



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 17 OF 2015

IN THE MATTER OF: THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLE 47(1) OF THE EXPEDITIOUS FAIR ADMINISTRATIVE ACTION

AND ARTICLE 35(1) AND (3) ON ACCESS TO INFORMATION NECESSARY TO

GAIN FULL BENEFIT OF LIMITED PUBLIC RESOURCES

AND

IN THE MATTER OF: TENDER NO. KPA/117/2003-2004/TE DESIGN, MANUFACTURE, SUPPLY, INSTALLATION,

TESTING AND COMMISSIONING OF THREE (3NO.) NEW FULLY BUILT SHIP TO SHORE GANTYRE CRANES

AND

IN THE MATTER OF: FAIR, EQUITABLE, TRANSPARENT, COMPETITIVE AND

COST EFFECTIVE PROCUREMENT OF PUBLIC GOODS AND SERVICES

AND

IN THE MATTER OF: ACCOUNTABILITY, OPENNESS, PUBLIC PARTICIPATION

AND TRANSPARENT USE OF PUBLIC FUNDS

BETWEEN

MAUR ABDALLA BWANAMAKA.....PETITIONER/APPLICANT

VERSUS

1. PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

2. KENYA PORTS AUTHORITY

3. KENYA REVENUE AUTHORITY
4. COMMISSION ON ADMINISTRATIVE JUSTICE
5. COMPETITION AUTHORITY OF KENYA
6. KENYA BEUREAU OF STANDARDS
7. DIRECTOR OF PUBLIC PROSECUTION
8. EITHICS AND ANTI CORRUPTION COMMISSION
9. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
10. PRINCIPAL SECRETARY IN CHARGE OF TRANSPORT
11. PRINCIPAL SECRETARY IN CHARGE OF INTERIOR AND
COORINATION OF NATIONAL GOVERNMENT
12. PUBLIC INVESTMENT COMMITTEE- PARLIAMENT
13. TRANSPARENCY INTERNATIONAL
14. THE LAW SOCIETY OF KENYA
15. THE PRESIDENTIAL DELIVERY UNIT

16. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

AND

1. LIEGHERR CONTAINERS LIMITED

2. FEDERAL SUPPLIES AGENCIES LIMITED.....INTERESTED PARTIES

R U L I N G

The 2nd respondent floated an international tender for the supply, installation and commissioning of three ship to show gantry cranes. The petitioner was the local representative of one of the international bidders who participated in the tendering process. The 2nd respondent on 17th December 2013 entered into a contract with the winning bidder, Liegherr Containers & Cranes Limited. The contractual sum is UD\$29,625,250. The petitioner sought to have the award to the winning bidder reviewed by the Public Procurement Administrative Review Board but the Board declined the request.

The Petitioner filed an application for Judicial Review, vide **Nairobi Judicial Review Application No. 382 of 2013- Republic V Public Procurement Administrative Review Board** but it was dismissed as it was not filed within the prescribed time. A notice of Appeal was filed together with an application for stay of execution before the Court of Appeal. The Appeal is pending while the application for stay of execution was withdrawn.

It is also clear from the record that the petitioner filed Constitutional Petition No. 43 of 2014 before the Mombasa Court. That Petition is still pending. The petitioner has now filed the current petition together with a notice of motion dated 10th November 2015 seeking several orders including a prayer to have the contract entered into on 17th December 2013 cancelled.

The 2nd respondent filed its notice of motion dated 3rd December 2015 seeking to have the petitioner's notice of motion as well as the petition struck out. The application is supported by the affidavit of **Fredrick Ndatho**, a Senior Engineer with the 2nd respondent. It is the application which is the subject of this ruling.

Miss Malik, counsel for the 2nd respondent, submitted that the current petition and notice of motion by the petitioner raises familiar issues as in the other proceedings hereinabove referred to. It is also submitted that the petition will make the court to sit as an appeal court over the ruling in Nairobi Judicial Review Application No. 383 of 2013. The totality of the submissions by Miss Malik is that the issues being raised by the petitioner have already been dealt with. The petitioner has been filing several suits in different courts and he is forum shopping. There is a contract already being performed and the petitioner's principal client lost the tender. The petitioner lacks locus standi to bring the current petition. Further, the suit pending before the Mombasa Court raises similar issues. The dispute was determined through the Judicial Review suit filed in Nairobi.

Mr. Muchiri, counsel for the Petitioner opposed the application. Counsel submitted that the application for Judicial Review was struck out on technicalities and not heard on merit. Counsel contends that constitutional petition number 43 of 2014 before the Mombasa court is challenging the award of the tender. It has been overtaken by events as the tender was awarded. It is the petitioner's position that under the contract between the 2nd respondent and the winning bidder, the contract ought to have been completed eleven (11) months ago. It is contended that the current application relates to the performance of the contract. This is a new cause of action. The issue raised in this action is that there is breach of the contract. The contract stipulated for the construction of the cranes in Ireland but the cranes are being constructed in Kenya.

The issue at hand is whether the petition and the petitioner's notice of motion dated 10th December 2015 should be struck out. Whereas I do agree with the submissions by counsel for the 2nd respondent that some of the issues being raised are pending before the Mombasa court, I do find that the current suit raises one fundamental issue relating to the performance of the contract. It is not the interest of the court to interfere with contracts entered into between two parties who are not complaining against each other. Neither the Kenya Ports Authority (2nd respondent) nor the winning bidder has complained to the court about the performance of the contract. However, the 2nd respondent is a public organisation. Under Article 35 of the Constitution, each citizen is entitled to the right to access information held by the state. Article 260 of the Constitution defines the term state to mean the collectivity of offices, organs and other entities comprising the government of Kenya under the Constitution. The 2nd respondent herein is a parastatal under the control of the ministry in charge of transport. The entire Board of Directors is appointed by the Government. It therefore comes under the purview of Article 35 wherever a citizen seeks information.

My understanding of the petitioner's application is that the contract between the winning bidder and the 2nd respondent stated that the cranes were to be manufactured in Ireland and delivered at the Mombasa Port fully assembled. The petitioner contends that the cranes are now being constructed and assembled at the Mombasa Port at the yard of Cormaco Ship Company. I expected the 2nd respondent to counter those allegations with contrary information showing how the agreement is being performed in compliance with its provisions. I expected the 2nd respondent to explain whether there is a delay in completion of the contract, whether its officers have visited the premises in Ireland where the cranes are being constructed and are satisfied with the progress as well as inform the court when the contract will be completed. Simply applying to have the petition struck out does not solve the problem. Striking out of pleadings is a residual power that should be exercised by the court sparingly. It can be utilised whenever the pleadings are outrightly frivolous and vexatious. However, the petitioner's contention that the cranes were to be built in Ireland upto international standard but what is being built is local made cranes without international certification. The petition cannot be struck out at this initial stage. If the allegations are found to be untrue, definitely the entire petition will be struck out. The vision, mission and core values of the Kenya Port Authority under the title "integrity" states as follows:

“we uphold fairness, honesty, professionalism and transparency in all our undertakings.”

Given the above pronouncement, it would only be fair not to have the petition struck out so that the 2nd respondent's fairness, honesty and transparency can be tested. This can only be done if it is established that indeed there are no cranes being constructed at the Cormarco Shipyard in Mombasa aimed at fulfilling the contract.

Section 6 of the Civil Procedure Act states as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Section 7 of the same Act provides for the doctrine of res judicata. The ruling in the Nairobi Judicial Review Application only struck out the entire application as the leave that had been obtained to seek Judicial Review orders was found to have been irregularly granted as the application was filed out of time. The Constitutional Petition before the Mombasa Court is not based on how the contract is being performed. There is no such prayer as visiting the Cormarco Shipyard in Mombasa. Even if the other prayers are the same, the issues emanate from a different perspective. The petitioner's counsel contends that even that suit has been overtaken by events. Further, this suit is not being heard at this stage.

Although counsel for the 2nd respondent did not specifically indicate that the current suit is res judicata, it can be implied from the submissions that the 2nd respondent's position is that the suit has been dealt with through Nairobi Judicial Review Case No. 382 of 2013. In the case of **Bulhan & Another V Eastern & Southern African Trade & Development Bank**, Justice Ibrahim, by then Judge of the High Court, held that ***for the principle of res judicata to apply, the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined or decided by the court.*** The issue as to whether the contract is not being performed as per the tender specifications had not been raised. Indeed, the 2nd respondent ought to have received the three tendered cranes by now and there is no explanation on that issue.

In the end, I do find that the application to strike out the petition and the notice of motion dated 10th November 2015 is not merited and is hereby disallowed. The preliminary objection dated 3rd December 2015 is hereby equally dismissed. With regard to the 3rd and 8th respondents, I do agree with the sentiments of counsels for both respondents that they were wrongly enjoined. I hereby order that their names be struck out from this suit with no orders as to costs.

Since the entire claim is based on the allegation that the three cranes are being constructed at the Shipyard of Cormarco Company and taking into account the value of the contract, I do find that no prejudice will be suffered by any of the respondents if prayer (b) of the notice of motion dated 10th November 2015 is granted at this stage. The orders will serve public interest as it is public funds involved.

I do proceed and grant prayer (b) of the application dated 10th December 2015. The applicant to only access the premises with officers from the other remaining respondents and file a report in court within twenty (21) days hereof. Should the filed report indicated that there are no cranes being built at the shipyard, the 2nd respondent shall be at liberty to apply for the dismissal of this suit.

Dated, signed and delivered at Malindi this 14th day of **December** 2015.

SAID J. CHITEMBWE

JUDGE