



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

PETITION NO. 222 OF 2013

BETWEEN

STEPHEN NYARANGI ONSOMU.....1ST PETITIONER

CENTRE FOR MULTI-PARTY DEMOCRACY.....2ND PETITIONER

AND

PROF. GEORGE MAGOHA.....1ST RESPONDENT

THE UNIVERSITY OF NAIROBI.....2ND RESPONDENT

MR. JOHN SIMBA.....3RD RESPONDENT

ENG. PROF. B.N.K NJOROGE.....4TH RESPONDENT

QS. DR. S.M. MASU.....5TH RESPONDENT

ARC. YASIR BREK.....6TH RESPONDENT

MR. J.M.K MOKAYA.....7TH RESPONDENT

MR. M. KARUE.....8TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioners, Stephen Nyarangi Onsomu and the Center for Multi-Party Democracy filed this Petition dated 24th April 2013 seeking the following reliefs;

“(1) A declaration that the provisions of the public Procurement of goods, works and services and that any procurement done in contravention of the express provisions of the public procurements and Disposal Act is unlawful, illegal, null and void and is not binding on the 2nd Respondent, and or its constituent colleges.

(2) The declaration that the appointment of:-

(i) Eng. A.S. Kitololo – Conveyor and Structural Engineer

- (ii) *Eng. A.W. Ogwayo – Electrical Engineer*
- (iii) *Eng. J.M. Litondo – Mechanical Engineer*
- (iv) *Dr. Eng. I. Ismail – Geotechnical Engineer*
- (v) *Qs. A.S.Marjan – Quantity Surveyor*

as providers of consultancy services to the university of Nairobi Towers on 23rd January 2013 contravened the law and hence null and void ab initio.

(3) A declaration that pursuant to Article 201, 226(5) and 227(1) of the Constitution of Kenya as read with Section 10 and 5 of the Public officer Ethics Act the Respondents are jointly and severally liable for any loss of public funds that may result from their involvement in any contravention of the law detailed herein.

(4) The costs of this Petition be provided for.

(5) Any other orders, writs, directions that this Honourable Court may deem fit to grant.”

2. The Petition is opposed and in reply to it, the Respondents filed a Replying Affidavit sworn by Prof. Peter Mulwa Felix Mbithi, the Deputy Vice-Chancellor in-charge of Administration and Finance for the 2nd Respondent. All parties later filed written Submissions.

Factual background

3. The background issues leading to this Petition are set out hereunder;
4. That the University of Nairobi, the 2nd Respondent herein, publicised a Request for Expression of Interest for an Architectural Competition for the “*University of Nairobi Towers*” in the “Daily Nation” newspaper of 10th May 2011. Subsequently, a consortium of Consultants led by M/s.Waweru & Associates was formed to respond to the Expression of Interest. On 17th August 2011, the Consultants were informed vide letter Ref: PROC/T/LOA/VOL.1 that their consortium had been shortlisted to participate in the design competition. As a result, the said consultants participated in the tendering process and later won the bid for the competition and were duly notified in that regard through a letter dated 22nd November 2011. They then accepted the appointment as well as the terms and conditions for the contract stipulated in the Public Works (1989) Edition of the Conditions of Engagement and Scales of Fees for professional services. A consultancy agreement was subsequently signed on 29th November 2011.
5. The next step undertaken was the issuance of tenders to shortlisted Contractors. The shortlisting of the contractors had been undertaken by the staff of the 2nd Respondent in a separate exercise that did not involve the Consultants. In the end, the bids by Contractors exceeded the University budget which was Kshs.1,990,166,628.00 and as a result, the Consultants were instructed to carry out value engineering so as to bring down the cost before an award was made to any contractor and later the contract was awarded to M/S China Wu Yi on 13th June 2012 at a cost of Kshs.2,046,268,470.09.
6. Upon the contract being awarded as aforesaid, M/s Landmark Holdings Ltd raised an objection to it and filed the objection with the Public Procurement Oversight Authority which nullified the award.
7. As a result of the nullification, the 2nd Respondent re-tendered the works through an open tendering process; the bids were received and opened; and a Technical Evaluation Committee was appointed with Eng. A.S Kitololo as Chairperson although Prof. B.N.K Njoroge of the University of Nairobi had been indicated in all documents as the Chairman. After the Technical Committee

finished its work, it presented its report to the Tender Committee which approved it and awarded the tender to China Wu Yi as recommended by the Technical Committee.

8. However, before China Wu Yi Could accept the tender, the 1st Respondent received communication from the Engineers Board of Kenya raising concerns about the design of the building which then led to the appointment of accredited Checkers to check the design. The team of accredited Checkers was single sourced by the 2nd Respondent and 10 days after their appointment, the accredited Checkers came up with recommendations in a report to the 1st Respondent, the Vice-Chancellor of the 2nd Respondent, which led to the termination of the Consultancy contract on 23rd January 2013. On the same day, the 1st Respondent appointed the team of accredited Checkers to be the Project Consultants thus supplanting the previously appointed consultants i.e. M/s. Waweru & Associates. China Wu Yi were also awarded the construction contract at a cost of Kshs.2,275,183,265.00.

Petitioners' case

9. The Petitioners contend that the University of Nairobi is a public body funded by taxpayers and that all its investments must abide by the necessary public procurement laws and rules. As such any decision to award tenders must be through competitive bidding, supervised and conducted under the applicable law.
10. They submit that the Respondents failed to follow the legal procedures of tendering for the project and that the first failure was in the appointment of Prof. B.N.K. Njoroge on 7th September 2012, to chair the Technical Evaluation Committee only for Engineer A.S Kitololo of M/s. Kitololo Consultants to do so. They claimed in that regard that Engineer Kitololo had an interest in the project and should never have chaired the Committee having been the one who initially complained to the Engineers Board of Kenya about the designs and that following those complaints, the Respondents allegedly, hurriedly appointed Checkers without notifying the affected Consultants and without not affording them the opportunity to respond to Eng. Kitololo's complaints or granting them the right to know their accusers and what they were accused of.
11. They further claim that in the 10 days that the Checkers performed their task, they refused to give the affected Consultants a chance to defend themselves and later, based on their report, the earlier contracts were terminated and reissued without competitive bidding of any kind. The following Consultants were instead appointed;
 - (i) *M/s Kitololo Consultants as providers of structural and civil engineering consultancy services*
 - (ii) *Mr. Adam S. Marjan as provider of Quantity Surveying Consultancy Services*
 - (iii) *M/s M&E Consultants, Litondo Mechanical Engineering and Eng. A. W. Ogwayo, as providers of Mechanical and electrical engineering consultancy services.*
 - (iv) *Dr. Issa Ismail as provider of Geotechnical engineering consultancy services.*
12. They contend therefore that in the context above, **Article 46** of the **Constitution** sets out the rights of consumers and that consumers of the University of Nairobi services now and in the future must be protected because if shoddy and unprofessional services would be allowed through incorrect and unlawful processes, then the consumers would be greatly endangered by the single act of the construction of a sub-standard building, the "University of Nairobi Towers".
13. On the issue of locus standi, they submit that under **Article 52(2)** of the **Constitution**, the Petitioners have the right to challenge the acts of the Respondents without having to prove a direct interest in the project.

14. They also submit that **Article 73(2)** on the **Constitution** has also set out the parameters of integrity in public service and in leadership and that the public officers named in this Petition have breached the provisions of the Constitution as to integrity and that their acts of commission and omission must be challenged as the Petitioners have done.
15. They further claim that **Article 227(l)** of the Constitution imposes particular and heavy responsibilities upon the Respondents in procurement of public goods and services and **Article 232** sets the need for provision of proper public services. That therefore applying those provisions, the construction services are being procured with opaqueness, corruption, unfairness and without following necessary legal requirements and is void *ab initio*.
16. They add that the Procurement Oversight Authority (PPOA) has shown clear lethargy in dealing with the matter thus leaving the Petitioners without any other remedy but access to this Court and therefore urge the Court to grant the prayers sought and which are reproduced elsewhere above.

Respondents' case

17. The Respondents' case is as contained in the Affidavit of Prof. Peter Mulwa Felix Mbithi. He contends that while the 4th, 5th, 6th, 7th and 8th Respondents sat in the Tender Committee they were only involved in decision of the said Committee and did not make decisions on the award of tenders for the project. He also claims that the terms of the tender remained constant and were not altered at any stage to favour any of the bidders including China Wu Yi. Further, that the Checkers were picked from a list of the most qualified and accredited Checkers in Kenya which list was provided by the Engineers Board of Kenya and the Board did not in anyway influence their appointment contrary to Submissions by the Petitioners.
18. It is the Respondents' submission therefore that the Petitioners have not demonstrated that any of their constitutional rights have been violated over and above the rights of other members of the public by the tender process as outlined elsewhere above.
19. In that regard, they further urge the point that the Petitioners do not have the *locus standi* to institute this Petition and they have also failed to establish how a matter of a purely commercial nature raises any constitutional issue for this Court's determination. In any event, that the aggrieved Consultants have pursued their claim in arbitration proceedings as is provided in the applicable contract, i.e. the Conditions of Engagement and Scales of Fees for Professional Services for Building & Civil Engineering Works which applies to all building contracts in Kenya. The Respondents rely on the cases of **Gouriet v Union of Post Officer Workers and Others (9177)** and **Law Society of Kenya v Commissioner of Lands & 2 Others (E & L) 1KLR 456, Maathai & 2 others v City Council of Nairobi & 2 Others (1994) 1 KLR** and **Wanyange v Commissioner of Lands 7 4 Others (E & L) 1 KLR 199** where it was generally held that a Petitioner must demonstrate its *locus standi* in any matter.
20. It is also their final submission that if any law had been violated in the tender process, then the **Public Procurement & Disposal Act** has provided for the mechanisms within it to address the Petitioners' complaints and none of those mechanisms has been utilized by them. They claim therefore that the Petitioners should have for example pursued their claim by way of arbitration as is provided for in the applicable contract. They rely on the case of **Matalinga and Others v Attorney General (1972) EA 518** for the proposition that before a declaration can be granted, there must be a real and not theoretical question for determination and therefore only known remedies can be granted. That therefore the Petition is devoid of merit and should be dismissed with costs.

Determination

21. Before I proceed to determine the merits or otherwise of the Petition before me, I must first address in limine an issue raised by the Respondents; that the Petitioners have no *locus standi* to

institute these proceedings. I have perused all the authorities cited by the Respondents and they clearly indicate that a person must generally have locus standi or an interest in a matter in order to file a Petition in public interest as the Petitioners have done. In **Gouriet v Union of Post Office Workers (supra)** for example it was stated as follows;

“A relator action, a type of action which has existed from the earliest times, is one in which the Attorney General, on the relation of individuals (who may include local authorities or companies), brings an action to assert a public right. It can be properly said to be a fundamental principle of English law that private rights can be asserted representing the public. In terms of the constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.”

That principle has also been repeated in our courts in **Law Society of Kenya v Commissioner of Lands & 2 Others (supra)** where the Court stated thus;

“If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above the injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in Court and to be heard on that matter. Otherwise public interest are litigated upon by the Attorney-General or such other body as the law sets out in that regard.”

22.Sadly for the Respondents, my mind is clear that the authorities cited by them espouse the position in law before the promulgation of the Constitution, 2010. **Article 22(2)** of the **Constitution** has in that regard removed the traditional rule on *locus standi* and has enabled any person on his own behalf or on behalf of another person; or in the public interest, to institute Court proceedings claiming that a fundamental right or freedom in the Bill of Rights has been violated. This **Article** states as follows;

“1) ...

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members”**

23.The above Article needs no more than a literal interpretation with regard to the enforcement of fundamental rights and freedoms and further, **Article 258(1)** of the **Constitution** then deals with the enforcement of all other provisions of the Constitution where violations are alleged. That **Article** provides as follows;

“(1) Every person has the right to institute Court proceedings,

claiming that this Constitution has been contravened, or is threatened with contravention.”

Without belabouring the point, the argument by the Respondents that the Petitioners have no *locus standi* to bring this Petition is an expression of old law and must fail.

24.Having found that the Petition is properly before the Court, I must address the Respondents'

submission that even if there had been a violation of the **Public Procurement & Disposal Act, 2009**, the **Public Officer Ethics Act, 2003**, the **State Corporations Act (Cap 446)**, the **Fiscal Management Act (Cap 412B)** and the **Anti-Corruption and Economic Crimes Act, 2003** as alleged by the Petitioners, their remedies lie elsewhere. So far as I can see, this argument rests on the premise that the several statutes listed in the Petition's rubric and elsewhere above, provide all the avenues for redress and, therefore, there is no constitutional issue capable of being addressed by this Court.

25. In answer to that issue, this Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See ***Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272***. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. This basic rule has been affirmed by the Court of Appeal in the ***Mumo Matemu Case*** as follows;

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.” (Emphasis added)

26. Applying the above generally accepted principle to this case, the Petitioners in their Submissions made allegations as follows;

“Consumers of the University of Nairobi services must be protected in that if shoddy services and buildings are allowed through incorrect processes then the consumers may be endangered by construction of sub-standard project to the detriment of the said consumers.” (sic)

If that be so, **Article 46** of the **Constitution** provides for Consumer Rights as follows;

“(1) Consumers have the right—

- (a) to goods and services of reasonable quality;***
 - (b) to the information necessary for them to gain full benefit from goods and services;***
 - (c) to the protection of their health, safety, and economic interests; and***
 - (d) to compensation for loss or injury arising from defects in goods or services.***
- (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.***
- (3) This Article applies to goods and services offered by public entities or private persons.”***

I have combed through the body of the Petition as well as the Affidavit in support and nowhere have the Petitioners provided further details on how the right of consumers have or may be violated. In my view, it is not enough to say that a sub-standard project will affect consumers without substantiating that general statement. That being the case, I will not belabour the point save to state that an important issue such as

consumer rights should not have been glossed over as the Petitioners have done and since it was, the arguments in that regard must fail.

27. Further, looking at the Petition, the Petitioners have also alleged a violation of **Articles 72, 232, 226, 227** of the **Constitution** without presenting any particulars or evidence in support of the allegations. Indeed, looking at the Petition again, most of it is based on generalized allegation of alleged violations of the law relating to the ethics of public officers whose factual basis are hazy and are in fact completely missing save that intense reference is made to the **Public Procurement and Disposal Act, Public Officers Ethics Act and Fiscal Management Act No. 5 of 2009** without clear evidence to back the alleged violation of those statutes. It is not the duty of this Court to presume facts and relate them to Statutes quoted.

28. That would have been the end of the matter but if I understand the Petitioners well, their other complaint is that M/s. Kitololo Consultants were contracted to provide structural and civil engineering consultancy services in place of Multiscope Consulting Engineers Ltd; Accredited Checkers were not appointed properly and the Chairman of the Engineering Board, Eng. Kitololo, is a member of staff of the University of Nairobi and is involved in the project at hand and participated in the tender process irregularly. They are therefore taking issue with the procurement and procedure used in the tendering of the 'University Towers' project generally. Even if that were so, I am constrained to ask, how have these actions violated the Petitioners' constitutional rights? I say so knowing very well that they purported to act on behalf of consumers of services at the University of Nairobi but failed to plead with some degree of precision the rights and constitutional provisions that have been violated.

29. It is difficult to find for the Petitioners in the circumstances and I am in agreement with the Respondents that even if there had been some violation, the **Public Procurement & Disposal Act** has set out the procedure to have the Petitioners' complaints addressed. In that regard, **Section 8(1)** of the **Public Procurement & Disposal Act** has established the Public Procurement Oversight Authority whose powers are set out under **Section 9** as follows;

“The Authority shall have the following functions—

- (a) to ensure that the procurement procedures established under this Act are complied with;*
 - (b) to monitor the public procurement system and report on the overall functioning of it in accordance with section 20 (3) (b) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable;*
 - (c) to assist in the implementation and operation of the public procurement system and in doing so-
 - (i) to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities;*
 - (ii) to provide advice and assistance to procuring entities;*
 - (iii) to develop, promote and support the training and professional development of persons involved in procurement;**
- and*

(iv) to issue written directions to public entities with respect to procurement including the conduct of procurement

proceedings and the dissemination of information on

procurements; and

(v) to ensure that procuring entities engage procurement

professionals in their procurement units.

(d) to initiate public procurement policy and propose amendments to this Act or to the regulations; and

(e) to perform such other functions and duties as are provided for under this Act.”

30. The Procedure of having the above matters addressed is then provided for under **Section 93(1)** of the Act as follows;

“Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”

The powers of the Review Board are set out under **Section 98** of the **Public Procurement & Disposal Act** as follows;

“Upon completing a review the Review Board may do any one

or more of the following—

(a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;

(b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;

(c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

(d) order the payment of costs as between parties to the review. ”

31. As can be seen, the law is clear that any candidate who claims to have suffered or is at the risk of suffering because of a decision of a procuring entity has the liberty to seek administrative review and I am alive to the fact this Court has previously held that the Constitution is not a substitute for all complaints about unlawful processes and procedures. In *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR*, the Court stated that whereas access to the Constitutional Court is an important avenue for seeking redress in certain cases;

“that does not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations. This court has considered similar applications where the Petitioners seek to enforce service contracts by way of constitutional applications and have held them to be an abuse of Court process – e.g. in *Rashid Odhiambo Aloggoh & 245 Others vs. Haco Industries Ltd HCC Misc 1520/1999*, and *Stephen Ndiboi & 27 Others vs Brookside Dairy Ltd Misc Applic. No. 764/05.*”

Further, in Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265, it was stated as follows;

“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution (our Chapter V) is fallacious. The right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

32. I am in complete agreement and in the instant case, the Petitioners have not made use of the elaborate procedure provided for under the **Public Procurement and Disposal Act** and pursue any of the remedies available to them in that Act and that failure cannot be redressed by half-baked arguments in a Constitutional Petition.

33. **But suppose I am wrong in interpreting the law as above?** Then I would still arrive at the same decision given the fact that it is now a well accepted principle that even if this Court has the jurisdiction to determine a violation of the provisions of the Constitution under **Articles 165 and 258** as it does, then it must exercise restraint and first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute as provided in the relevant statute. This has been well articulated by the Court of Appeal in Narok County Council v Trans Mara County Council [2000] 1 EA 161 at page 164 where it stated that;

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision at Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”

34. The Court of Appeal has also upheld this reasoning in Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, where it held that:-

“In our view there is considerable merit....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

35. I fully agree and having held so, and looking at the Petition again, there is nothing left for me to determine. What the Petitioners are seeking are various declarations which as I have shown above are not supported by any legal right. In my view, the declarations claimed what would be contrary to the accepted principles on which this Court exercises its jurisdiction under **Article 23(3)** of the **Constitution** - See Matalinga & Others v Attorney General (supra).

36. In closing, I am aware that the affected parties in the tender process have filed two suits viz Nairobi HCCC No. 21 of 2013 and Nairobi HCCC No. 47 of 2013 which have both been referred to arbitration. Let the issues in contention as regards the entire process relating to the proposed construction of the 'University of Nairobi Towers' be dealt within those two suits and for good reason.

37. There is nothing more to say. I find no merit in the Petition and the final orders to be made will be as follows;

(i) *The Petition dated 24th April 2013 is hereby dismissed.*

(ii) *As there are other ongoing proceedings relating to the same subject, let each party bear its own costs.*

38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence:

Irene – Court clerk

Mr. Nyaencha for Petitioners

Mr. Kipkorir for Respondents

Order

judgment duly delivered. Copies of the Judgment to be supplied.

ISAAC LENAOLA

JUDGE