



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

PETITION NO 8 OF 2015

JAPAN EXPORT VEHICLE INSPECTION CENTER CO. LTD.....PETITIONER

VERSUS

THE KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

Introduction

1. This petition concerns the alleged violation of the petitioner's rights as a result of the failure of the respondent, the Kenya Bureau of Standards (hereafter KEBS) to extend its vehicle inspection contract pending tender and award of contracts in respect of such inspections.
2. The petitioner first approached the Court by way of a notice of motion brought under certificate of urgency dated 15th January 2015 in which it sought, among others, an interim order to restrain the respondent from discriminating against the petitioner by failing to extend the contract between the petitioner and the respondent dated 15th January 2012 for the provision of pre-export inspection services for used motor vehicles on the same terms as the other existing service providers pending the hearing and determination of the application, and an interim order restraining the respondent from discriminating against the petitioner by failing to extend the said contract pending the hearing and determination of the petition, It also sought the costs of the application.
3. By consent of the parties on 20th January 2015, the application for conservatory orders was dispensed with and the parties agreed to proceed with the petition.

Background

4. The facts giving rise to the petition are fairly straightforward and not in dispute. On 15th January, 2012, the respondent entered into a contract with the petitioner and two other companies, Autoterminal Japan Limited (ATJ) and Quality Inspection Services Inc. Japan (QISJ) for the provision of pre-export inspection services for used motor-vehicles.
5. Upon expiry of the contracts, the respondent invited tenders for the provision of the services, and the petitioner was one of the applicants. It was, however, unsuccessful in its bid, and as a result, it filed an application for review with the Public Procurement Administrative Review Board

(PPARB). Pending the determination of the application for review, the respondent extended the contracts for the two companies, ATJ and QISJ, for the provision of pre-inspection services. It is for this reason that the petitioner contends that the failure by the respondent to extend its contract was a violation of its constitutional rights against non-discrimination and to equal protection of the law, and fair administrative action.

The Petitioner's Case

6. The petitioner's case is contained in the petition dated 15th January, 2015 and the supporting affidavit sworn by its Managing Director, Mr. Lee Sayer, on the same date. It also filed written submissions in support of its case. It was presented by Learned Counsel, Mr Njogu.
7. In his affidavit, Mr. Sayer deposes that on 15th January, 2012, the petitioner entered into an agreement with KEBS for the provision of pre-export inspection services for used motor vehicle. The agreement provided that the contract was to remain in force between 15th January, 2012 until 15th January, 2015 when it was to expire by lapse of time, unless otherwise terminated. The petitioner further avers that KEBS also entered into similar contractual arrangements with ATJ and QISJ for the provision of the same services, and that the agreements were in similar terms as its contract with KEBS, and were to expire on the same day.
8. It is further deposed on behalf of the petitioner that on 24th November, 2014, following an advertisement for tenders for provision of pre-shipment services by KEBS, it submitted its proposal in accordance with the terms of the Request for Proposals. It was informed on 16th December 2014 that its bid was not successful. Aggrieved by the decision, it filed a request for review before the PPARB, Application No 56 of 2014. It is averred on its behalf that it was its expectation that on account of filing the said application, its agreement with KEBS would continue to subsist until the hearing and determination of the application.
9. Mr. Sayer further avers that on 14th January, 2015, KEBS published a notice on its website indicating its contracts with ATJ and QISJ would continue in force until the determination of the request for review filed before the PPARB. It also carried a separate notification highlighted in red for prominence notifying members of the general public that its contract with the petitioner had been terminated. The petitioner argues that no reason was given by KEBS for excluding it from providing pre-inspection services pending the determination of the request for review.
10. It is the petitioner's case that in the seven years that it has provided pre-shipment inspection service to KEBS, it has always been provided with an exemplary record of conduct by KEBS during the auditing of its processes and conduct; that it has committed heavily to the agreement for the provision of pre-shipment inspection services in the form of land and equipment lease, as well as human resources to accommodate its current responsibilities under the agreement it had with KEBS. It is its contention that should it not be afforded an extension to its existing agreement, it stands to suffer substantial loss due to the inability to renegotiate existing contract terms with its lessors.
11. The petitioner further contends that by its failure to extend its agreement in the same manner that it had extended the contracts of ATJ and QISJ pending the hearing and determination of the review application, KEBS has unlawfully limited the petitioner's right to full and equal enjoyment of all rights and fundamental freedoms; violated its legitimate expectation of equal treatment with the other service providers; violated its right to fair administrative action by treating it differently from other service providers and by prejudicially singling it out for mention in KEBS website; failed to carry out its duty to observe, respect, protect, promote and fulfil the petitioner's rights and fundamental freedoms.
12. It is the petitioner's contention that the Court has jurisdiction to exercise its constitutional, statutory and inherent power to intervene and deal with the violation of its rights and fundamental freedoms, and it prays for the following orders:

a) This Honourable Court issues a declaration that the failure by the respondent to extend your petitioner's Agreement for provision of pre-shipment inspection services pending the hearing and determination of the requests for review that were pending before the Public Procurement Administrative Review Board of Kenya was a violation/infringed and/or limited the rights and fundamental freedoms of your petitioner under Article 47 of the Constitution of Kenya.

b) This Honourable Court issues a declaration that the respondent's differential treatment of your petitioner by failing to extend your petitioner's Agreement for provision of pre-shipment inspection services with Autoterminal Japan Limited and Quality Inspection Services Inc. Japan pending the hearing and determination of the requests for review that were pending before the Public Procurement Administrative Review Board of Kenya has violated/infringed and/or limited the fundamental right of your petitioner to protection from discrimination under Article 27 of the Constitution of Kenya.

c) This Honourable Court issues a judicial review order of certiorari to remove into this Honourable Court and quash the decision of the respondent as set out in the Public Notice issued on 14th January, 2015 to terminate the contract of your petitioner.

d) This Honourable Court issues a judicial review order of mandamus directed to the respondent directing it to carry out its statutory, contractual and constitutional mandate of fair and equal treatment and treat your petitioner in the same manner as the other existing service providers Quality Inspection Services Japan and Autoterminal Japan Limited.

e) This Honourable Court issues a permanent order of injunction directed at the respondent restraining it whether by its directors, officers, employees, servants, agents or any person whatsoever authorised by it from targeting and discriminating against your petitioner by failing to extend the terms of the agreement for provision of pre-shipment inspection services pending the hearing and determination of the requests for review before the Public Procurement Administrative Review Board.

f) The costs of the petition be borne by the respondent.

g) Such other Order(s) as this Honourable Court shall deem just.

The Respondent's Case

13. The respondent relies on an affidavit sworn by Mr. Charles O. Ongwae, its Managing Director, on 21st January 2015, and submissions of the same date. Its case was presented by Learned Counsel, Ms Ndirangu.

14. The respondent's case is that the present petition is a non-starter as it is an ill-conceived constitutional petition premised on a purely contractual or commercial dispute touching on a contract between the petitioner and the respondent which has since ceased to subsist. It is its case therefore that the petition should be struck out *in limine*.

15. According to the respondent, in execution of its mandate, it approved, through its highest governance body, the National Standards Council established under Section 6 of the Standards Act, the contracting of various service providers who carry out motor vehicle pre-export inspection/verification services in accordance with KS 1515:2000. Following the approval and authorization, it engaged various potentially suitable service providers, including the petitioners,

- in accordance with the Public Procurement and Disposal Act. Upon finalization of the process of procurement and consequent notification of the successful bidders, it awarded the contract for pre-export inspection services for used motor vehicles in Japan, United Arab Emirates, United Kingdom, Singapore and South Africa in accordance with Kenya Standards KS 1515:2000 to the petitioner by a contract dated 16th January, 2012.
- 16.The respondent avers that this contract expressly and unequivocally set out the terms of the agreement and engagement between the parties; that the contract came into force on 15th January, 2012 and was to expire on 15th January, 2015, after thirty-six months, and the expiration date was well within the full knowledge of both parties.
- 17.Mr. Ongwae averred that clause C4 of the contract provided that the parties were bound by the terms set out in the contract, and were not to be bound by or be liable for any statement, representation, promise or agreement not included in the agreement, and any engagement or undertakings outside the agreement could not be lawfully visited on the other party. It was its case therefore that if the petitioner had leased property, equipment, engaged employees or any other undertakings, it could not visit such arrangements on the respondent.
- 18.According to the respondent, by a letter dated 21st July, 2014 referenced KEBS/CONF/PVOC/1/VOL.1, it notified the petitioner of the expiration of the contract. It is its case that it duly observed the obligations imposed upon it as against the petitioner until effluxion of time under the agreement on the 15th January, 2015.
- 19.The respondent avers further that it advertised Tender No. KEBS/T057/2014-15 for provision of motor vehicle inspection services; that having processed the seven bids that had been received and evaluated, it lawfully awarded the contract to QISJ as the company with the highest score. It contends that various bidders, including the petitioner, being dissatisfied with the evaluation and tender award, filed requests for review Nos 55, 56 and 59 of 2014 whose effect was to stay the procurement process.
- 20.The respondent contends that as a result, it was faced by a crisis with the possibility of commercial transaction and consumer protection in the realm of motor-vehicle imports falling in a limbo, and it therefore proceeded to contract other service providers pending the determination of the requests for review.
- 21.The respondent submits that this petition raises private law queries completely outside the limb of constitutional petitions; that the contractual agreement in question was lawfully terminated in accordance with the agreement and as such no plausible cause of action accrues as alleged by the petitioner.
- 22.KEBS denies that it has always provided exemplary record of conduct to the petitioner and avers that the averments in this regard were misleading and false. It was its case that, in any event, the petitioner's previous conduct is not a consideration or term of contract between the parties; nor does it preclude KEBS from terminating the agreement in question in accordance with Clause 7.1.
- 23.It was its contention therefore that if the petitioner has any plausible cause of action over the procurement process that preceded the contract(s), the proper avenue was the PPARB before which it has already initiated such review proceedings. It urged the Court to dismiss the petition with costs.

Determination

24. From the pleadings and submissions of the parties set out above, it is apparent that a single issue arises for determination in this matter: whether there has been a violation of the petitioner's rights under Articles 27 and 47 by the failure of the respondent to permit it to continue with provision of

pre-shipment inspection services pending the determination of the reviews before the PPARB. Should the response be in the affirmative, the Court shall proceed to consider the relief, if any, to grant the petitioner.

25. A second, preliminary issue arises from the submissions of the respondent, namely whether the matters raised in this petition are justiciable and fall for determination before this Court. It is worth setting out the submissions of the parties on this preliminary issue before proceeding with its determination.
26. The petitioner contends that it has been discriminated against and its rights under Article 27 of the Constitution violated. It is also its case that its right to fair administrative action under Article 47 was violated. It is its case that the Court has jurisdiction to determine this matter as it challenges KEBS's exercise of discretion in extending the contracts of two service providers, QISJ and ATJ, to its exclusion. Its case is that its complaint does not relate to the terms of the contract it had entered into with KEBS, nor does it ask the Court to impose a contract between it and KEBS.
27. Its contention is that it is not seeking enforcement of its contractual rights under the agreement but enforcement of its constitutional right to non-discrimination and fair administrative action. It contends that the grounds it has advanced and reliefs sought are fully grounded on the Constitution and not in contract. It is therefore its contention that it is properly before the Court.
28. The response by KEBS is that this petition raises no justiciable dispute as the crux of the matter rests upon the respondent exercising their right as a party to a contract to opt out of engaging with the other party in accordance with the terms of the contract.
29. The respondent further argues that the petitioner has neither challenged the validity of the contract nor has it claimed that any right, duty or obligation owed to it under the contract was contravened; nor does it take issue with the manner in which the contract came to an end. It is also the respondent's case that the petitioner has not alleged that KEBS made any prior indications, representations or commitments (whether written or oral) that it would consider extending the petitioner's contract.
30. The respondent further argues that the petitioner, having noted that it has no recourse before a commercial court, opted to rely on the fact that the respondent is a state organ and transposed its alleged contractual obligations to the realm of a public duty. It is KEBS submissions that not all wrongs, actions and omissions can be attributed to arise from the Constitution, and that a party who comes before the Court must set out with some level of particularity the specific right and how it is violated, in accordance with the dicta in the case of **Anarita Karimi Njeru vs The Republic, 1976 KLR 1272**. It was its submission that in this case, the petitioner was seeking to revive a dead commercial transaction where no actual dispute can be deciphered and where there was no constitutional issue.
31. The respondent further argues that the complaint itself arises from matters relating to private law, within the purview of contract law and as such, no complaints that give rise to pertinent constitutional issues have been raised by the petitioner. The respondent relies in support of this contention on the decision in **Hon Uhuru Kenyatta vs The Nairobi Star Limited, Petition No 187 of 2012**.
32. In the case of **Jesse Kamau and 25 Others vs Attorney General, Misc App 890 of 2004**, the court rendered itself as follows on the concept of justiciability:

*“The discussion by Laurence H. Tribe in his book **American Constitutional Law, second Edition**, by Ralph S Tyler Jr Professor of Constitutional Law at Harvard University on the doctrine of justiciability is also both useful and instructive. The following passage is found at p.68-*

“In order for a claim to be justiciable it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a real and substantial controversy is determined under the doctrine of “standing” by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy itself an aspect of the appropriateness of the issues for (judicial) decision... and actual hardship of denying the litigants the relief sought.

Examination of the contents of the controversy is regarded as necessary to ensure that the courts do not out-step the constitutional authority by issuing advisory opinions.”

33. In **Petition No. 3 of 2014, Hon. Martin Nyaga Wambora vs Speaker, County Assembly of Embu and 5 Others**, the Court observed that:

“It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.’

34. In determining whether a matter before it is justiciable, the Court must consider the facts and circumstances of the case. Article 22 grants to each person, a term defined to include natural and corporate persons, the right to approach the Court alleging that a right or fundamental freedom has been violated or is threatened with violation. Article 23 (1) vests the High Court with the jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. At Article 165(3), the High Court is granted wide, unlimited jurisdiction in respect to civil and criminal matters, as well as the jurisdiction, under Article 165(3)(b), “...***to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.***”

35. In the matter before me, the petitioner alleges that certain acts of the respondent purported to have been done under the law resulted in an infringement of its rights under the Bill of Rights. That being the case, it cannot be disputed that an allegation of violation of fundamental rights by a statutory body is not justiciable, and therefore should be dismissed *in limine*. Whether the claim is ultimately successful is another question altogether, but it is not a claim that can be dismissed off hand as non-justiciable. I therefore find that the present petition is properly before me, and I now turn to consider the main issue that it raises.

Whether There has been a Violation of the Petitioner’s Constitutional Rights

Violation of Article 27

36. The petitioner alleges that the respondent has discriminated against it and violated its rights under Article 27(4) and (5) of the Constitution. Article 27(4) of the Constitution states that:

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any grounds specified or contemplated in clause (4.)

37. The obligation that is imposed on a party alleging an infringement of a constitutional right is to plead with a reasonable degree of precision the provisions of the Constitution which have been violated, and the manner of violation. This position was enunciated in the case of **Anarita Karimi Njeru (supra)** and expanded in the case of **Trusted Society of Human Rights vs Attorney General & Others**. The requirement for precision is intended to enable the respondent know the case he or she is facing so that he can adequately respond to it.

38. In this case, the petitioner claims that it has been discriminated against and its rights under Article 27 (5) of the Constitution violated. As is clear from the provisions of the Constitution at Article 27(4) set out above, there are specific grounds of discrimination which a party must show that discrimination with respect to it arises. These include: “**race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**” The petitioner has not stated or demonstrated under which of the grounds set out in Article 27(4), or any other ground analogous to these grounds, the alleged discrimination with respect to it arises.

39. In the case of **Peter K. Waweru vs Republic [2006] eKLR**, the Court observed as follows with respect to the discrimination provisions in the (now repealed) constitution:

“Under Section 82 (3) of the Constitution of Kenya, “discriminatory” means “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

Blacks Law Dictionary 11th Edition defines “discrimination” as under:

“Discrimination” in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.” BAKER v CALIFORNIA LAND TITLE Co. D.C. CAL 349 F. Supp 235, 238, 239.”

40. The claim by the petitioner is that it was discriminated against because the respondent did not extend a commercial contract for a limited period pending review of a procurement process that it had participated in. The material before me is devoid of any demonstration of how the petitioner’s rights under Article 27 have been violated, or indeed the ground of discrimination under the said Article, on the basis of which a claim of discrimination can be founded, I am therefore unable to find a violation of the petitioner’s rights under Article 27.

Violation of Article 47 of the Constitution

41. The petitioner has also alleged violation of Article 47 of the Constitution. This Article provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given

written reasons for the action.

(3) ...

42. The question that arises with respect to the alleged violation of the petitioner's rights is whether the respondent, in engaging in contracts for the provision of motor vehicle pre-shipment services, was performing an administrative function.

43. The question whether an act falls within the context of administrative action was addressed by the South African Court in the case of **President of the Republic of South Africa and Others vs South Africa Rugby Football Union and Others (CCT 16/98) 2000 (1) SA 1** where it was stated that:

“[141] ... The test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”

44. Section 3 of the Standards Act which establishes the Bureau stipulates that:

“There is hereby established a Bureau which shall be a body corporate by the name of the Kenya Bureau of Standards, with perpetual succession and a common seal, and which shall, in its corporate name, be capable of—

(a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding, charging and disposing of property, movable or immovable; and

(c) entering into contracts and doing or performing all such other things or acts for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

45. As deposed by the respondent, KEBS is granted the statutory mandate of standardization and conformity assessment with relevant Kenyan standards through, *inter alia*, the provision of testing and calibration facilities as provided under section 4 of the Standardization Act.

46. I note that the contract in question was an arrangement between KEBS and the petitioner to provide services that normally KEBS is mandated by statute to undertake, namely the provision of motor vehicle pre-shipment inspection services. It chose to engage the services of private parties, among them the petitioner, to provide the services. In other words, the respondent entered into a private contractual arrangement with the petitioner, and such, this action of entering into a private contractual relationship does not amount to an administrative action within the realm of public law. It is my view therefore that such an arrangement was governed by private contractual arrangements entered into freely between the parties. The act of the respondent in entering into contracts with the petitioner and the other pre-shipment inspection service providers did not fall within the ambit of administrative action as alleged by the petitioner but was merely a private contractual arrangement which it exercised pursuant to Section 3 of the Standards Act as outlined above.

47. That being the case, can it properly be argued that the respondent discriminated against the petitioner or failed to accord it fair administrative action in not extending its services for the period prior to the resolution of the application for review before the PPARB? I think not.
48. In my view therefore, inviting this Court to, as it were, direct KEBS to extend a contract that had already expired would amount to this Court dictating the respondent to enter into a contract with the petitioner, and in effect dictating the terms of the contract between the parties. As the contract in question was entered into for a specific period of three years from 15th January, 2012, at the expiry of which period there were no longer any contractual obligations between the parties; and further, there being no provision that the contract between the parties would continue in force pending the entry into contract by the respondent with other parties, there would be no basis for the Court to enter into the matter. In any event, even had there been such a provision, it would have been one enforceable under private contract law, not in public law as a claim in violation of constitutional rights. I am therefore unable to find that there was a basis for the petitioner to claim that it had a legitimate expectation that its contract would be extended like those of QISJ and ATJ.
49. In the circumstances, I can find no basis for alleging that there was a violation of the petitioner's rights under Articles 27 and 47 of the Constitution, or that the petitioner had a legitimate expectation that its contract with the respondent would be extended pending the entry by the respondent into contracts for the provision of pre-shipment inspection services.
50. For the above reasons, I find no merit in this petition, and it is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 16th day of June 2015

MUMBI NGUGI

JUDGE

Mr. Njogu & Mr. Okeyo instructed by the firm of Coulson Harney & Co. Advocates for the petitioner

Ms. Ndirangu & Mr. Ahilia holding brief for Mr Sichangi instructed by the firm of Sichangi & Partners Co. Advocates for the respondent.