



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 130 OF 2015

B JERKE TERMINALS.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. By a plaint dated 6.10.2015 the Plaintiff sued the defendant and sought an order for general damages for breach of Statutory duty allegedly committed by the defendant in the manner it handled the tender headed **“CONCESSIONAIRE FOR PHASE OF SECOND CONTAINER TERMINAL AT THE PORT OF MOMBASA TENDER NO. KPA/007/2014-2018/CS”**.

2. THAT plaint was subsequently amended on the 17/12/2015 to essentially particularize what the plaintiff considered to be the breaches of the law including allegations of unfair treatment, conferring undue advantage on a section of the tenderers and failure to comply with the law which the plaintiff contend was in contravention of the statutory and constitutional provisions relating to public procurement. As a consequence the prayers in the plaint were amended and the general damages then became quantified in the same of US DOLLARS 423,108,000/-

3. It is that amended plaint that the defendant now seeks to have struck out by the defendant application dated 24/5/2016 on grounds among orders that:-

“The court is not clothed with requisite original jurisdiction

to hear and determine any dissatisfaction, complaint and or petition emanating from the decision taken by the defendant and touching on the tender in the first instance.

That there is a clear and special procedure for redress provided for by the Public Private Partnership Act which the plaintiff was bond to follow and which it has not followed”.

4. The application is supported by an affidavit sworn by AZA NASSIR DZENGO an employee of the Defendant in the position of senior procurement officer and reiterates the grounds of the application.

5. The defendant opposed the application by the grounds of opposition dated 20/7/2016 in which the application is attacked as being frivolous and lacking in merit and that it is brought in bad faith merely to delay the final determination of the suit.

6. I have equally perused court file and nosed that the objection to jurisdiction grounded on the provisions of the Public Private Partnerships Act was also taken by a notice of preliminary objection dated 28/1/2016 and filed in court on the 29/1/2016.

7. When the matter came up for hearing Mr Mogambi appeared for the defendant/applicant while Mr Kariuki appeared for the plaintiff/respondent.

8. Mr. Mugambi's argument was short and precise. He argued that there is a clear procedure provided under the Act for the redress of disputes and which by itself deprived this court of original jurisdiction to entertain the matter before one exhausts the rights under the statute. He cited section 67 of the Act and the decision of the court of Appeal in JALDESA TUKE DABELO VS IEBC & ANOTHER to support his application and the arguments.

9. In response Mr Kariuki submitted that the suit as framed does not seek review of the tender process and award but an order for damages for breach of statutory duty on the Defendant to consider the tender fairly. He however conceded that section 67 of the Act establishes the Petitions Committee which is enjoined to consider all compliments submitted to it but that the committee does not have jurisdiction to award damages. He added further that as worded the provision does not deprive the court of the adjudicative authority under the Constitution at Article 159.

10. In rejoinder to that opposition, Mr Mugambi submitted that as worded, the statute gives jurisdiction to the Petitions Committee to hear all complaints and petitions by a private party in the process of tendering and entering into project agreement under the Act.

11. The court has read the pleadings on record and taken into account the submissions by the parties and applied same to the law applicable. To the court the issue for determination is only one, whether or not the cause of action as pleaded lies before this court regard being heard to the provisions of section 67, Public, Private Partnership Act No. of 2013. Section 67 provides:-

12. It is a cardinal principle of law that where the legislature or the Constitution vest on a body a specific duty, the court must respect that decision and can only interfere by way of supervision or by appeal if the statute so provides. This is the flip side of the settled principle of law that the jurisdiction of the court must be granted by the statute of constitution but cannot be usurped or abrogated by judicial craft. See *Owners of motor vessel "S" [2012] eKLR*.

13. In the matter before the court the statute is unequivocal that all disputes, complaints and petitions concerning and emanating from the tendering and entering in a partnership agreement shall be determined by the Petitions Committee. The law in this area is in no doubts and has been restated severally.

In the case of JADELSA TUKE DABELO vs IEBC & ANOTHER at paragraph 18 the Court of Appeal said:-

“It has often times been stated that rules of procedure are handmaids of justice where there is a clear procedure

for redress of any grievance prescribed by an act of parliament, that procedure should be strictly be followed (see National Assembly, in the matter of James Njenga Karume & 3 Others,

Civil Application No. Nairobi 92 of 1992). In the Instant case, the Elections Act stipulates that the procedure to challenge membership to the County Assembly is by way of a Petition. The Appellant having chosen a wrong procedure cannot turn around and rely on Article 159 of the Constitution. Article 159 of the Constitution was neither aimed at conferring jurisdiction where none exists nor intended to derogate from the express statutory procedures for initiating a cause of action before the courts. The statutory procedure stipulated for determining the question of membership to the

County Assembly is by way of a petition.

14. I have no reason not to be guarded by that very clear and sound pronouncements of the Court of Appeal.

I find that the entity vested with original jurisdiction to determine the plaintiff grievances was the Petitions Committee and not this court. I therefore strike out the suit for not lying here on the grounds that this court has no jurisdiction under the Act.

I award costs to the defendant/applicant.

Dated, signed and delivered at Mombasa this **4th** day of **August** 2016.

P.J.O. OTIENO

JUDGE