



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CONSTITUTIONAL PETITION NO. 14 OF 2014

IN THE MATTER OF ARTICLES 10, 22 & 227 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 39 OF PUBLIC PROCUREMENT AND DISPOSAL ACT

AND

**IN THE MATTER OF THE CONTRAVENTION AND/OR APPREHENDED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

BETWEEN

JOHNSON K. NJIGOYA, CHAIRMAN MUTITHI

**EXTENSION RICE FARMERS SOCIETY LTD.....1ST
PETITIONER**

KIBICHO JEREMY NYAMU, SECRETARY, MUTITHI

**EXTENSION RICE FARMERS SOCIETY LTD.....2ND
PETITIONER**

**RICHARD KARIUKI KABUCHWA, TREASURER,
MUTITHI**

**EXTENSION RICE FARMERS SOCIETY LTD.....3RD
PETITIONER**

-VERSUS-

**ATTORNEY GENERAL.....1ST
RESPONDENT**

THE PRINCIPAL SECRETARY MINISTRY

**AGRICULTURE, LIVESTOCK AND FISHERIES.....2ND
RESPONDENT**

MWEA RICE GROWERS MULTIPURPOSE

RULING

The Petitioners/Applicants named herein have brought a notice of motion dated 21st August 2014 asking for the following reliefs

1. That the application be certified urgent and be heard during vacation.
2. That the Honourable court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and /or servants from receiving any money for purchase of New Holland Farm Tractors 80 HP and Kubota combine Harvesters from any third party pending the hearing and determination of prayer 4 and 5 in this application.
3. The honourable court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and/or servants from releasing any farm machine namely New Holland Farm Tractors 80 HP and Kubota Combine Harvesters to any third party pending the hearing and determination of 4 and 5 of this application.
4. That the Honourable court be pleased to issue conservatory order restraining the respondents by themselves, their agents and /or servants from receiving any money for purchase of New Holland Farm Tractors 80 HP and Kubota Combine Harvesters from any third party pending the hearing and determination of the petition.
5. That the Honourable court be pleased to issue a conservatory order restraining the respondents by themselves, their agents and /or servants from releasing any farm machinery namely New Holland Farm Tractors 80 HP and Kubota Combine Harvesters to any third party pending the hearing and determination of the petition.
6. That costs of this application.

The motion before me is based on the grounds listed on the face of the application. These are:

- a. The Applicants responded to an advertisement by the respondents for procurement of New Holland Farm Tractors 80 HP and Kubota Combine Harvesters.
- b. That the Applicants qualified to procure the New Holland Farm Tractors 80 HP and Kubota Combine Harvesters.
- c. That the tender if at all existed moved to arbitrarily issue the tender to a different party even after the applicant qualified.
- d. That awarding the procurement tender to a different party violates the spirit of the Constitution of Kenya and Public Procurement and Disposal Act.
- e. That continuing with the process would be prejudicial to the Applicants.
- f. That it would be just to allow the application.

Brief Summary

The Petitioners/Applicants herein are officials of a cooperative Society known as MUTITHI EXTENSION RICE FARMERS COOPERATIVE SOCIETY LTD and have brought a petition on their behalf and on behalf of other members of the said society who are rice farmers in the Mwea Scheme within Kirinyaga County. The 2nd respondent is a state organ charged with affairs of the Ministry of Agriculture, Livestock and Fisheries which inter alia offer supportive roles to the petitioners. The 1st respondent is the Chief Legal Advisor of the 1st respondent.

A dispute arose as result of a grant from Japan that was to support the farming activities of the applicants and other targeted farmers at Mwea. A grant from the Government of Japan was in form of farm machines and implements which were to be sold to targeted groups/ qualified persons/societies through a tender process that is now the subject matter in the petition before court. The petitioners view the process that overlooked them in the awarding of tender as a clear violation of their Constitutional rights and the law. The respondents have countered the same saying that everything was done in accordance with the law and that due process was followed.

The Applicants have expressed fears that unless the process is halted the petition despite raising serious constitutional violations may be rendered nugatory and to forestall such eventuality they have brought the interlocutory application now before court.

Main Application

I have looked at the application and though the applicants have cited wrong provisions (**Order 8 Rule 3(1)**) that deals with amendments of pleadings, I do not think that citing a wrong provision of law is fatal to an application. The provision of **Order 51 Rule 10 Civil Procedure Rule shields** them and in that regard I shall consider the substance of the application. Prayers 1, 2 and 3 are already spent in my view and the only prayers remaining for determination are prayers 4, 5 and 6.

The prayers sought by the applicant would affect the interests of MWEA RICE GROWERS MULTIPURPOSE COOPERATIVE SOCIETY LTD a party who has been brought in as interested parties in this petition. They have also opposed the application before court and this court has considered their opposition and I will come to the same in a short while.

In the application now before court, the 2nd petitioner have sworn an affidavit detailing the process that led to the dispute. He depones that the 2nd respondent appointed a project manager known as RICEMAP who was on the ground on behalf of the Ministry to oversee the project. I have looked at the supplementary affidavit of Kibicho Jeremy and the annexures and note that the apparent engagements between the petitioners and the 2nd respondents in so far as the project that was going on at Mwea was concern. The Petitioners/Applicants have submitted that they applied to purchase the farm machinery that the respondent intended to sell to under privileged farmers in Mwea. They have annexed a letter dated 19th February 2014 marked as “KJN2” in the supporting affidavit of KIBICHO JEREMY to support their submissions. This court has looked at the letter and the letter is addressed to project manager, Ricemap. It is also apparent that the letter solicited a response because in a letter dated 24th March 2014 exhibited by the Applicant as “KJNS”, the project manager responded with a letter referenced as,

“letter of no objection financing of 2KR machinery purchase”

The applicants’ contention is that they merited consideration but the 2nd respondent unfairly Secluded them and used a process that favoured the interested party which process they contended violated the law and their constitutional rights.

The respondents and the interested party strongly opposed the application and filed their respective opposition. To begin with the submissions of the interested party, (is also a cooperative society) they submitted that the prayers sought by the applicants are not available and have already been overtaken by events. The interested through its chairman one PIUS NJOGU KATHURI has deponed that the 2nd respondent lawfully and regularly offered them a chance to purchase an assorted agricultural machinery under 2KR project. The machinery was valued at kshs 43,040,750/- . The letter of offer is annexed to his affidavit and is marked as “P.N.K 2” and by the time the petitioner came to court on 21st August 2014 they had already accepted the offer and paid the total amount required of kshs 43,040,750/- and have annexed an official receipt marked “P.N.K. 5 b” as proof of payment done on 15th August 2014. I have looked **at** the receipt and this fact is not disputed. The interested party’s position was that the applicants prayers and specifically prayer 2 and 4 of the application is untenable because it seeking to stop an event that has already taken place. Mr Kahiga for the interested party also urged this court to find that the petitioner/applicant had only bidded for threshers and reapers valued at kshs 1,440,000/- and has not even paid for what they had successfully bidded. He has faulted the petitioners for trying to reap where they have not sown and ought to have known that the farm machinery (2KR) were not given ex gratia.

It is further submitted on behalf of the interested party that the process that led them to being selected was through a study and that the process was also not open to procurements procedures but was

covered by an agreement between the Government of Kenya and Japan which agreement was not contrary to our laws or our Constitution as submitted by the petitioner. Finally he urged the court not to allow the application as doing so would not only prejudice their interests but the interests of this Nation now grappling with food insecurity. This is a view supported by the respondents.

The 1st and 2nd respondents through Mr Obondo also came out strongly opposing the application and relied majorly on the affidavit of Sicily Kanini Kariuki the Principal Secretary at the State Department of Agriculture in the 2nd respondents ministry. The Principal Secretary has deponed that indeed Japan Government gave a grant to Kenya through a food security project for under privileged farmers known as Japan's '2KR' (Second Kenedy Round) and it was through the initiative that the government identified rice farming as a key area that needed improvement through mechanized farming.

The 2nd respondent party has further submitted that the Government of Kenya and Japan through an agency known as Japan International Corporation Agency (JICA) carried out a study on rice mechanization for enhanced productivity and identified key agricultural machinery and equipment for Mwea Irrigation Scheme. It is submitted that it was through such studies that the interested party herein was picked to benefit from the program having demonstrated financial stability and establishment of machinery fleet and workshop for maintenance.

Mr Obondo counsel for the 1st and 2nd respondents in his submissions further urged this court to find no merit in the application now before court. He stated that the farm machinery also known as 2KR was a grant from Japanese Government facilitated by a grant agreement which obligated the Government of Kenya to abide by all the conditionalities to avoid consequences spelt out under **Article 16 (2)** of the Grant Agreement annexed to respondent's affidavit as SKK1. The sanction specifies that the grant may be suspended if the terms and conditions are not fulfilled by the Government of Kenya. The counsel for the respondent also stated that the law applicable on the project was that of Japan and after studies carried out and prequalification done the interested party was picked to benefit from the agricultural machines on offer while petitioner was offered threshers and reapers through competitive bidding. This is confirmed by the Principal Secretary in her affidavit.

Abubakar counsel for the petitioner countered these submissions made by both the respondents and the interested party. According to him the Constitution of Kenya is the Supreme law in Kenya and under **Article 2** of the same any other law is subject to the Constitution. He submitted that the procurement used to select the interested party was bad in law and when an act is void it is a nullity. He urged this court to find that the stipulated procedures were not adhered to and to preserve the interest of justice the application should be allowed.

CASE LAW

I have considered all the submissions which were ably made by all the counsels appearing in this petition and I have read the affidavits. The prayers sought in the application before me are injunctive in nature and the principles governing injunctive reliefs are now well settled. In the celebrated case of **GIELLA -VS- CASSMAN BROWN & CO LTD (1973) 358** three principles were set out which still guided the issuance of injunctions in Kenya. These are

- i. An applicant must demonstrate a prima facie case with a probability of success.
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm/ injury.
- iii. When the court is in doubt on the first two guidelines then it will decide the case on the balance of convenience.

The above principles have guided courts in many decisions over the years. In the case of **MRAO LTD -VS- FIRST AMERICAN BANK OF KENYA & 2 OTHERS (2003) KLR 125** the court of appeal sitting in Mombasa applied Giella case and settled the law on conditions for interlocutory injunction with its resultant holdings. It held, that the power of a court to issue interlocutory injunction is a discretion to be exercised judiciously on the basis of law and evidence presented before it. The court went further to

define what constitutes a prima facie case. It stated;

“ I would say that in civil cases it is a case in which on the material presented to the court or a tribunal properly directing itself, will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal of the latter”.

This court of appeal decision appears to have been a development of Giella case and appeared to lean to principle set out in the case of AMERICAN CYANAMID CO-VS-ETHICON LTD(1975) UKHL where it was stated that the principles set out in the case of Giella was not a hard and fast rule and that all the plaintiff needed to prove was that there was a serious question that needed to be tried. The court in that case being called upon to determine an infringement of a patent right held inter alia that where a question of adequate damages was hard to predict it would be prudent to preserve the status quo to preserve a subject matter in a suit to enable the court determine substantive issues in the case. The court made the following observations which I consider relevant in this case.

“ In all cases, including patent cases the court must determine the matter on a balance of convenience there being no rule that it could not do so unless first satisfied that if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory relief sought and where there was a doubt as to parties respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo”.
(emphasis mine)

THE LAW

The applicants main assertions in their petition and the motion before me is the procurement process that saw them being locked out from the bidding process that determined the destination of the farm machinery coined 2KR project. What underpins these assertions is the provisions of **Article 227** of the **Constitution** which states:

“When a state organ or any other public entity contracts for goods or services, it shall do so on accordance with a system that is fair, equitable, transparent, competitive and cost effective”. It does appear quite clear from the above constitutional provision that all public bodies cannot just make unilateral or arbitrary decisions in matters of procurement. They must stick to the letter and spirit of the constitution which is reflected by statute under **Public Procurement and Disposal Act Cap 412 A Laws of Kenya**. This Law under part IV provides general rules that guides procurement by public entities in Kenya. It provides for;

- a. Open tender procedure.
- b. Alternative procurement procedure.
- c. Restricted procurement procedure.

The choice of the process is controlled and regulated by the said statute. **Section 29(1)** states as follows:

“For each procurement, the procurement procuring entity shall use open tendering under V or an alternative procurement under part VI “.

Under subsection 2 on the issue alternative procurement procedure it provides as follows

“A procuring entity may use an alternative procurement procedure only if that procedure is allowed under part V”. Part V of the act deals with open tendering which was not used by the respondents herein.

Subsection 3 deals with restricted tendering procedure and it provides as follows:

“A procurement entity may use restrictive tendering or direct procurement as an alternative

procurement procedure only if, before using that procedure the procuring entity

- a. *Obtains the written approval of its tender committee and*
- b. *Records in writing the reasons for using the alternative procurement procedure”.*

The above provisions of law cited do demonstrate that the petitioners have to some extent made out a case against the respondents herein as the respondents have not demonstrated that any of the above procedures were followed.

The respondents have asserted that they were adhering to the agreement entered between Kenya Government and Japan and in that regard the Japanese laws applied. I have looked at the minutes of discussions between Japan and the Republic of Kenya (normally referred as protocol) on the food security project for under privileged farmers (annexed as exhibit “SKK1” to the affidavit of **Sicily Kanini Kariuki**, the Principal Secretary of the 2nd respondent) and without going into details, I do find from part 2-2 of the attachment, that national policy of Kenya is given emphasis. It states;

“of importance is consistency of the project with national policy and /or plan of assistance for under privileged farmers and small scale farmers”.

I have also looked at the methods of procurements under the agreement between Japan and Government of Kenya and it does not appear to me as submitted by the respondents that the laws of this country is precluded. It infact does look like the contrary position obtains because our national policies are in tandem with the laws of this county and the Constitution. The respondents in my view have not made out a case that they were not in the instant project as subject to the **Public Procurements and Disposal Act**. In any event even assuming that indeed the grant agreement excluded the operation of our laws, I would agree with the petitioner that such exclusion would be unfounded as supremacy of our Constitution under **Article 2 (4)** is not in dispute. Any law or regulation that is inconsistent with our constitution obviously is invalid.

The interested party and the respondent submitted that the choice of the interested party to benefit from the project was done through a study that was carried out. The respondents have however not demonstrated how this study was done and whether it was carried professionally and in accordance with **Article 10** of the **Constitution**. The results of the study were not availed before court to see if fairness prevailed. It is important to note even at this stage that aspirations of Kenyans as expressed in the Constitution are important and it is sacrilegious for anyone to disregard them. They must be respected. In the case of **REPUBLIC –VS- PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD AND ANOTHER (2003) KLR** Honourable **Justice Nyamu** stated in part that

“Section 2 of the Public Procurement and Disposal Act 2005 is elaborate on the purpose of the act and top on the list is to maximize economy and efficiency as well as to increase public confidence in those procedures.....” The act also promotes competition and ensures that competitors are treated fairly. Honourable Justice Nyamu concludes that,

“Fairness, transparency and accountability are core values of a modern society like Kenya”. These views show that the spirit and the letter of the law as stated above espouses the principles and values in our current constitution.

The applicants have contended that the respondents acted in a manner that discriminated them which not only violated their constitutional right but also the law which is **Public Procurement and Disposal Act (cap 412 C)**. They have cited the authority of **KENYA TRANSPORT ASSOCIATION –VS- MUNICIPAL COUNCIL OF MOMBASA AND ANOTHER (2011) e KLR** to support their argument and support the view of the supremacy of the constitution in relation to any other law. Although I find this authority more relevant to the main petition rather than the motion which is interlocutory, it is my view that it demonstrates, in addition to the other authorities cited here and observations I have already made, that the petitioners/applicants have a prima facie case against the respondents.

This court in applying its mind to the standard question posed in American Cyanamid case is satisfied that the petitioners petition, if it was to be determined purely on the basis of what is in record, would be sustained for the aforesaid reasons. The petitioners have in my view have raised both legal and constitutional questions in regard to procurement process and procedure done by the respondents that demand answers, rebuttals and /or explanation from the respondents

I have considered the submissions made by the interested party that the prayers sought herein particularly prayers 2 and 4 have been overtaken by events. Indeed this court as rightly put cannot be called upon to stop an event that has already taken place. The interested party has demonstrated that money has already been paid and to that extent prayers 2 and 4 of the application is spent. This position is well founded and I do find that the 2nd and 4th reliefs sought are indeed no longer available and to that extent prayers 2 and 4 of the application must fail.

The upshot of the foregoing is that the application partly succeeds in that this court finds merit in prayer 5 of the application before me. The application before me is therefore allowed only in terms of prayer 5. Costs shall be in the cause of the main petition.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 24TH DAY OF NOVEMBER, 2014
in the presence of

Mr Abubakar counsel for the Applicants.

Mr Obondo counsel for 1st and 2nd respondents.

Mr Kiguru Kahiga counsel for the interested party.

Mbogo Court Clerk.