



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**PETITION NO. 6 OF 2012**

**CONSOLIDATED WITH**

**PETITION NO. 8 & 9 OF 2014**

**BETWEEN**

**MICHAEL JUMA OTIENO ..... PETITIONER**

**AND**

**EXECUTIVE DIRECTOR NON-GOVERNMENTAL**

**ORGANISATIONS BOARD ..... RESPONDENT**

**JUDGMENT**

1. The genesis of the consolidated petitions is *Kisumu HC Misc. Civil Application No. 7 of 2011* filed by the petitioner Michael Otieno Juma suing as the representative for the Centre for Peace and Documentary (CEPAD) Board of Director against the Executive Director Non-Governmental Organisations Co-ordination Board. The petition sought an order of mandamus to compel the Non-Governmental Organisation Co-ordination Board to register new CEPAD officials elected during a special annual general meeting held at Bondo on 29<sup>th</sup> October 2010. The respondent and interested parties in that case were represented by the firm of *Otieno, Yogo, Ojuro & Company Advocates* (“the Firm”). The suit was struck out with costs to the respondent and there currently proceedings for recovery of costs.

2. In order to challenge the appointment of the Firm to represent the respondent in *Kisumu HC Misc. Civil Application No. 7 of 2011*, the petitioner lodged **Petition No. 6 of 2012** in which it alleged the respondent procured the Firm’s services without due process to represent them in the matter and that since the Firm represented both the respondent and other interested parties in that case, the representation was likely to lead to a conflict of interest. The petitioner also applied for an order under **Article 35** of the Constitution, which protects the rights to information held by the State, directing the respondent to supply it with documents relating to the procurement of legal services from the Firm and a consequent declaration that the Firms engagement by the respondent was null and void.

3. In **Petition No. 8 of 2014**, the petitioner applied for an order directing the respondent to furnish it with documents leading to the procurement of legal services from the Firm and declarations that representation of the respondent by the Firm in *Kisumu HC Misc. No. 7 of 2011* was, “*an imposition, null and void and therefore not binding on the respondent if the procurement on record are not supplied to the petitioner.*” It also sought a declaration that the Firm had a conflict of interest as it represented the respondent and some of the interested parties.

4. In **Petition No. 9 of 2014**, the petitioner applied for an order directing the respondent to furnish it with documents leading to the procurement of legal services from the Firm. It also applied for several declarations among them a declaration, “*the alleged representation of the [respondent] by the firm .... in Civil Suit No. 16 of 2011 in the High Court at Kisumu .... is illegal, fraudulent, null and void in the absence of proof of existence of appropriate procedures through documentary evidence that services were obtained through a legal process.*” In the case cited, **Kisumu HCCC No. 16 of 2011**, the petitioner had sued the respondent, Martin Luther Omondi Ocholla and Christine Awuor Otiri for damages for defamation on account of an advertisement placed in a local newspaper claiming that he was not an official of CEPAD.

5. The common thread running through the petitions is that the petitioner has invoked **Article 35** of the Constitution which establishes a right to freedom of information from the State to seek information on how the respondent procured services of the Firm.

6. When the matter came up for directions on 30<sup>th</sup> June 2016, I directed the respondent to file an affidavit containing all the information sought by the petitioner in the consolidated petitions. The respondent filed a replying affidavit sworn by Lindon Otieno sworn on 15<sup>th</sup> July annexing minutes of the respondent’s tender committee and other correspondence between it and the petitioner. On 8<sup>th</sup> August 2016, the petitioner requested to have the following documents; the advertisement notice, minutes or report of the tender opening, minutes or report of the evaluation committee and minutes of the technical committee. I directed the respondent to facilitate the petitioner to access the documents through its advocate. The petitioner claimed that he did not get access to the documents so I directed the respondent’s counsel to obtain all the documents and furnish them to the petitioner. The respondent through the affidavit of Geoffrey Yogo sworn on 16<sup>th</sup> August 2016 furnished all the documents requested for by the petitioner and ordered by the Court.

7. I have considered all the documents furnished and I find and hold that the respondent has complied with its obligation under **Article 35** of the Constitution to facilitate access to information. Likewise, counsel for the petitioner confirmed that all the documents had now been furnished. The issue that remains now is whether I should grant the other orders in relation to **Kisumu HC Misc. Civil Application No. 7 of 2011** and **Kisumu High Court Civil Suit No. 16 of 2011**.

8. In each of the pending cases, the petitioner challenges the respondent’s representation by the Firm on account of conflict of interest. I take the view that the issue of conflict of interest, being a matter concerning representation of a party in a matter, should be determined as part of that case and not in separate and parallel petition. My view is fortified by the fact that the Firm represents other parties who are not parties to this suit. To insist of parallel proceedings to determine an issue that can be taken up in the pending proceedings would undermine the court’s objective to ensure that justice is dispensed fairly and efficiently. As the issue of conflict of interest can be taken in the pending proceedings, I find and hold that these **Petitions No. 8 and 9 of 2014** constitute an abuse of the court process and are hereby struck out.

9. The other complaint relates to the process by which the respondent procured the Firm’s services. This is an issue that concerns the competence of the Firm to represent parties to a suit. It is also an issue that should also be taken up in the within the pending suits. As the issue concerns the public procurement of services, it is also governed by the **Public Procurement and Asset Disposal Act, Act No. 33 of 2015** which establishes the Public Procurement Regulatory Authority. Among its functions, under **section 9** of the **Act** is, ‘*to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities tenderers, contractors or the general public that are not subject of administrative review.*’

10. Thus without saying more, the first port of call on matters of procurement is the Public Procurement Regulatory Authority which is authorized to investigate complaints like that raised by the petitioner. As he has now been furnished with information regarding the procurement of legal services from the Firm, he may now use it to agitate his case before the Authority.

11. On the issue of costs, the petitioner has succeeded in **Petition No. 6 of 2012** as he has now obtained the documents he requires. **Petitions Nos. 8 and 9 of 2014** have been struck out. As both parties have won and lost in equal measure there shall be no order as to costs.

12. The final orders are therefore as follows;

(a) I declare that the respondent had complied with **Article 35** of the Constitution by supplying the petitioners with documents in its possession concerning the procurement of services for legal services from the firm of *Otieno, Yogo, Ojuro & Company Advocates*.

(b) **Petition Nos. 8 and 9 of 2014** are hereby struck out.

(c) There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 18<sup>th</sup> day of August 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Amondi and Mr Lore instructed by Amondi and Company Advocates for the petitioner.

Mr Yogo instructed by Otieno, Yogo, Ojuro and Company Advocates for the respondent.