



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO 465 OF 2014

BETWEEN

HCIG-ENERGY INVESTMENT CO. LTD AND LIKETH

**INVESTMENT KENYA LIMITED (HCIG
CONSORTIUM.....PETITIONER**

VERSUS

THE MINISTRY OF ENERGY &

PETROLEUM CONTRACTING AUTHORITY.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, THE

MINISTRY OF ENERGY & PETROLEUM.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

GULF ENERGY, CENTUM INVESTMENT

CO. LTD, SICHUAN NO. 3 ELECTRIC

POWER CONSTRUCTION CO. LTD,

SICHUAN ELECTRIC POWER DESIGN &

CONSULTANCY CO. LTD, CHD POWER

PLANT OPERATION CO. LIMITED

(GULF ENERGY CONSORTIUM).....4TH RESPONDENT

**THE PRINCIPAL SECRETARY MINISTRY OF NATIONAL TREASURY.....5TH
RESPONDENT**

SHANGHAI ELECTRIC POWER CO. LTD, AVIC

**INTERNATIONAL, CISTENIQUE(SHANGHAI CONSORTIUM).....INTERESTED
PARTY**

RULING

Introduction

1. The petitioner is a consortium of two companies, Hebei Construction Investment Group(HCIG) – Energy Investment Company limited, a China based company which was incorporated with the sole mandate of investing and constructing power projects around the world, and Liketh Investments Kenya Limited a Kenya based investment Company. It has filed the present petition together with an application by way of Notice of Motion dated 18th September 2014 in which it seeks the following substantive orders:

1. ...

2. That pending the hearing and final determination of the Notice of Motion Application herein, conservatory orders in the form of interim injunction be granted restraining the Respondents either jointly or severally or through their agents and or servants or any person claiming under or through them; from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or concluding a power purchase agreement between the 4th respondent herein and the Kenya Power and Lighting Company Limited as regards Tender No MOEP/RFP/15/2013-2014.

3. That pending the hearing and final determination of Petition No 1 of 2014, HCIG Consortium v The Ministry of Energy and Petroleum and 5 others), filed at the Petitions Committee established under the Public Private Partnerships Act 2013, conservatory orders in the form of injunction be granted restraining the respondents either jointly or severally or through their agents or servants or any person claiming under or through them, from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or conducting a power purchase agreement between the 4th respondent herein and the Kenya Power and Lighting company limited as regards Tender No MOEP/RFP/15/2013-2014.

4. That the 1st, 2nd and 3rd respondent respectively be ordered to provide copies of documents to the petitioner in terms of its requests dated 5 September 2014 addressed to the said respondents and annexed as exhibit “H9” in annex MK2 herein at pages 213 to 219.

5.

2. The 1st respondent, the **Ministry of Energy and Petroleum**, is the Ministry charged with the responsibility of formulating, advancing and implementing energy policies within the Republic of Kenya as well as developing and/or advancing hydro-power, geothermal, thermal, coal and other forms of power generation in the country. The 2nd respondent is the Principal Secretary in charge of the administrative functions in the Ministry of Energy and Petroleum. The 3rd respondent, the Office of the Attorney General, established under Article 156 of the Constitution, is the Principal Legal Adviser to the Government of the Republic of Kenya.

3. The 4th Respondent is a consortium of private corporate investors which successfully tendered for the design, financing, procurement, supply, construction, testing, commissioning, operation and maintenance of a 900 – 1000 MW coal fired power plant to be located at Lamu, Lamu County in the Republic of Kenya on a Build, Own and Operate arrangement – Tender No MOEP/RFP/15/2013-2014. (**“the project”**).

4. The 5th respondent is the Principal Secretary in charge of the administrative functions in the Ministry of National Treasury, while the Interested Party is a consortium of private companies also engaged in

investing and financing in power generation.

Background

5. The facts that precipitated the filing of this petition are set out in the affidavit sworn in support of the application by Mr. Martin Kinoti on 18th September 2014. The petitioner avers that it was among several private corporate investors which participated in **Tender No MOEP/RFP/15/2013-2014** for the design, financing procurement, supply construction, testing, commissioning, operation and maintenance of a 900 -1000 MW coal fired power plant to be located at Lamu, Lamu County. On 2nd September 2014, it learnt through a letter dated 29th August 2014 from the 1st respondent that it had not been successful in its bid. It also subsequently learnt through the media that the contract would be awarded to the 4th respondent.

6. Aggrieved by the decision to award the tender to the 4th respondent, the petitioner, pursuant to the provisions of **Section 67** of the **Public Private Partnerships Act** (hereafter "**The Act**"), filed a complaint before the **Petition Committee** established under section 67 of the Act. The complaint was filed on 9th September 2014.

7. The petitioner states that by a letter dated 5th September 2014, it requested the 2nd, 3rd and 5th respondents to furnish it with records and documents in their custody and control pertaining to the project. It did not receive the said documents and has not received them to-date.

8. The petitioner further states that while it filed its petition with the Petition Committee on 8th September 2014, it was not able to secure a stay of proceedings or an injunction from the Petition Committee to restrain the respondents from acting on or proceeding with the award of the tender as the Petition Committee lacks the power to grant such orders. It further contends that whereas section 67(6) of the Public Private Partnerships Act contemplates regulations to provide for the procedure for determining a petition, no such regulations have been promulgated thus undermining the petitioner's right to be heard and its right to access to justice.

9. The petitioner further contends that its rights and freedoms under Articles 22, 23, 35, 47, 48, 50, 51, 227 of the Constitution are at imminent risk of being grossly violated by the respondents; and that the actions of the respondents are also in violation of the established principles of natural justice, fair administrative action, rule of law and legitimate expectation. It therefore lodged the present petition alleging breach of various of its constitutional rights and constitutional provisions.

10. In response to the application and the petition, the 1st, 2nd, 3rd and 5th respondents filed grounds of opposition dated 22nd September 2014. The 4th respondent filed a Notice of Preliminary Objection, the gist of which echoed the grounds of opposition filed by the 1-3rd and 5th respondent. The preliminary objection was canvassed before me on 23rd September 2014, and it is to this objection that this ruling relates.

Submissions by the 4th Respondent

11. The 4th respondent's preliminary objection contains several points. It contends, first, that the matters in contention in this suit do not form the basis of a constitutional petition as the substance of the disputes do not seek any interpretation or declaration of any fundamental constitutional rights of the petitioner and neither does it disclose any violation of the petitioner's constitutional rights, and this court therefore has no jurisdiction to hear the petition.

12. It contends, further, that there is no constitutional matter between the State and its citizens to be determined in this Petition; that the petitioner has come before the court using an entirely erroneous process for articulation and determination of its private grievances and the court cannot grant any of the orders sought; and that the crux of the petitioner's case is its dissatisfaction with the procurement process leading to the award of the contract to the 4th respondent, which process was at all times a private

contractual competitive process, governed by substantive statutory provisions. Consequently, any disputes on the matter, whether on the applicable legal principles or facts, can only be litigated in a privately instituted formal lawsuit.

13. The 4th respondent further objects to the petition on the basis that the petitioner has lodged a petition which requires the court to make factual findings on issues of impropriety of the tender process, which cannot be litigated through a constitutional petition but through a substantive formal law suit.

14. Further, it argues that the peripheral references to the Constitution do not render a dispute amenable to be determined as a constitutional petition, particularly where substantive legal provisions govern the matters under review or dispute. It terms the petition an abuse of the court process and seeks that it be dismissed.

15. On behalf of the 4th respondent, Learned Counsel, Mr. Kiragu Kimani, submitted that the present petition has no foundation in law as required in constitutional matters, and that it does not meet the threshold for constitutional petitions. He submitted that the petitioner had used the wrong vehicle for litigating what are in essence commercial disputes for which an Act of Parliament provides a mechanism; that the vehicle of a constitutional petition is so important in legal processes that it should not be taken lightly; and that the court must do the utmost to guard the process against persons with no grievance or with an alternative forum.

16. According to the 4th respondent, the petitioner in this case had already taken advantage of the mechanism of the Petition Committee established under section 67 of the **Public Private Partnerships Act of 2013** which came into force on 8th February 2013; that the idea of protecting specialist bodies with a statutory mandate has found favour with this court as evidenced in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 2 Others (2013)eKLR Civil Appeal No 290 of 2012**, in which the court of Appeal held that it will hesitate to enter into merit review of the exercise of its functions by a state organ proceeding in accordance with the statute that governs it.

17. Mr. Kimani further submitted that the petitioner was seeking two prayers in the petition: an injunction to stop negotiations and the signing of documents, and it was his submission that the request for an injunction is not achieved on any breach of the constitution. Mr. Kimani took the view, with regard to the petitioner's contention that the Petition Committee has no power to issue orders staying any negotiations, that in enacting the Public Partnerships Act, Parliament had not clothed the Petition Committee with power to issue injunctions; and it was his submission that the court must avoid sitting on appeal on decisions of Parliament, relying in this regard on the decision in the **Mumo Matemu** case. It was his submission further that if Parliament has decided not to give the Petition Committee power to issue injunctions, the petitioner has the option to move the court through a normal suit seeking redress, but not to clothe its case as raising constitutional issues.

18. With regard to the petitioner's prayer on the right to information under Article 35(1), it was the 4th respondent's position, on the authority of the decisions in **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company Limited & Two Others High Court Petition No. 278 of 2011** that this right is only available to citizens. Mr. Kimani submitted that once this limb of the petitioner's case failed, the petition collapsed entirely.

19. In response to the petitioner's contention that there should be no situation without a remedy, Counsel submitted that it was upon a party to choose the appropriate vehicle to seek a remedy; that while Article 227 allows a party to come to court to seek a remedy, there is already a mechanism available to the petitioner, and having taken advantage of that mechanism, it was to vex the respondents to again bring them before the court.

20. Counsel relied on the decision of the court in **Judy Watiri Wambugu vs Chief Land Registrar and 6 Others, Nakuru High Court Petition No 49 of 2012 (unreported)** in which the court held that courts will not consider a matter as a constitutional issue unless a remedy depends on it, and submitted that the

Court does not need to deal with any constitutional issue with regard, to the petitioner's claim.

21. According to Mr. Kimani, the court must ask itself what a party who moves the court on a constitutional matter needs to do. It was his contention that in the absence of any constitutional issue framed with any degree of specificity, the court should find it has no jurisdiction; that it must also find that a party who has taken advantage of the existing mechanism is abusing the court process by coming to court. He therefore asked the court to uphold the preliminary objection and strike out the petition.

Submissions of the 1st, 2nd, 3rd and 5th Respondents

22. These respondents supported the preliminary objection by the 4th respondent and filed their own grounds of opposition dated 23rd September 2014 comprising some 10 grounds. In making his submissions on their behalf, Learned State Counsel, Mr. Njoroge, relied on grounds 1, 3 and 9 of their grounds of opposition which he stated corresponded with the preliminary objections by the 4th respondent.

23. In the said grounds, the respondents contend that the application and petition are an abuse of the court process as the petitioner has not shown which rights and freedoms have been breached; that the petitioner is only challenging the process that led to the award of the tender to the 4th interested party and the petition is therefore not properly before the court; that the petitioner has already filed another Petition before the Petition Committee which is a judicial body established under the Public Private Partnerships Act with the jurisdiction to hear the matter; that this which is the proper forum as it is the body mandated to regulate, monitor and supervise the implementation of project agreements on infrastructure where private entities are involved and its jurisdiction to competently handle the Petition before it has not been challenged. The respondents further challenged the application and petition on grounds that went to the merits of the petition.

24. In his oral submissions, Mr. Njoroge adopted the submissions made on behalf of the 4th respondent. He submitted, further, that the petitioner had already filed Petition No 1 of 2014 before the Petition Committee in compliance with the provision of the Public Private Partnerships Act; that it had filed the present petition ten days later, which in his view amounted to an abuse of process as the petitioner knows the forum for filing their claim. Mr. Njoroge submitted that it was trite law, as had been established in the case of **Alphonse Mwangemi Munga vs The Attorney General, Petition No 564 of 2004, Harikisoon vs The Attorney General of Trinidad & Tobago [1980] A.C 265, and The Speaker of the National Assembly vs Hon James Njenga Karume Civil Application No NAI 92 of 1992 (NAI 40/92 unreported)** that where there is a forum established by law, this court cannot deal with the issue.

25. Mr. Njoroge agreed with the submission by Mr. Kimani that if Parliament had intended for there to be a stay in negotiations in the matters the subject of this petition, it would have provided for it. He asked the court to interpret the Act as Parliament intended and refer the petitioners to the Petition Committee under section 67 of the Act.

26. With regard to the claim of violation of the right to information, Mr. Njoroge submitted that the petitioner is not a person for the purpose of seeking a remedy for breach of constitutional provisions; that the subject of the dispute is a commercial transaction which is remediable under civil law as well as before the Petition's Committee. It was his submission that it was an abuse of process for the petitioner, which is a corporate entity with no rights that can be breached, to allege breach, relying on the decision in **The County Government of Meru vs The Ethics & Anti – Corruption Commission Petition No 177 of 2014**. He asked the court to apply the said decision by analogy to the facts of the present case and find that the petitioner has no rights that can be breached. It was his prayer on behalf of the respondents that the petition should be struck out.

Petitioner's Submissions in Response

27. The position taken by the petitioner and presented by Mr. Ongoya and Mr. Waweru Gatonye is that

the respondent's objection did not meet the definition of a preliminary objection as established in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited [1969] EX 696**. According to Mr. Ongoya, a preliminary objection raises a pure point of law on the assumption that all the facts pleaded are correct, and he asked the court to act on this assumption and ask what the pure point of law raised by the respondents is. It was its contention further that there was no substance in the present objection that satisfies the criteria of a preliminary objection.

28. Learned Counsel submitted further that the Constitution is the ultimate shield for all persons and should not be taken away; that when a court is invited to exercise jurisdiction over a constitutional dispute, it must be the last to refuse jurisdiction, doing so only when the petition is more than hopeless.

29. Mr. Ongoya observed that the respondents had made two important concessions: that the petitioner is dissatisfied with a process undertaken under the Public Private Partnerships Act, which is the subject of a dispute before the Petition Committee; and that the Petition Committee has no jurisdiction to issue an injunction. Mr. Ongoya posed the question where, in such circumstances, the remedy of a person in the petitioner's position who is desirous of obtaining conservatory relief and has made out a case for such relief lay. Mr. Ongoya submitted that a request for conservatory relief is a request for justice, and that one should never be locked out of access to justice under Article 48 which enjoins the state to ensure access to justice. It was his submission that the court has jurisdiction, under Article 23, to grant the injunction sought by the petitioner.

30. To the 4th respondent's submission that it is incumbent on a party to choose the appropriate forum in which to lodge a claim, Counsel submitted that this court was the appropriate forum; that the petitioner was not asking the court to amend the Private Partnerships Act to give the Petition Committee power to issue injunctions. It was his submission therefore that the 4th respondent's reliance on the **Mumo Matemu** case is misleading; that what the petitioner was asking the court to do is to use its power under Article 23 to bridge the gap left by section 67 of the Act to provide relief.

31. Counsel submitted further that there are two statutes for the procurement of goods and services, the Public Procurement and Disposal Act 2005 (hereafter the "**The PPOA**") and the Public Private Partnerships Act 2013. It was his submission that under the PPOA, there are regulations made for dispute resolutions, but that none had been made under the Public Private Partnerships Act.

32. Counsel submitted further that under the PPOA, both the substantive law and the regulations provide for an automatic stay once a complaint is made; and if a litigant were to ignore that process and come to court, an argument could be made that there is abuse of process. He submitted that there is neither such automatic stay or power to grant stay under the Private Public Partnerships Act, and it was his submission therefore that this gave the court a role in circumstances such as this where such a stay is necessary.

33. With regard to the respondents' submission that the right to information was not available to the petitioner, in reliance on the **Nairobi Law Monthly** case, Mr. Ongoya submitted that the present petition satisfies the criteria set in that case; that the relevant prayer in the petition requests for information in terms of the request dated 5th September 2014; and that the request for information was made by a natural person, Mr. Kennedy Ogeto. It was the petitioner's submission therefore that the principle of citizenship had been met, and that Mr. Kennedy Ogeto is within his right to ask for information, as he has done, for protection of any right or fundamental freedom.

34. Mr. Ongoya submitted further that Article 35(1)(b) is not limited to the right of the person seeking the information, and that Mr. Ogeto's right to information having been violated, it is not necessary for him to come to court in person. He contended that the petitioner is entitled to come to court and litigate Mr. Ogeto's right.

35. In further submissions on behalf of the petitioner, Learned Senior Counsel, Mr. Waweru Gatonye, submitted that the court has jurisdiction to make orders of a conservatory nature provided for under Article 23, arguing that the jurisdiction of the court had been seriously misapprehended by the

respondents.

36. With regard to the argument that the petitioner had not satisfied the requirements of a valid constitutional petition, Counsel submitted, in reliance on the **Mumo Matemu** case, that the exposition of the law was that the court should be slow to shut out a party on the basis that it does not raise a constitutional issue. What the law required was for a party to set out the provisions of the constitution alleged to have been violated, and how, so that the court can discern what has been violated; and that by so doing, one has invoked the jurisdiction for the grant of orders under Article 23. It was his submission that this has been done in the present case, and the petition should not be struck out. It was also his submission that the petitioner was not seeking substantive orders but for protective orders pending the determination of the dispute before the Petition Committee.

37. With regard to the right to information, Mr. Gatonye submitted that one of the canons of constitutional interpretations is that the Constitution should be read holistically to give the greater benefit to citizens, and to meet its values and objectives. Counsel termed the argument that one cannot get documents from government unless one is a citizen simplistic; that Article 227 requires procurement to be open, competitive and fair, that the court could not satisfy itself if it cannot call for documents, and that it would be difficult to make a determination as to whether the constitutional threshold under Article 227 is met. Counsel submitted further that Article 35 is not the final word as to whether documents may be ordered to be produced to establish whether a constitutional requirement has been met by a procuring authority.

38. Mr. Gatonye submitted that the respondents had conceded that this matter related to a procurement process, and that it was therefore subject to Article 47; that Article 47 is one of the pillars of the petition; and it cannot therefore be said that the petitioner has not cited provisions violated or the manner of violation.

39. To the contention that the petitioner was a consortium and has no right to come to court, Counsel submitted that this contention is answered by Article 258(2)(b); that even if it was only one member of the consortium who had come before the court, he would be entitled to do so; that this is a matter that is of profound public interest and so the petitioner had also approached the court under Article 258(2)(c); and that the petitioner qualified as Article 260 defines a person to include a body of persons whether Corporate unincorporated.

40. Counsel concluded that the respondents had not raised a Preliminary Objection as it is understood in law; that the petition satisfies the threshold required by law for it to go for hearing on merit; that to be shut out from seeking a conservative order before hearing by the Petition Committee would constitute a grave injustice and render the hearing before the Petition Committee an academic exercise.

41. It was his submission that no prejudice occurring to the successful bidder as a result of the issuance of conservatory orders could be compared to the public interest in ensuring that the procurement in dispute complies with the Constitution and is in the interests of the people of Kenya.

The 4th Respondent's Submissions in Reply

42. In responding to the petitioner's submissions, Learned Counsel, Mr. Musangi, contended that the petitioner had missed the point of a Preliminary Objection. It was his submission that 90% of cases filed in the Court Registry touch on law, but that does not make them constitutional matters. Counsel submitted that the genesis of their claim was a competitive commercial process, which they had lost, that they are dissatisfied with the loss but this does not make their claim a constitutional issue. Mr. Musangi reiterated that as long as there is a substantive process for judicial relief, parties cannot couch their application as constitutional issues; and that the Constitution was never intended to be the silver bullet to substitute for other provisions of law.

43. Counsel further argued that the petitioner was disingenuously suggesting that it is acting for Mr. Ogeto in lodging a claim under Article 35. It was his submission that the correspondence clearly shows

that Mr. Ogeto was acting for the petitioner, and that therefore the finding in the Famy Care case, particularly paragraph 27 thereof, applied to the facts of this case.

Determination

44. The facts leading to the present dispute are not in dispute and have been set out briefly at the beginning of this ruling. The petitioner is dissatisfied with the decision to award the 4th respondent, the successful bidder, with the tender. It contends that the 4th respondent was not among the twenty six entities which submitted their Expression of Interest during the first stage of the tendering process, and that it had not collected the Request for Proposal documents on the basis of which the said entities would provide their tender proposals. The petitioner's contention is therefore that it was irregular, unprocedural, unlawful and illegal for an entity that did not participate in the expression of interest to emerge the eventual winner of the tender as this was a violation of not only **Section 46(4) and (5) of the Public Private Partnerships Act** but also **Article 227** of the Constitution that enjoins the state and its organs to contract for goods and services in a manner that is equitable, transparent, competitive and cost effective.

45. In accordance with the provisions of section 67 of the Act, the petitioner filed a Petition with the Petition Committee dated 8th September 2014. Its case is that it has been compelled to come to seek conservatory orders from this court as it was unable to obtain a stay or an injunction from the Petition Committee to restrain the respondents from proceeding with the award of the tender to the 4th respondent. This is because the Petition Committee lacks the power to grant such orders.

46. Section 67 of the Public Private Partnerships Act establishes the Petition Committee with the mandate to hear and determine disputes arising from the tendering process for public private partnerships. It provides as follows:

1. There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.

47. Section 67(2) of the Act sets out the composition of the Committee, while at section 67(4) and (5), the Act provides that:

(4) Where a petition is based on an administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.

(5) The decision of the Committee shall be final and binding on both parties.

48. The core of the petitioner's problem is the absence of regulations prescribing a procedure for hearing of petitions, and the lack of powers vested in the Petition Committee to stay the process of negotiations and completion of the contracting process pending the hearing and determination of disputes before the Petition Committee. Section 67(6) states that:

(6) The Cabinet Secretary may by regulations, provide for the procedure for determining a petition under subsection (1).

49. The objection by the respondents to the present petition can be simplified into two limbs. The first limb is that this court lacks the jurisdiction to issue the conservatory orders sought as there is a mechanism provided for the resolution of disputes under the Act which the petitioner has already activated. The second limb relates to the absence of a constitutional issue for determination by the court as the petitioner, not being a citizen has no right to information guaranteed under Article 35 of the Constitution.

50. The response by the petitioner is that the preliminary objections do not meet the definition of a

preliminary objection as defined in the **Mukisa Biscuits** case. With regard to the second limb, their case is that the request for information was made by a citizen, Mr. Kennedy Ogeto, and that therefore the test set in the **Nairobi Law Monthly** case was satisfied; and secondly, that the petitioner was entitled to litigate the violation of Mr. Ogeto's right to information. I now turn to consider these two limbs and the rival submissions with regard thereto.

The Nature of a Preliminary Objection

51. In the **Mukisa Biscuits** case (supra), Law, JA stated as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (Emphasis added)

52. The objection by the respondents relate to the jurisdiction of this court, their argument being that the court lacks the jurisdiction to hear the matter as there is already a mechanism provided by law that the petitioner has already activated. I am satisfied that this objection falls within the rubric of the **Mukisa Biscuits** case. It is an issue arising out of the pleadings which does not require a trial of the facts for the Court to determine. I am also satisfied that, in keeping with the decision of the Court in the **Mukisa Biscuits** case with regard to points of law arising from the pleading, and also bearing in mind that in accordance with the decision of the Court of Appeal in the case of **Motor Vessel “Lilian S”**, the Court is permitted to consider the evidence presented before it to determine whether or not it has jurisdiction, I believe the preliminary objections are properly raised before this Court.

53. As observed above, the **Public Private Partnerships Act** provides for complaints arising under the Act to be filed with the Petition Committee within 15 days of the dispute arising. There is no time frame provided for the determination of the complaints, and no powers are vested in the Petition Committee to stay the procedure while the complaint is under consideration.

54. There is clearly a lacuna under the Act. The petitioner argues that unlike the situation in the **Public Procurement and Disposal Act**, the Petition Committee cannot stay the award of contracts by the public entity. As a result, the entity can, in accordance with **Section 52(i)** of the **Public Private Partnerships Act**, after a tender has been awarded to a successful bidder, enter into negotiations with the successful bidder. The petitioner contends that the 1st respondent is currently engaged in negotiations with the 4th respondent and a contract could be signed any time now, thus rendering the petitioner's claim before the Petition Committee illusory.

55. The respondents have argued that as there is a mechanism provided by law, this court should not enter into the present dispute; that had Parliament intended that the Petition Committee should have the power to stay the process of awarding tenders, it would have so provided. It urges the court to be guided by the injunction of the Court of Appeal in the **Mumo Matemu** case for the Court not to sit on appeal on decisions of Parliament.

56. It is indeed the law that where a mechanism is provided by legislation, that mechanism should be followed. This has been the consistent decision of the courts in this jurisdiction-see **Francis Gitau Parsimei & 2 Others –vs- The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012; Kones vs. Republic and Another ex-parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005;** and **Speaker of the National Assembly -vs- Karume (2008) 1 KLR (EP) 425** in which the Court of Appeal expressed itself as follows:

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

57. In this case, there is no argument that the petitioner has not submitted itself to the prescribed process. The petitioner has activated the process provided under the Act. It is the Petition Committee, through that process, whose decision, under section 67(5) of the Act, is final, which has the mandate to deal with the petitioner's complaints. Can the petitioner, after submitting its complaint to the Petition Committee, properly come before this court alleging violation of constitutional rights and seeking conservatory orders under Article 23?

58. The High Court has original and unlimited jurisdiction, under Article 165, in civil and criminal matters, but it should be slow to enter into matters where a process has been provided by statute. One, however, understands the predicament of the petitioner, and the ingenuity of its Counsel in framing its claim as a constitutional issue and seeking relief under Article 23.

59. As noted above, the **Public Private Partnerships Act** does not vest the Petition Committee with the jurisdiction to grant injunctions or to stop the procuring authority from proceeding with negotiations and granting a contract under the Act while the petition before the Petition Committee is pending. The respondents deem this to be in order, their position being that if Parliament had intended to vest the Petition Committee with power to grant injunctive relief, it could have done so. The petitioner argues that it should not be left without a remedy where there is a lacuna in an Act of Parliament, and so they invoke the jurisdiction of this court.

60. I have read the provisions of the **Public Private Partnerships Act**. A consideration of the matters governed by the Act leads me to the conclusion that it could never have been intended that the Petition Committee would be seized of a matter, while the procuring authority is at liberty to proceed with the negotiation, and possibly award, of a contract. What would be the point of granting the Petition Committee power to hear and determine complaints, and to provide that its decisions would be final, if, by the time it hears and determines a matter, a contract may well have been executed? I agree with the petitioner that there should be an option for a party aggrieved by the tendering process to seek temporary stay of the process pending hearing and determination of its complaint.

61. Where I have difficulty with its claim is when it approaches this court alleging violation of rights under the Constitution. As the title of the Act under which the petitioner's claim arises indicates, the transaction in dispute is a commercial transaction, albeit involving a public entity. It is similar in many respects to the situation under the Public Procurement and Disposal Act, and in my view, powers similar to those granted to the **Public Procurement Administrative Review Board** under the PPOA perhaps ought to have been granted to the Petition Committee if the rights of parties, as well as the public interest in fair, transparent processes under the Act, is to be safeguarded. In the absence of such a power vested in the Committee, where should a party in the situation of the petitioner seek relief?

62. I take the view that the present situation is analogous to that of a party under the Public Procurement and Disposal Act in relation to an appeal from decisions of the Public Procurement Review and Administrative Board. A party dissatisfied with a decision of the Board has the right to lodge an appeal in the High Court, and such appeals are ordinarily lodged in the Civil Division of the High Court. That the High Court has jurisdiction in an ordinary suit to grant injunctive relief has been conceded by the 4th respondent in submissions made on its behalf by Mr. Kimani.

63. On the powers of the High Court to grant an injunction or conservatory relief where a body established under a statute has no such powers, a further analogy can be drawn with the position of a party who seeks relief in a matter pending before the **Business Rent Restriction Tribunal**, which the establishing Act, the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301** of the Laws of Kenya did not give power to grant injunctive relief. In several decisions coming before the High Court and the Court of Appeal, it has been held that the High Court has jurisdiction to give an injunction in respect of a matter pending before the Tribunal in order, so to speak, to conserve the status quo and protect the interests of the tenant pending the determination of the issue in dispute before the Tribunal.

64. In the case of **Caledonia Supermarket Ltd –vs- Kenya National Examination Council [2000] E.A.**

357 in which the tenant, a protected tenant under the Act, was unlawfully threatened with termination of its tenancy, , the Court of Appeal held that the tenant had properly approached the High Court for an injunction as the Tribunal had no jurisdiction to issue an injunction.

65. Similarly, in **Geoffrey Gikonyo –vs- Mohamed Idris Khilji and 3 Others Nairobi HCCC No.352 OF 2004** Ochieng J, Ag. J (as he then was) quoted extensively from the case of **Caledonia Supermarket Ltd –vs- Kenya National Examination Council (supra)**, noting in particular the observation of the court at page 361 that:-

“Faced with what was clearly an illegal eviction, the appellant could not seek protection from the Business Premises Tribunal because the notice given being an invalid notice deprived the tribunal of the power to intervene. In any case the Tribunal has no power to issue an injunction. That left the appellant with only one cause of action. It had to seek redress from the High Court.

66. In the case of **Tiwi Beach Hotel Limited –vs- Julian Ulrike Stamm [1990] 2 KAR 189** where a protected tenant applied to the High Court for an injunction when threatened with an illegal eviction, Kwach JA (as he then was) held that the High Court was justified in issuing an injunction in favour of the tenant in respect of a matter pending before the tribunal.

67. In **Moses N. Gitonga and Another vs George Gatheca Kinyanjui and Another Civil Suit No 125 of 2013** the court rendered itself as follows:

“[9] It is not in dispute that this suit relates to a controlled tenancy. Both parties admit that fact and agree that there are pending in the BPRT two suits relating to the subject matter herein, to wit, BPRT Case No. 29 of 2005: Njoroge Wamunyua & Moses N. Gitonga vs. George Gatheca Kinyanjui and BPRT Case No. 96 of 2013: Njoroge Wamunyua & Moses N. Gitonga t/a Likia Guest House Vs. George Gatheca Kinyanjui. It is therefore common ground that the right forum to ventilate the dispute between the parties herein is the BPRT. However, the Orders sought in the Application and the Plaint are Orders of injunction. It is trite law that the BPRT does not have jurisdiction to grant orders of injunction.”

68. In the case of **Republic vs Business Premises Rent Tribunal & another & Ex parte Davies Motor Corporation Limited [2013] eKLR, Odunga, J.** in holding that the Business Premises Rent Tribunal had no jurisdiction to issue an injunction, observed as follows:

“Precedence shows that the right forum is to seek orders of injunction in the High Court even if there is a case pending in the BPRT. This was the holding in the case of S. N. T/A Baby Steps Kindergarten Vs Hasham Lalji Properties Ltd & Another [2008] eKLR, where Nambuye, J. (as she then was) held that the High Court has jurisdiction to entertain an application for injunction even if the dispute arises from tenant landlord relationship governed by the Landlord, Tenant, Shops Hotels and Catering Establishment Act, Cap. 301.”

69. Finally, Ojwang JA (as he then was) held in the case of **Reuben Gitonga M'Mugambi vs Kenyatta National Hospital [2005] eKLR** that the High Court can provide interlocutory relief in a matter pending before the Business Premises Rent Tribunal.

70. I am duly guided by the reasoning of the court in the above decisions. Where legislation establishes a body but does not grant it the jurisdiction to grant injunctive relief pending determination of matters before it, such power vests in the High Court. It would be a travesty of justice and render the intentions behind the establishment of a body such as the Petition Committee of no value.

71. Thus, both the cases for the respondents and the petitioner have some merit with regard to the powers of this court vis a vis the issues in dispute. The respondents are correct that the issues in this matter are commercial in nature, and that the petitioner should not approach the court to seek constitutional relief, jurisdiction for dealing with complaints arising in matters such as this having been vested in the Petition

Committee. They are also correct that the Public Private Partnerships Act does not grant the Petition Committee the power to grant injunctions in respect of matters pending before it.

72. The respondent are, however, in my view, wrong in supposing that since Parliament did not see fit to include a provision for the grant of injunctive relief by the Petition Committee, the petitioner should be left without a remedy. I agree fully with the petitioner that it should not be left without a remedy, and that it has the right to seek injunctive relief from the High Court. As observed earlier, however, such relief should have been sought from the Civil or Commercial Division, and the petitioner can only come before this court by way of a constitutional petition if it can demonstrate a violation or threatened violation of a constitutional right. The question is whether the facts before me demonstrate violation or threat of a violation of the petitioner's constitutional rights.

The Right to Information

73. The petitioner's claim with respect to the right to approach this court on account of a constitutional violation relates to its allegation that its right to information has been violated, but this claim is somewhat convoluted and contradictory. It argues, first, that in order to effectively and properly exercise its right of access to justice and to exhaustively present its case given the lack of transparency that characterized the tendering process it requested for several documents from the respondents on 5th September 2014. It contends that the said documents have not been disclosed, and its right to information and access to justice have thus been compromised and continues to be compromised.

74. However, in submissions made on its behalf by Mr. Ongoya, the petitioner argued that the criteria in the **Nairobi Law Monthly** case had been satisfied as the request for information was made by Mr. Kennedy Ogeto, and that the petitioner was only litigating on behalf of Mr. Ogeto with regard to the right to information.

75. This is again quite ingenious on the part of the petitioner, but on close scrutiny, and as already determined in previous decisions, it cannot stand. First, Article 22(2) (a) provides that ***"In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by a person acting on behalf of another person who cannot act in their own name."*** As submitted by the 4th respondent, nothing before the court shows that Mr. Ogeto is unable to present a claim for violation of his rights under Article 35.

76. Secondly, Mr. Ogeto is Counsel for the petitioner. He has no interest in the matter before the Petition Committee or before this Court, and such interest as he was pursuing while requesting for information was his client's interests. Majanja, J dealt with a similar situation in **Famy Care Limited –vs- Public Procurement Administrative Review Board & Another High Court Petition No. 43 of 2012**.

77. To an argument similar to that in the present case that the request was by an individual, natural person who was a citizen of Kenya and the Advocate for the petitioner in that case, Majanja J stated as follows:

"[27] Mr. Mugambi argues that as a citizen, he is entitled to information under Article 35(1). As a citizen, Mr. Mugambi is no doubt entitled to exercise and enforce his constitutionally guaranteed rights. However, in this matter, Mr. Mugambi is not the petitioner but the advocate for the petitioner. The argument he advances is at once startling and if accepted, would revolutionalise the practice of law and compromise the independence of an advocate. An advocate remains an agent for his client for purposes of prosecuting the case. He is not to substitute himself for his client or give his client certain benefits due to him as an advocate qua advocate or as a citizen by actively and deliberately circumventing constitutional or other legal provisions by using his privileged position in the course of proceedings. Mr. Mugambi is not the petitioner and there is nothing in the pleadings that entitles him to act as such. He cannot circumvent the provisions of Article 35(1) by constituting himself as a petitioner and citizen to benefit the petitioner who is not a citizen." (Emphasis added)

78. I fully agree with the sentiments of Majanja J set out above. In this case, the claim for information

was in the interests of the petitioner, and effectively, it is the petitioner, through Mr. Ogeto, which was seeking information. The right under Article 35 is not a right to which it is entitled as a corporate citizen, and Mr. Ogeto cannot circumvent the provisions of the Constitution in order to give the benefit of the Constitution to his client.

79. Mr. Gatonye made an attempt to bring the petitioner within the purview of Article 47 on the basis that the dispute related to a procurement process and thus involved administrative action, but this argument is, in my view, untenable. It is therefore my finding, and I do hold, that there is no merit in the claim of constitutional violation.

Disposition

80. So where does this leave the petitioner? As I have found above, it would be to render the proceedings before the Petition Committee nugatory if the petitioner were to be left without a remedy and the 1st respondent proceeded with the award of the contract while the petitioner's claim is still pending. Further, as I have found above, this would, in my view, not only work an injustice against the petitioner, but would be against the tenets of transparency and fairness in public procurement contained in Article 227.

81. The petitioner is entitled to injunctive relief from the High Court in light of the lacuna in the powers given to the Petition Committee, which it should have sought from the Civil or Commercial Division of the High Court. However, as a Division of the High Court, and in light of the original and inherent jurisdiction vested in the High Court by the Constitution, it is my view that in the circumstances before me, this court has jurisdiction to grant relief to the petitioner. It would not be a useful way of expending judicial time to send the petitioner away, after finding that it is entitled to conservatory relief, in order for it to seek relief in another Division of this court.

82. In the circumstances, I will dispose of this petition by granting orders in terms of prayer 3 of the petitioner's application dated 18th September 2014 as follows:

***“That pending the hearing and final determination of Petition No 1 of 2014, HCIG Consortium v The Ministry of Energy and Petroleum and 5 Others, filed at the Petition Committee established under the Public Private Partnerships Act 2013, conservatory orders in the form of injunction be and are hereby issued restraining the respondents either jointly or severally or through their agents or servants or any person claiming under or through them, from conducting, facilitating, approving, ratifying, endorsing or in any manner participating in negotiating, signing, executing or conducting a power purchase agreement between the 4th respondent herein and the Kenya Power and Lighting company limited as regards Tender No MOEP/RFP/15/2013-2014.*”**

83. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 28th day of November 2014

MUMBI NGUGI

JUDGE

Mr. Thongori and Mr. Ogeto instructed by the firm of Thongori & Co. Advocates for the Petitioner.

Ms. Kimani and Mr. Njoroge Mwangi instructed by the State Law Office for 1st, 2nd, 3rd and 5th

Respondents.

Mr. Kiragu Kimani, Mr. Musangi, Mr. Amoko and Mrs. Kashindi instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for 4th Respondent.