



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

**AT NAIROBI**

**CIVIL SUIT NO. 499 OF 2010**

**THIONG'O NJIRI AND 81 OTHERS .....PLAINTIFF/APPLICANTS**

**VERSUS**

**THE MUNICIPAL COUNCIL OF KIAMBU .....1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**THE COUNTRY COUNCIL OF KIAMBU .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Before the court is a Notice of Motion dated 5<sup>th</sup> March, 2011 which was by consent taken as an Amended Notice of Motion. The only point needs to be determined at this stage is whether the Advocates on record for 1<sup>st</sup> and 2<sup>nd</sup> Defendants are duly appointed and are authorized to represent the defendants. The plaintiffs relied on The Public Procurement and Disposal Act, 2005 (hereinafter referred to as 'The Act'), to substantiate their objections.

Sec. 27 of the Act stipulates that a public entity shall ensure that the Act, Regulation and directions of Authority are complied with in respect to each of its procurement.

The rational and purposes of the Act has been specified in Sec. 2 thereof, which provides: -

**2. *The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –***

- a) *to maximize economy and efficiency;***
- b) *to promote competition and ensure that competitors are treated fairly;***
- c) *to promote the integrity and fairness of those procedures;***
- d) *to increase transparency and accountability in those procedures;***
- e) *to increase public confidence in those procedures; and***
- f) *to facilitate the promotion of local industry and economic development.***

It was submitted by the counsel for the two defendants that the purposes specified in Sec. 2 are irrelevant so far as legal services are concerned.

So far as the Advocates are concerned, it has been shown that, although the process of procurement for legal service was adhered to by the firm of 1<sup>st</sup> defendant's advocate, the provisions of Sec. 2 are in contraventions of the provisions of the Advocates Act, wherein the issue of competition, which could be assimilated to touting or canvassing is prescribed as an offence and against the dignity of the legal profession. Act of submitting bid to procure the legal services of the local Authorities is against the values and principles of legal profession.

Moreover, the Advocates are bound by the Advocates Remuneration Order (published under the Advocate's Act (Cap 16)). The Advocates are forbidden to charge less than what is prescribed under the said order. Similarly, they also cannot be allowed to charge more fees than those prescribed. The issue of competitiveness envisaged in the Act is not pertinent so far as the legal service is concerned.

The preamble of the Act, it was further contended, does not meaningfully include the Legal Services.

The words "professional services" stipulated in the definition of services, due to peculiar position of the legal services as per The Advocate's Act, does not include the legal services as per their submissions.

It may be appropriate to quote the definition of 'services':

***"services" means any objects of procurement or disposal other than works and goods and includes professional, non professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services;***

It is clear from the definition of public entity in Sec. 2 of the Act that local authority under the Local Government Act is a public entity.

The counsel for both the defendants have emphasized that the basis of the Act is to maximize economy or efficiency and enhance the competition in the procurement process. As per the Law Societies Act (Cap 18) all the Advocates, once placed on its Roll of Advocates, are equally qualified and are all Advocates governed under the Advocates' Remuneration Order. They cannot place the bid which would be tantamount to advertising or canvassing. The Act prohibits the Advocate to do any of those acts.

I do note that Sec. 4(a) of the Law Societies Act, stipulates that one of the objects of the Law Society is to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise

It was further emphasized that the process of procurement takes times and the legal process is time bound. The parties on receipt of a Summons has to file the pleadings as per the provisions of Civil Procedure Rules. Thus the appointment of an Advocate could be covered under the "urgent need", which is defined as:-

***"urgent need" means the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable;***

The provisions of sections 74 and 75 of the Act dealing with direct procurement were also relied upon by the defendants.

In my considered view, the reliance of Sec. 93 of the Act may not be appropriate or shall not be relevant to the defendants. However, I may note that the review of the procurement decision could only be made by the person who had suffered any loss or damages and that is the process of Administrative review. The plaintiffs have also not shown any prejudice or loss by the representations of the Advocates on record.

The plaintiffs through Mr. Gacheru, the 27<sup>th</sup> Plaintiff insisted that the legal service, being professional service, is covered under the procurement process and though the 1<sup>st</sup> defendant's firm is shown to have gone through the process of procurement, it has failed to produce a written contract under the Seal

stipulated in Sec. 68 of the Act.

I must say that I was really impressed with the clarity and tenacity exhibited by Mr. Gicheru in presenting and submitting on the preliminary objections raised as to the validity of the representation of the two Advocates. He seemed to know all the relevant provisions of law.

The point raised definitely is an interesting and unique one which I shall have to consider on first principle basis as well as considering the spirit, purport and tenet of the Act and the Advocates Act (Cap 16).

It cannot be denied that the Advocates are occupying a special position amongst the professionals and are guided strictly by the very elaborate provisions of the Advocates Act, Orders and Rules made under the Act as well as the Law Society Act. Due to the position held by the Advocates, they have been placed under stringent conditions as regards legal charges and manner in which they are restricted to advertise or compete with other co-Advocates. The Advocates Act thus is a specific Act governing the practice of the Bar.

As against those provisions, the plaintiffs are relying on the provisions of Act which stipulates the process of procurement before any goods, works or services are procured, by a public entity. In my view, the Act is a general Act unlike the Advocates Act.

The 1<sup>st</sup> defendant in its replying affidavit has shown that there was an advertisement for legal services from the Local Authority and the firm of the 1<sup>st</sup> defendant was given contract of legal service for a specified period. The 2<sup>nd</sup> defendant on the other hand procured the services without undertaking any procurement process.

In my considered view, the inclusion of service of an Advocate to be procured by advertising and the procurement process could and does involve the breach of the provisions of the Advocates Act, the Advocates Remuneration Order as well as Advocates (Practice) Rules. I do wonder how an Advocate could bid to tender for legal service simpliciter. How an Advocate could place the economic provision for legal services in the tender without the claim, value or nature of claim being specified. The legal charges shall vary according to each and every case which the local authorities might file or defend. Inviting to bid for legal services *per se* could contravene the spirit and purport of the Advocates Act which is a specific Act and prior in time.

If the local authority needs the services for a specified case, the insistence of undergoing procurement process shall be self-defeating due to the court procedure.

The invocation of the procurement process under the Act would be clearly impractical and, if I may state, unethical so far as legal profession is concerned. Sec. 5 of the Act which is stressed by Mr. Gicheru, in my view, has no relevance to the issue before me. There is no conflict between the purport spirit and purpose of the two Acts considering the nature of the legal services to be rendered even to a public entity.

I do find that the Act thus does not apply to the Advocates.

I may not state much as the court has not before it the full details of how the specific services of the two counsel have been offered and accepted.

Be that as it may be, I may further state that even if I am wrong on what I have found hereinbefore, so far as the plaintiffs are concerned, they have not shown what prejudice they would face in this case, if the two Advocates are allowed to represent the two defendants. The representation by the two Advocates, does not nullify or affect in any way the filing of defence as well representation by the two Advocates who are, as per the Advocates' Act, qualified to represent their respective clients at their requests. The Representation by the two Advocates cannot be considered as fatal to the competence of the pleadings filed by the defendants.

I thus do not uphold the preliminary objection raised by the plaintiffs as to the competence of the two Advocates to represent the Defendants.

I do not make any order on the cost of these proceedings.

**Dated, signed and delivered** at Nairobi this 9<sup>nd</sup> day of **May, 2011**

**K. H. RAWAL**  
**JUDGE**  
**9.05.2011**