



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 446 OF 2013

OKIYA OMTATAH OKOITI
.....1ST PETITIONER

WYCLIFE GISEBE NYAKINA
.....2ND PETITIONER

VERSUS

THE ATTORNEY GENERAL
.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF
NATIONAL GOVERNMENT2ND
RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION
.....3RD RESPONDENT

ZTE CORPORATION KENYA LTD
.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC
PROSECUTIONS.....5TH RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE
.....6TH RESPONDENT

THE ETHICS AND ANTI CORRUPTION
COMMISSION7TH RESPONDENT

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
(PPAEB)..... 8TH RESPONDENT

E. MUTEA IRINGO
..... 9TH

RESPONDENT

GITHU MUIGAI

.....10TH

RESPONDENT

RULING

1. The petitioners approached the Court by their application dated 9th September 2013 filed under certificate of urgency on 10th September 2013. They allege violation of the Constitution in the manner in which the tendering process for the 3rd respondent's communication equipment was conducted.
2. In the said application, the petitioners seek the following orders:
 1. ***That the application be certified as urgent and heard ex parte and service thereof be dispensed with in the first instance.***
 2. ***That an order be issued suspending the reinstatement and fast tracking of cancelled Tender No OOP/NSCCC/2011-2012, for the supply, installation, testing and commissioning of the national surveillance, communication, command and control systems in the national Police Service, pending the hearing and determination of the application herein inter partes***
 3. ***That an order be issued suspending the reinstatement and fact tracking of Cancelled Tender No OOP/NSCCC/2011 -2012 for the supply, installation, testing and commissioning of the national surveillance, communication, command and control systems in the National Police Service, pending the hearing and determination of the application herein inter partes.***
 4. ***That a mandatory order be issued compelling the 1st, 2nd, 9th and 10th Respondents to immediately provide the Petitioners with the information they sought from the Respondents vide the Petitioners; letters dated September 5,2013 to the said Respondents, specifically:***
 - a. ***A copy of the letter Ref. No. AGCONF/2/6/127/VOL. 1, dated 12th August 2013 in which the 10th Respondent (abusing the office of the 1st Respondent) advised the 2nd and 9th Respondents that the ministry "may proceed to conclude the Procurement process" for the Police Communication, Command and Control System (PCCC) under the cancelled Tender, No 00P/NSCCC/2011-2012.***
 - b. ***A copy of the six page misleading briefing document endorsing the reinstatement and fast tracking of tender, No 00P/NSCCC/2011-2012, which the 9th Respondent (abusing the office of the 2nd Respondent) prepared for the President to prepare the President for his recent state visit to the People's Republic of China.***
 5. ***That this Honourable court be pleased to join other parties relevant to this Petition as and when it deems fit.***
 6. ***That the court do give any other or further orders that will favour the cause of justice***
 7. ***That costs be in the cause.***
3. On the face of it, the petitioner and the application for conservatory orders related to matters of importance to national security. Consequently, I certified it urgent and directed that it be heard *inter partes* on 11th September 2013. Following an application on behalf of the 9th and 10th respondent, I issued orders for their names to be expunged from the proceedings.
4. The remaining respondents all opposed the application for conservatory orders. An affidavit in reply to the application sworn by Mr. Peter Thande Kuria was filed on behalf of the 1st, 2nd, 3rd, 6th and 8th respondents while the 4th respondent filed grounds of objection dated 11th September 2013. The 5th and 7th respondents did not file any reply to the application, which was argued before me on 11th September 2013.

Submissions on Behalf of the Petitioner

5. Mr. Nguring'a submitted that the petitioners are alleging that the constitutional provisions on procurement contained in Article 227, the integrity of the procurement process as well as the provisions of Article 46 on the rights of consumers have been violated, as has the autonomy of the 3rd respondent.
6. The petitioners contend that they have brought this petition and the application for conservatory orders so as to advance the public interest; that should the prayers being sought in High Court Petition No. 256 of 2013, in which the 999 facility is the subject, be granted, the success of their implementation will heavily rely on the National Police Service Command and Control System which is the subject of the tender in this matter.
7. According to the petitioners, the government had in 2012 advertised the tender for the system; that it had discriminated against all other companies except Chinese companies, two of which were Huawei and the 4th respondent; that the 4th respondent was awarded the tender and Huawei went to the Public Procurement Administrative Review (PPARB) Board and lost; that it filed a judicial review application being No 16 of 2013.
8. The petitioners allege that they are seeking interlocutory orders to stop the fast-tracking and reinstatement of the cancelled tender No 00P/NSCCC/2011-2012 for the supply, installation and testing of the national surveillance, communication, command and control system of the National Police Service; that the 1st and 2nd respondents have not granted the 3rd respondent its operational autonomy as they are carrying out procurement for it; that the tender in question is marred with irregularities and controversy; and that it involves a huge amount of public funds.
9. They concede that the tender controversy has gone through the statutory process required: that it has been taken to the Public Procurement Administrative Review Board (PPARB) and the PPARB ruled that the process was above board; and that the issue was also the subject of JR 16 of 2013 which was withdrawn by the applicant.
10. The petitioners submit that they were not party to the proceedings before the PPARB nor the judicial review proceedings before the High Court; that they have come before the Court because they believe that the PPARB did not address the grievances by Huawei; because the petitioners have strong convictions that the tendering process did not meet the constitutional threshold on public procurement; and that they have strong reasons to believe that there is fraud being perpetrated by the 4th respondent.
11. Mr. Nguring'a submitted with regard to the judicial review proceedings that the proceedings were not carried to their logical conclusion as there was a letter from the then Permanent Secretary in the Ministry of Finance, Mr. Kimemia, cancelling the tender.

Submissions in Response

12. The substance of the submissions by Learned State Counsel, Mr. Njoroge, on behalf of the 1st, 2nd, 3rd, 6th and 8th respondents is that the entire application has no merit whatsoever and had not met the threshold for constitutional matters set by the case of **Anarita Karimi Njeru –vs- Republic (1976-80) 1 KLR 1272**. He observed that it has been shown that the right process stipulated by statute in regard to the tender was followed; that there was a process before the Public Procurement Oversight Authority (PPOA); the matter went to the PPARB, then to the High Court in JR 16 of 2013.
13. In his view, the petitioners' application was based on three issues, none of which had been established by the petitioners: that there was a cancellation of the tender; that there was a reinstatement; and there is now fast tracking of the tender. He contended that for the application to

- succeed, it must be supported by evidence of these three issues, none of which had been tendered. There were no documents in support of the application on the basis of which the court could make a determination of the urgency of the matter and on the basis of which conservatory orders could issue; that the court could not go to the petition to look for such evidence, and in the absence of such documentary evidence in support of the application for conservatory orders, the application had no basis.
14. Mr. Njoroge took the position that the entire application before the court was based on mere suspicion; that the affidavit in support of the application, whose allegations were unsupported by evidence, should be struck out; and without the affidavit in support, the entire application had no basis. He asked that the application be dismissed with costs.
 15. Mr. Kihara, Learned Counsel for the 4th respondent, submitted that there had been no cancellation or re-instatement of the tender the subject of the petition; that section 6 of the Public Procurement Authority Act (PPOA Act) makes the provisions of the Act supreme; and that the issue of the relationship with other governments is not justiciable before this court.
 16. Mr. Kihara agreed with Mr. Njoroge's submission that the impugned tender had gone through the entire statutory process; and that no evidence has been tendered to show why the petitioners did not appear in the proceedings before the PPARB or the High Court in JR 16 of 2013.
 17. Mr. Kihara submitted that there was no single reason shown why the matter was urgent, except its heading; that there was nothing that would go wrong if the orders were not granted that would justify the urgency; and he asked the court to dismiss the application with costs.
 18. Learned Counsel for the 5th respondent, Mr. Okello, associated himself with the submissions of Mr. Njoroge, Counsel for the state. In his view, the application deserved to be dismissed as it was long on words but totally lacking in evidence. He submitted further that there is no basis at all why the 5th respondent had been included in the matter. It was his view that if the petitioner has a problem with a matter, then he should have complained to the 5th respondent or the Criminal Investigation Department (CID) for appropriate action to be taken. He too, prayed that the application be dismissed with costs.
 19. In his submissions on behalf of the 7th respondent, Mr. Muraya pointed out that its mandate is to investigate any conduct that discloses economic crimes. He submitted that no decision has been made to investigate the tender, and the 7th respondent could not make any speculative submissions on the matter. He essentially left the matter to the Court, submitting that should the Court find that there is reason for investigation, the 7th respondent was ready to comply.
 20. In his rejoinder, Mr. Nguring'a contended that the PPOA was enacted prior to the Constitution; and has grey areas; that Article 159 enjoined the court not to be bound by technicalities; and he urged the Court to consider the matters before it in the spirit of the said Article and to keep in mind the Kshs 20 Billion which was the amount in dispute in the tender; and that if, as submitted by the respondents, the tender had not been cancelled and re-instated, there would be no harm if the orders that the petitioners were seeking were issued.

Findings

21. The substance of the petitioners' claim in the application before me can best be captured in the words used by his Counsel, Mr. Nguring'a, in his submissions before me. The petitioners have come to court because **they believe** that the Public Procurement Administrative Review Board (PPARB) did not address the grievances by Huawei; because the petitioner has **strong convictions** that the tendering process did not meet the constitutional threshold on public procurement; and that the petitioner has **strong reasons** to believe that there is fraud being perpetrated by the 4th respondent.

22. In order for the court to grant conservatory orders in a matter before it, I believe that there must be clear evidence before it of the alleged violation of the Constitution, and a basis for believing that if the orders that a party seeks are not granted, there is some harm that will result.
23. In the present case, the petitioners are challenging a tender that was the subject of at least three legal processes months ago. It was considered by the Public Procurement Oversight Authority; it went before the Public Procurement Administrative Review Board and a decision was made in January 2013; it was also the subject of litigation before the High Court in **High Court Judicial Review Application No. 16 of 2013- Republic –vs- The Public Procurement Administrative Review Tribunal Ex parte Huawei Technologies Co. Limited (JR 16 of 2013)**.
24. The petitioners were not parties in any of those matters. They have not shown why they did not apply to join, at the very least, the proceedings before the High Court in JR 16 of 2013. They now come before this court alleging a violation of the Constitution on the basis of their belief, ‘*strong conviction*’, ‘*strong reasons*’.
25. The Constitution of Kenya has vested jurisdiction in the High Court, under Article 165 (3), to hear and determine cases alleging violation of the Constitution. At Article 258, it has given the citizen the right to bring any matter before the court alleging that there has been a violation of the Constitution. This is an important power and right that the Constitution gives the citizen. It is not a right that should be abused by bringing all manner of claims before the court.
26. The matter before me is clearly an abuse of the Court process. Unless, as the petitioners’ Counsel denied in his submissions, *a propos* of nothing, the petitioners were holding brief for Huawei and attempting to litigate afresh the matters that were before the court in JR 16 of 2013, I can see absolutely no basis for the application now before me.
27. I will not say more with regard to the matter as I may prejudice such merits as there may be in the petitioners’ claim in the petition.
28. Suffice to say that the application before me is dismissed with costs to the respondents.

Dated, Delivered and Signed at Nairobi this 24th day of September 2013

MUMBI NGUGI

JUDGE

Mr. Nguring’ a instructed by the firm of Ishmael & Co. Advocates for the Petitioner.

Mr. Thande Kuria and Mr. Njoroje, Litigation Counsel, instructed by the State Law Office for the 1st, 2nd, 3rd, 6th, and 8th Respondents

Mr. Muraya instructed by the firm of Julius Muraya & Co. Advocate for 7th Respondent

Mr. C. N. Kihara and Mr Kenneth Wilson instructed by the firm of C.N. Kihara & Co. Advocates for the 4th Respondent

Mr. Okello Litigation Counsel, instructed by the Director of Public Prosecutions for the 5th Respondent.