



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 18 OF 2011**

**ZIPPORAH ODHIAMBO OWITI..... PETITIONER**

**V E R S U S**

**KENYA ANTI CORRUPTION COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. In her petition dated February 3 2011, the petitioner seeks orders against the respondent as follows:

i) A declaration that her inalienable, fundamental and constitutional right to be presumed innocent until proven guilty by a court of law has been breached and continues to be breached by the Respondent.

ii) A declaration that the confidential directive by the Respondent to the Kenya Power and Lightening (*sic*) company Limited to stop it (K.P.L.C) from contracting the Petitioner from rendering Wayleaves Acquisition Services is unconstitutional and illegal and an order that the said directive be rescinded by the Respondent immediately.

iii) Further reliefs, orders, and directions that this Honourable Court may deem fit or consider appropriate for the purposes of enhancing or securing the Petitioner fundamental and inalienable rights and the enforcements of the provisions of the constitution as it relates to the Petitioner rights to the due process and a fair opportunity to earn a livelihood.

The petition is supported by the affidavit of the petitioner, **Zipporah Adhiambo Owiti** sworn on 3<sup>rd</sup> February, 2011.

2. The respondent opposes the petition and has filed a replying affidavit sworn by one **Francis Kidogo** on 7<sup>th</sup> March, 2011 and the following grounds of opposition:-

1. The Petitioner is too ambiguous
2. The Petition is incompetent and should be struck out.
3. The Petitioner is non-suited as against the Respondent.

Mr. Ochieng presented the case for the petitioner while the respondent was represented by Mr. Nzioki.

### **The Petitioner's case**

3. According to the petitioner, she had a contract with Kenya Power and Lighting Company Limited (KPLC) in respect of provision of wayleaves acquisition services. The respondent, pursuant to powers conferred upon it by **The Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003**, conducted investigations against the petitioner. The petitioner was arrested and taken to the offices of the respondent on the allegations that she had solicited and received a bribe in the course of offering wayleaves acquisition services under a contract with the KPLC entered into in February 2010. She was later released with no charge and the respondent's investigations did not result in any prosecution against the petitioner nor were any administrative steps taken against her.

4. The petitioner claims, however, that subsequent to the completion of investigations the respondent sent a confidential circular to KPLC not to give the petitioner any more contracts. She did not produce a copy of the circular but she alleged that she was informed by an officer of KPLC about it, and the respondent had not disputed its existence. As a result of that circular, the petitioner cannot get any more contracts from KPLC, and her right to earn a living has therefore been fundamentally breached.

5. In the heading to the petition, the petitioner refers to Chapter 4, Articles 25-50 of the Constitution. However, neither in the petition nor in the affidavit in support has the petitioner cited what specific rights and what constitutional provisions have been breached by the respondent. Mr. Ochieng submitted that the petitioner's rights under Article 40 on the right to property, Article 41 on fair labour practices and Article 47 on fair administrative action had been violated.

6. The petitioner argues that where one has a contract and it has been breached, one has a right to run to a constitutional court, and that she was seeking an order directing the respondent to withdraw the confidential circular to KPLC and a declaration that KACC has breached or contravened the petitioner's fundamental right. If there was an issue as to her conduct, then she ought to have been charged in a court of law.

7. The petitioner argues further that she could not sue KPLC for breach of contract as the respondent has wide powers under the Anti-corruption Act and KPLC would argue that the petitioner was being investigated by the respondent.

8. With regard to the challenge of the petitioner's capacity to sue, the petitioner claimed that she had capacity to sue as she was trading as Dazie African Pot in which, as set out in the second paragraph of her supporting affidavit, she was a joint registered proprietor.

### **The Respondent's Case**

9. Mr. Nzioki for the respondent argued that the petitioner was alleging violation of 25 Articles of the constitution, 25-50, and the respondent was not sure which one it was supposed to have breached. He submitted that it is a cardinal principle that where a party alleges the infringement of any right, the party ought to be very specific as to the right that has been breached so that the court can give a remedy. What was before the court in this instance was an allegation of the infringement or better still the cancellation of a contract between a party known as Dazie African Pot and a company known as KPLC, both of which are not parties to this petition. The petitioner in this case had no capacity to sue either KPLC or the respondent.

10. It was the respondent's case further that while emphasis has been placed on the issue of breach of the Constitution, what really was at issue was the termination of a contract between KPLC and Dazie African Pot. Instead of Dazie African Pot either filing a civil suit to enforce a contract or judicial review proceedings to challenge KPLC's or the respondent's actions, the petitioner had proceeded to court under the wrong provisions of the law and is seeking orders against a party that had no role in the dispute with KPLC. The petitioner had not demonstrated any violation of rights to warrant the court's intervention, and the petition should be dismissed with costs.

### **Findings**

11. The petitioner has alleged violation of her fundamental rights under the constitution, and has cited

25 Articles of the Bill of Rights. In her submissions before this court however, she cited Article 40, 41 and 47 as having been violated by the respondent. The question that I need to address my mind to is whether the facts and evidence presented to me demonstrate a violation of the fundamental rights of the petitioner as provided for under Articles 40, 41 and 47 of the constitution.

12. The petitioner case is that a business entity in which she is one of the proprietors, Dazie African Pot, had a contract with KPLC. The contract was terminated by KPLC, ostensibly on the basis of a confidential circular from the respondent. She has not seen this circular but was told about it by an officer of KPLC. The circular was allegedly issued following an operation in which she was alleged to have solicited a bribe and was briefly arrested by the respondent but no charges were brought against her. She noticed thereafter that she was not being given any more contracts by KPLC and upon inquiry she was informed by a senior manager at KPLC that the respondent had written to KPLC not to give her any more contracts.

13. Article 40(1) of the constitution provides as follows:

***‘Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***

*(a) of any description; and*

*(b) in any part of Kenya.*

Article 40(2) prohibits the enactment of any law that permits the State or any person to arbitrarily deprive a person of property of any description.

14. Has the respondent in this case deprived the petitioner of her rights under Article 40? Even assuming there was a circular to KPLC not to give contracts to the petitioner, would this amount to a violation of the provisions of Article 40? To my mind, it does not. There is nothing before me that shows that the respondent violated in any way the right of the petitioner to acquire, either individually or in association with others, property of any description and in any part of Kenya. Even assuming that one could say that the petitioner could rightly claim a right to sue in respect of the contract between Dazie African Pot and KPLC, one cannot properly argue that termination of that contract, or failure by KPLC to award other contracts to the petitioner amounts to a deprivation of property as contemplated under Article 40.

15. Similarly, I find nothing in the evidence before me that demonstrates violation of the petitioner’s rights under Article 41 and 47 of the constitution. Article 41 provides that ***(1) Every person has the right to fair labour practices’*** while Article 41(2) provides for the rights of workers to fair remuneration, reasonable working conditions, and the right to form, join or participate in the activities and programmes of a trade union and the right to go on strike. The petitioner has not shown how her rights under this Article have been violated.

16. With regard to fair administrative action, Article 47 (1) provides that ***‘Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.’*** Again, I find nothing before me that amounts to a deprivation of this right by the respondent.

17. Regardless of how the petitioner wishes to clothe her complaint, the issue really is that her claim relates to a contract with KPLC entered into by an entity in which she claims to be a joint owner. The contract appears to have been terminated following allegations of corruption against her, and she was denied subsequent contracts by KPLC. Whether or not the initial contract was terminated fairly or not is not a matter that can be determined in a constitutional petition alleging violation of constitutional rights. Determination of the claim relating to the contract rightly lies within the purview of a civil claim. Further, the award of subsequent contracts by KPLC cannot be enforced at all, let alone by an order directing the respondent to withdraw a circular the existence of which is based on information from an unnamed senior manager of KPLC, which is not a party to this petition.

18. In the circumstances, I find that this petition has no merit and is hereby dismissed with costs.

**Dated and Delivered at Nairobi this 3rd day of February, 2012**

**Mumbi Ngugi**  
**Judge**