



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**PETITION NO. 1 OF 2015**

ABDALLA ABUBAKAR MIRAJ ..... 1<sup>ST</sup> PETITIONER

PETER OSEKO MATANGI ..... 2<sup>ND</sup> PETITIONER

- VERSUS -

KENYA FERRY SERVICES LTD. .... RESPONDENT

**RULING**

**Preliminary Objection**

1. The learned Counsel for the defendant, Mr Kitur, has raised a preliminary objection to the petition herein on the ground that the court lacks jurisdiction to hear and determine the Petition as framed. The Objection is opposed by counsel for the Petitioners, Mr. Nyanyuki.

**Background**

2. By a petition dated 2<sup>nd</sup> January 2015, the petitioners who describe themselves as residents of Mombasa City entitled to consumer rights as users of ferry services seek against the respondent government organ in charge of provision of ferry services the following relief in relation to an award of tender for supply of ferries:

- A. *A Declaration that the award of tender KFS/FERRIES/01/09/2014 for the design, build, supply and commissioning of two new passenger /vehicle ferries violates the provisions of Articles 10, 42, 201 and 227 of the Constitution of Kenya, 2010, therefore null and void ab initio.*
- B. *A Declaration that the tender KFS/FERRIES/01/09/2014 for the design, build, supply and commissioning of two new passenger /vehicle ferries is wrought with fraud and misrepresentations.*
- C. *An Order of Certiorari directed to the respondent removing into the High Court for purposes of being quashed the award of tender KFS/FERRIES/01/09/2014 for the design, build, supply and commissioning of two new passenger /vehicle ferries for want of constitutional and statutory requirements.*
- D. *Costs of this petition to the petitioners.*

3. The petitioners sought to establish their locus by averment in paragraph 4 of the Petition that:

*“4. The petitioners are frequent users of Ferry services offered and managed by the respondent in the enjoyment of the rights, freedoms of movement and social economic pursuits within*

***Mombasa County and its environs and entitled to a safe ferry facility competently, competitively and diligently procured. Besides, the general public, residents of Mombasa and users of the ferry services are entitled to a facility of sound quality, procured through a competitive process in line with the law germane to procurement of public goods and services in Kenya”***

4. The petitioners’ primary complaint as pleaded at paragraphs 12 and 13 of the petition is as follows:

12. *In blatant violation of the tender requirements, the respondent has recklessly failed, neglected and or omitted to conduct site visit of the bidders to ascertain the bidders’ technical competence to supply the said ferries.*
13. *The processes attendant to the said procurement were an abuse of the tender document/requirements, waste of public resources, detrimental to the public interest and right to value for money. Such omission [h]as denied the respondent the opportunity to pick the best bidder with technical competence to supply the ferries sought to be procured.*

5. The “nature of injury caused or likely to be caused to the petitioners and the public at large” is given at paragraph 18 -20 of the Petition as follows:

18. *The Respondent has violated the fundamentals of the tender requirements and mandatory provisions of section 31 of the Public Procurement and Disposal Act 2005.*
18. *The Petitioners aver that the safety and security of the users is not guaranteed in the face of negligence, omissions and commissions on the part of respondents, its agents, employees or functionaries.*
19. *The Petitioners are apprehensive that it is expensive to hire or procure a ferry service from an entity which has not been internationally and nationally as the same amount to use of the Kenyan public/ferry users as guinea pig for experimental purposes.*

### **Submissions**

6. In urging his Preliminary Objection, Mr. Kitur contended that the substratum of the petitioners action was a procurement process undertaken by the respondent and therefore the court lacks jurisdiction on the ground that once a party brings himself within the provisions of the Public Procurement and Disposal Act, the party was obliged to comply with the process of the Act. Counsel contended that the Act has a mechanism including an appeal process which has not been exhausted. Citing sections 93 and 96 of the Act, counsel urged that the matter was within the province of the Public Procurement and Administrative Review Board where the petitioners could seek admission as parties and if subsequently aggrieved by the statutory process come to court by judicial review or appeal. Counsel considered therefore that the petition was premature. Counsel submitted that where there is a statutory procedure for resolution of disputes the same should be followed, and relied on the decisions of ***Okiya Omtata Okoiti & 2 Ors. v. Attorney General and 3 Ors.*** Nairobi HC Petition NO. 58 of 2014, (2014) eKLR and ***Kituo cha Sheria and Anor. v. The Central Bank of Kenya and Ors.*** Nairobi HC Petition NO. 191 of 2011, (2014) eKLR.

7. Mr. Nyanyuki for the petitioners opposed the objection as a side show arguing that the matter before the court was a constitutional petition whose competency is underpinned by the provisions of Article 258 the constitution that every person has a right to institute proceedings that the constitution has been contravened or is likely to be contravened coupled with article 165 (3) (d) (ii) conferring to the High Court -

*“(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) ...;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;”*

8. Counsel contended that Article 227 of the Constitution required a public procurement process that is fair and cost effective and the respondent as a public body is subject to Article 227. The applicant, having alleged that the respondent had not done the procurement in accordance with the constitution, could properly approach the court for a determination whether the act of procurement was done in accordance with the Constitution. Counsel argued that section 96 did not make it mandatory for everybody to approach the Review Board. The section 96 procedure would only avail parties to the tender process and not outsiders such as the petitioners who, as Kenya citizens and users of the ferry service, sought to enforce their consumer rights under Article 46 of the Constitution and a determination whether any act has been done in accordance with the Constitution.

### **Issue for Determination**

9. The issue for determination is therefore whether the court has jurisdiction to entertain a petition alleging contravention of the Public Procurement and Disposal Act, 2005 as a violation of Constitution or whether such matter should be dealt with under the Provisions of the Public Procurement Act, 2005.

### **Determination**

10. A preliminary objection, according to *Mukisa Biscuits Co. v. West End Distributors Ltd*, (1969) EA 696, 701 raises a pure point of law which is argued on the basis that all the facts pleaded by the other side are correct. In raising the Preliminary Objection the respondent is taken to accept the facts as pleaded by the petitioner and the court shall not refer to the replying affidavit filed in the matter on behalf of the respondent.

11. 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. That must accord with the principle of the Rule of Law which is one of the cardinal principles and values of governance under Article 10 of the Constitution.

12. Article 227 of the Constitution is in the following terms:

*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 cost-effective.*

*(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.*

13. Clearly Article 227 does not stipulate the specific requirements of public procurement law but rather lays down the principles to underpin legislation to be enacted by parliament providing the specific procedures for public procurement. The Public procurement and Disposal Act is the legislation enacted by Parliament pursuant to Article 227 to give effect to the principles of public procurement set out in the Constitution. The legislation contemplated by Article 227 being the Public Procurement and Disposal

Act, unless a successful challenge is made that the Act is inconsistent with the Constitution in not giving effect to the principles set out in the constitution, it must be the law against which compliance with the public procurement principles will be measured.

14. Accordingly, a contention that an act of procurement is not done in accordance with the Constitution must be understood 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 provision on the matter or that the provision of the Act made is contrary to the principles set in the Constitution.

15. I respectfully agree with Mumbi Ngugi, J. in the *Kituo Cha Sheria* case, supra, where on a question of violation of public procurement process, the learned judge said:

*“35. [T]he 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.”*

16. Does the Act avail a person outside the tender process? Section 96 of the Public Procurement and Disposal Act provides for the person who may become parties to a review as follows:

*96. The parties to a review shall be —*

*(a) the person who requested the review;*

*(b) the procuring entity;*

*(c) if the procuring entity has notified a person that the person’s tender, proposal or quotation was successful, that person; and*

*(d) such other persons as the Review Board may determine.*

The petitioners may be admitted as parties to the review under paragraph (d). Moreover, from the pleadings, the averments of the details of the procurement transaction and process as to what was done and what was not done with respect to the technical evaluations of the bidders indicate that the petitioners are proxies for some participant(s) of the tender process and not merely citizen users of the ferry services as pleaded. It has not been alleged that the petitioners sought and were denied opportunity to join or seek a review under this section. In the circumstances, the petition to this court is at best premature.

17. Indeed, there is an avenue for subsequent reference to the High Court on judicial review under section 100 of the Act as follows:

*“100. (1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision.*

*(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.”*

18. The question of technical evaluation of the tenders which is the central complaint of the petition as shown at paragraph 12 of the Petition is the subject of Regulation 16 (5) of the Public Procurement and Disposal Regulation 2006 as follows:

*(5) A technical evaluation committee established in accordance with paragraph (2) (a) shall be responsible for—*

- a. *the technical evaluation of the tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;*
- b. *performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders.*

The petitioners should, therefore, use the mechanism of the Act to enforce the provisions relating to technical evaluation of the bids.

19. The petitioners allege contravention of section 31 of the Public Procurement and Disposal Act, which provides for Qualifications of a person to be awarded contract. The avenue for redress of such contravention is through the Public Procurement and Disposal Act, 2005, and this action by constitutional petition is wholly unnecessary. The constitutional concerns based on consumer rights protections are protected under the strict provisions of the legislation regime on public procurement contained in the Public Procurement Act 2005 and the regulations made there-under.

20. That is the outcome dictated by the principle of ‘constitutional avoidance’, which as observed by the Supreme Court of Kenya in ***Communications Commission of Kenya & 5 Ors. v. Royal Media Services Ltd & 5 Ors.*** (2014) eKLR holds that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of. See *ibid* at paragraphs 256-8.

### **Orders**

21. Accordingly, for the reasons set out above, the Preliminary Objection succeeds and the Petition dated 2<sup>nd</sup> January 2015 and the Notice of Motion of the same date filed therein, are struck out for being premature, with costs to the Respondent.

**DATED SIGNED AND DELIVERED THIS 23<sup>rd</sup> DAY OF JANUARY 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Nanyuki for the Petitioners

Mr. Kitur for the Respondents

Murimi Court Assistant.