



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 67 of 2012**

**COME-CONS AFRICA LIMITED ..... PETITIONER**

**AND**

**PERMANENT SECRETARY MINISTRY OF FINANCE .....1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY MINISTRY OF ROADS .....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This matter came up for directions on 26<sup>th</sup> September 2012 and 23<sup>rd</sup> October 2012 and there was no attendance by the petitioner's advocates. On 23<sup>rd</sup> October 2012, I directed the petitioner to show cause why the suit should not be dismissed. Today, 7<sup>th</sup> October 2012, when the matter came up for the petitioner to show cause, Mr Mutahi informed the court that counsel who was sent to attend court on the respective days did not inform him of the dates taken hence his failure to attend court. To any mind this reason is flimsy because counsel for the petitioner owes his client and the court the duty to take an interest in the matter including inquiring from the court whether and when the matter has been fixed for directions in the event the counsel he instructed does not revert with the information.

2. The matter was adjourned to 2.30pm to enable counsel for the petitioners seek further instructions on the matter. At 2.30pm Mr Mutahi, informed the court that he instructions to abandon prayers A, B and C of the petition and wished to proceed with C. Since prayer C was a reference to arbitration, counsel applied for this matter be transferred to the Commercial and Admiralty Division for hearing and disposal.

3. Mr Wamotsa, counsel for the respondents, did not oppose the abandonment of the reliefs but pointed out that prayer D could not be severed from the other reliefs and therefore the matter should be dismissed. In any case he submitted that the prayer sought arbitration which was a matter governed by the contract between the parties. He also submitted that the matter was time barred under the **Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya)** and the petitioner should not be permitted to circumvent its provisions.

4. The only issue left for my determination is whether I should allow the determination of prayer D of the petition to proceed for hearing. This petitioner's claim arises from a dispute concerning a contract awarded by the Government to the petitioner to construct the Standkisa Khumusalaba Road in

1996. The contract was terminated in 2000 by the Government and the petitioner raised certain claims for breach of contract and damages arising from the breach of contract.

5. By the petition dated 28<sup>th</sup> February 2012, the petitioner now seeks the following reliefs;

A. A declaration do issue that the 1<sup>st</sup> respondent decision of 25<sup>th</sup> of July 2007 purporting to conclusively assess the petitioners bill for Ksh.142,917,972.60 in respect of project contract number RD 10343 (KAK25/96-97 with the 2<sup>nd</sup> respondent as not payable was in breach of the terms and at the least constituted a violation of the petitioners constitution and fundamental rights under section 70 and 75 of the former constitution of Kenya which was in force at the material times and which are now guaranteed under Article 41(1)(2)a, 35(1)a, 47(1,2) and 50 of the Constitution of Kenya which was promulgated on 27<sup>th</sup> day of August 2010 and the said decision be declared to be null and void.

B. A declaration do issue that the Consultant Implementation Committee Report on pending bill dated 4<sup>th</sup> August 2001 and is hereby deemed as the final report regarding the petitioners final bill payable.

C. Consequential damages/orders – upon the issue of declaration that the petitioners are entitled to compensation from the respondents on account of unconstitutional deprivation of the petitioners a sum of money comprising of the petitioner’s financial loss duly assessed by an organ/committee of the respondents. The respondents be ordered to compensate the petitioner as per the award by the Consultant Implementation Committee report on pending bills dated 4<sup>th</sup> August 2001 which clearly recommended that an amount of Kshs.124,130,097.72 as payable to the petitioner.

D. That in the event that this Honourable Court declines to grant the declaration sought in A, B, C above, then this Honourable Court do declare a dispute and be pleased to refer the matter for arbitration and further do proceed to confirm the appointment of Mr Muigua D K Advocate as the agreed joined and sole arbitrator to arbitrate on the dispute between the parties herein.

E. Interest on (c) above at court rates with effect from February 2000 until payment in full.

F. Costs of this petition.

G. Such other orders as this Honourable Court shall deem fit and just to grant.

6. The dispute articulated in the pleading is really a contractual dispute where the petition seeks to enforce contractual claims. It does not raise any issue of the enforcement of fundamental rights and freedoms. I perused the contract and it contains an arbitration clause which ought to have been invoked before seeking this court’s relief. I would note that **Article 159(2)(c)** obliges this court to promote alternative dispute resolution including arbitration.

7. Arbitration and matters concerning arbitration are fully dealt with by the **Arbitration Act, 1995** which empowers the High Court when properly moved to enforce arbitration clauses and to appoint an arbitrator to handle the dispute. It is therefore unnecessary to have recourse to **Article 22** and **23** where the law provides clear relief and remedies. The cases of **Alphonse Mwangemi Munga and Others v African Safari Club Nairobi Petition No. 564 of 2004 (Unreported)** and **Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265** support the proposition that where there is an avenue for relief under statutes which are open and available, the High Court should not be burdened with matters that are not fit for determination under **Article 22**.

8. The purpose of the provisions of **Article 22** is to provide direct access to the High Court for any person to enforce the fundamental rights and freedoms contained in the Bill of Rights. It is not a procedure intended for the litigation of ordinary commercial matters. The core of the petitioner’s dispute is contained in the relief sought in prayers A, B, C of the petition and once these are abandoned, the Court has nothing in the nature of fundamental rights and freedoms to adjudicate. It follows that since there is nothing to enforce under **Article 22**, the court cannot grant relief under **Article 23**. Consequently, there is

nothing to transfer to the Commercial and Admiralty Division of the High Court.

9. In view of the abandonment of the prayers A, B and C there is nothing further to adjudicate and the petition is therefore struck out with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 7<sup>th</sup> day of November 2012

**D.S. MAJANJA**  
**JUDGE**

Mr Mutahi instructed by Wachira Mburu Mwangi and Company Advocates for the petitioner.

Mr D. Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondent.