



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 629 OF 2014

HON JIMALDIN ADAN AHMED & 10 OTHERSPETITIONERS

VERSUS

THE HON ALI IBRAHIM ROBA1ST RESPONDENT

THE HON COUNTY SECRETARY OF MANDERA2ND RESPONDENT

THE HON ATTORNEY GENERAL3RD RESPONDENT

RULING

Introduction

1. The petitioners have filed the present petition dated 22nd December 2014 in which they seek a declaration that the actions of the 1st respondent, in failing to allocate 30% of the projects advertised on 25th December 2014, to special groups within Mandera County amount to gross violation of the provisions of **Article 227(2)(b)** of the **Constitution** and **Regulation 31** of the **Public Procurement and Disposal (Preferences and Reservations) Act 2005** as amended by Legal Notice No 114 of 2013. They also seek orders that the tendering process is null and void, as well as the costs of the petition.
2. Simultaneously with the petition, the petitioners filed an application by way of Notice of Motion dated 22nd December 2014 seeking, together with the costs of the application, the following substantive orders:

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2. That this Honourable court be pleased to issue a temporary injunction stopping the Respondents by themselves, servants and/or agents from implementing the Tender advertised on 14th December 2014 pending hearing and determination of this application interpartes.

3. That this Honourable court be pleased to issue a temporary injunction stopping the Respondents by themselves, servants and/or agents from implementing the Tender advertised on 14th December 2014 pending hearing and determination of this Petition.

3. The grounds on which the application was lodged are set out in the application. The petitioners state that the County Government of Mandera had in the Standard Newspaper of 31st October 2014 published a Re-advertisement of tenders and invited interested and eligible bidders for 210 projects within Mandera County. Out of the 210 projects advertised, the County Government had, contrary to the provisions of the Constitution and the law reserved only 50 of the projects for the special groups instead of 63 projects which would amount to 30% of the total projects. They state further that the 1st petitioner, being the member of the County Assembly representing the youth tabled a question on the floor of the County Assembly of Mandera questioning the manner in which the said tendering process had been allocated, but that the respondents did not respond to the question but that the respondents cancelled the tender advertisement.
4. The petitioners claim, however, that in blatant disregard of Article 227(2)(b) of the Constitution and the grievances of the special groups in Mandera County, the 2nd respondent, on 14th December 2014, re-advertised the same 203 projects out of which none have been allocated to the special groups which should have been allocated 61 projects or 30% of the projects as mandated by law. It was this alleged failure to allocate any projects to the special groups that precipitated the filing of this petition and the application.
5. By an order made on 31st December 2014, the petition and application were amended to reflect that the impugned advertisement was the one dated 25th December 2014.
6. The application is opposed. The 1st and 2nd respondents filed grounds of opposition dated 30th December in which they argue, inter alia, that the impugned tenders have been reviewed, expanded and re-advertised on 25th December 2014 and that they expressly reserve specific tenders for special groups, namely women, youth and persons with disabilities, as well as encouraging the participation of such groups.
7. The application was canvassed before me on 7th January 2014.

The Petitioners' Submissions

8. The petitioners' case was presented by their learned Counsel, Mr. Muthama. He submitted that the petitioners, who bring the petition on their own behalf and on behalf of other special groups in Mandera County, are aggrieved by the 1st and 2nd respondents' advertisement in the Standard Newspaper of 25th December 2014 which they contend violates Article 227 of the Constitutions and Regulation 31(1) of **The Public Procurement and Disposal (Preference and Reservations) Regulations**, Legal Notice No 114 of 2013. Mr. Muthama submitted that regulation 31 stipulates that 30% of all government tenders are to be awarded to the target group, namely women, youth, and persons with disabilities, and that in the present case, by reserving 43 or 21% of the tenders to these special groups, the respondents had violated the regulations and the Constitution. Counsel submitted that in accordance with Article 2 of the Constitution, any action that was in contravention of the Constitution was null and void.
9. To support his claim that the conservatory orders were merited, Mr. Muthama relied on the decision in **Giella -vs- Cassman Brown & Co. LTD (1973) EA 358** with regard to the principles to be considered in granting injunctive orders. He submitted that the tender period is to expire on 13th January 2015 and so should the prayers not be granted, the petitioners stand to be locked out. It was also his submission that the petitioners will suffer, irreparable loss as this is a target group which was meant to improve its economic status, and therefore no amount of damages can compensate them if the orders are not granted. It was also Counsel's submission that the balance of convenience lay in favour of the petitioners as the petition has a high chance of success.

Submissions by the 1st and 2nd Respondents

10. Mr. Yunis Mohamed, Learned Counsel for the 1st and 2nd respondents, opposed the application. He conceded that in the tender advertised on 25th December 2014, the respondents had reserved 43 projects out of 203 which amounts to 21% of the projects. It was his submission, however, that there was no violation of Article 227(2)(b), in which the key word is protection or advancement of special groups to which the respondents had given 21% of the projects. He submitted that the 30% requirement was in respect of the budget and projects in every year, and not in every project.
11. Counsel further informed the court that discussions had been held with the petitioners in which an offer was made to compensate the special groups with 9 % of the projects in the next advertisement but it was rejected. It was his case that the words used in regulation 31 of **The Public Procurement and Disposal (Preference and Reservations) Regulations** relied on by the petitioners is “*procurement spend*” and relates to the County budget expenditure for the year, and it was his submission therefore that this application is premature.
12. Mr. Mohamed submitted that there are many other projects which the County gives at local level, and there was nothing before the court to show that lesser allocation occurs to special groups.
13. Mr. Mohamed urged the court not to grant the orders sought, arguing that the public interest lay in allowing the tenders to proceed. He submitted that the advertisement dated 25th December 2014 had a list of 203 projects, among which are projects for supplying of drugs to hospitals, construction and equipping of maternity wings, water and roads to improve accessibility. It was his submission that on the **Giella Cassman vs Brown** principles, a prima facie case does not arise when an order is made to deny the population much needed drugs and other essentials. It was his case that the petitioners will not suffer any irreparable loss or injury if the orders sought are not issued and the tenders are opened as they can be adequately compensated with an award of damages.
14. It was also his position that the balance of convenience lies in favour of the county government proceeding with the wheel of development. Counsel relied on the decision of the court in **Abdi Salat Agalab -vs- Governor, Garissa County and Another Garissa, High Court Petition No 2 of 2013** to urge the court not to grant the interim orders sought by the petitioners but to dismiss the application with costs.

Submissions by the 3rd Respondent

15. Learned Counsel for the Attorney General, Ms. Wawira, informed the court that she was leaving the decision on whether to grant the orders sought by the petitioners to the court.

Petitioners’ Rejoinder

16. In his reply to the submissions on behalf of the 1st and 2nd respondents, Mr. Muthama submitted that as the 1st and 2nd respondents had conceded that they had not given 30 % of the projects to the special groups, they had conceded that they were in violation of the Constitution and the law. It was also his position that whether or not a matter is in the public interest, the court must uphold the law. He urged the court, even if it did not issue the interim orders sought by the petitioners, to issue orders maintaining the status quo pending the hearing and determination of the petition.

Determination

17. This application revolves around the reservation to special groups of less than 30% of the tenders advertised by the 1st and 2nd respondents in the Standard Newspaper of 25th December 2014. It is conceded that the County Government reserved 43 or 21% of the tenders to special groups. The petitioners are adamant that the tenders violate the Constitution and the procurement regulations as at least 61 of the projects should have been reserved for women, youth, and persons with disabilities.

18. The tenders in question are set to be opened on 13th January 2015. The issue before me is whether to restrain the opening of the tenders pending the hearing and determination of the petition. In considering this question, I bear in mind the provisions of the Constitution and **The Public Procurement and Disposal (Preference and Reservations) Regulations** that the petitioners argue have been violated.

19. Article 227 of the Constitution 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 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)

20. It is not in dispute that **The Public Procurement and Disposal Act** and the regulations made thereunder, **The Public Procurement and Disposal (Preference and Reservations) Regulations** are the constitutionally underpinned legal framework within which public procurements take place. Regulation 31 of Legal Notice No 114 of 2013, which is titled “**Budgetary Reservations**”, provides as follows:

31. (1) A procuring entity shall allocate at least thirty percent of its procurement spend for the purposes of procuring goods, works and services from micro and small enterprises owned by youth, women and persons with disability.

(2) For the purpose of implementing paragraph (1), a procuring entity shall implement the requirement through its budgets, procurement plans, tender notices, contract awards and submit quarterly reports to the Authority. (Emphasis added)

21. The regulations do not define “**procurement spend.**” However, the provisions of regulation 31(2), in my view, suggest that the “**procurement spend**” must be taken to include the overall budget of the procuring entity, so that the 30% reservation can be achieved through “**budgets, procurement plans, tender notices, contract awards.**”

22. I appreciate that I am considering this point at the interlocutory stage, and that at the substantive hearing of the petition, there may be arguments and authorities placed before the court that may show otherwise. However, on the material before me, I am satisfied that the intention behind the constitutional provisions and the regulations was not that every single tender by every public entity must have a 30% reservation for special groups, failure to do which should lead to invalidation of the tender.

23. The provisions in the regulations appear to contemplate a situation in which, taken as a whole, the procurements by a public entity demonstrate that the “**protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination**” have been taken into consideration, and that at least thirty percent of the funds utilized in procurement by a public entity have been through these previously disadvantaged groups.

24. In the case before me, the County Government of Mandera has reserved 43 out of 203 projects, or 21 per cent of the projects covered in the tender advertised on 25th December 2014, for special groups. Can this be said to be a violation of Article 227 and Regulation 31? On the face of it, and given the view that I have taken of the intention behind the constitutional provision and the regulations, I do not think it is. In the circumstances, therefore, I am not satisfied that the petitioners have established a prima facie case with a probability of success on the principles established in **Giella –vs- Cassman Brown** that they rely on.

25. It is also my view that the petitioners fail on the second principle in **Giella**. The parties who are successful in the tender process would expect to receive payment for the contracts they enter into with the County Government. In other words, the petitioners' claim is about financial gain, and should they succeed and it was found that their claim was well founded, then they can, as submitted by the respondent, be compensated in damages.

26. Thirdly, I find that the balance of convenience, as well as the public interest principle consideration advanced in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** militate against the grant of the conservatory orders. In that case, the Supreme Court (**Ojwang and Wanjala JJSC**) expressed itself as follows:

“...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.”...

27. As submitted by Mr. Mohamed on behalf of the 1st and 2nd respondents, the projects covered by the tenders set to be opened on Monday, 13th January 2015, cover critical areas such as water pans, boreholes, construction of roads and classrooms, dispensaries and health centres in various parts of the County of Mandera. It is, in my view, in the public interest and in the best interests of the residents of the County that the tenders are opened as scheduled.

28. For the above reasons, I decline to issue the orders sought in the application dated 22nd December 2014. It is therefore dismissed, with the costs thereof to await the outcome of the petition.

Dated, Delivered and Signed at Nairobi this 9th day of January 2015

MUMBI NGUGI

JUDGE

Mr Muthama & Mr Meme instructed by the firm of Kago Muthama & Co. Advocates for the petitioner

Mr Yunis Mohamed instructed by the firm of Yunis Mohamed & Associates for the 1st & 2nd respondent

Mr Njoroge instructed by the State Law Office for the 3rd respondent