

37. It is thus evident that the petitioners had a clear process for resolution of their grievances with respect to the tendering process by the respondent. It does not help to argue, as they have done, that the 1st petitioner, as a private citizen, has a right to lodge a constitutional petition under Article 22 and 258. While he does indeed have that right, in this case, he is attempting to circumvent the strictures of the Public Procurement and Asset Disposal Act, which require that such disputes be placed within certain timelines before the Public Procurement Administrative Review Board. His argument is therefore untenable.

38. However, even had it been possible for the petitioners to raise a constitutional matter out of the procurement process, does their petition disclose a constitutional issue for resolution by this Court? This is the second hurdle that I believe the petitioners have not been able to overcome.

39. Mr. Sang submitted that the petitioners were alleging violation of Articles 10, 22, 23, 41 and 227 of the Constitution. I have already addressed myself to the provisions of Article 227, which I have set out above. Article 10 contains the national values and principles of governance, while Article 22 relates to the right of a person to lodge a petition alleging violation of a right or fundamental freedom. Article 23 sets out the jurisdiction of the Court with respect to a petition lodged under Article 22, while Article 41 protects the right to fair labour practices.

40. Having read the petitioners’ pleadings and heard their Counsel’s submissions, I am constrained to say that I have not seen any violation or threat of violation of any of the constitutional rights of the 1st petitioner disclosed. There was a submission that the security guards employed by the 2nd petitioner may lose their livelihood, but this is not a matter for consideration in a procurement dispute. Further, the rights guaranteed under Article 41 fall within the jurisdiction of the Employment and Labour Relations Court established pursuant to Article 162 of the Constitution, and are not for adjudication before this court.

41. Taking all these limitations in the petitioners’ case into consideration, the only conclusion I can come to is that no prima facie case to justify the grant of conservatory orders as sought in the application dated 6th July 2016 has been made out. I am therefore constrained to dismiss the application, which I hereby do.

42. Costs in respect thereof shall await the outcome of the petition.

**Dated, Delivered and Signed at Kericho this 29th day of July 2016.**

**MUMBI NGUGI**

**JUDGE**