



**Timber Manufacturers Association v Kenya Airports Authority &
another (Environment and Land Constitutional Petition E019 of 2021)
[2022] KEELC 15398 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15398 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E019 OF 2021

SM KIBUNJA, J

DECEMBER 20, 2022

**IN THE MATTER OF PUBLIC AUCTION OF EUCALYPTUS GRANDIS
TREES AT ELDORET AIRPORT BY THE KENYA AIRPORTS
AUTHORITY**

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27,
29 (D), 43, 69, 159, 165, 232, 258, 259 AND 260 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION
OF KENYA 2010 AND IN THE MATTER OF VIOLATION OF THE
RIGHT TO PUBLIC PARTICIPATION, THE RIGHT TO LEGITIMATE
EXPECTATION, THE PRINCIPLES OF PUBLIC PROCUREMENT
AND IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 27,
29 (D), 42, 43, 47, 69, 70, 227, AND 22 OF THE CONSTITUTION
OF KENYA (2010)**

BETWEEN

TIMBER MANUFACTURERS ASSOCIATION PETITIONER

AND

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT



RULING

1. The petitioner commenced this proceeding through the petition dated the December 17, 2021 that was filed contemporaneously with the Notice of Motion of even date. the petitioner seeks for conservatory orders staying and or suspending and or halting the further and continued tendering and or public auction process of Eucalyptus Grandis trees at Eldoret International Airport by the 1st Respondent herein, pending the hearing and determination and final disposal of the petition, and costs. The application is based on the twenty (20) grounds on its face, and supported by the affidavit of Bernard Gitau, the chairperson to the petitioner. It is their case that on July 16, 2021 the 1st respondent invited the public to tender for the public auction of eucalyptus grandis trees at Eldoret International Airport. The 1st respondent later took down that initial invitation and substituted it with a new offer which the petitioner argues has deducted details and oppressive terms in comparison with the initial one. The petitioner claims that the said act was a violation of their right to public participation in matter on disposal of public resources and was a breach of their right to fair competition, legitimate expectation, equal opportunity and fair administrative action, and hence this petition and application.
2. In opposition to the application, the 1st respondent filed a Notice of Preliminary Objection dated the December 23, 2021 on two grounds that; the application be dismissed with costs as it was incompetent by virtual of section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015 and Regulation 202 of the *Public Procurement Regulation* 2020; that the application had been filed in the wrong forum as this court has no jurisdiction to determine matters in the nature of procurement and disposal as envisaged by the *Public Procurement and Asset Disposal Act* 2015. They also filed a replying affidavit sworn by Patrick K Wanjuki, the 1st respondent's General Manager Procurement and Logistics.
3. The court gave directions on filing and exchanging submissions on the February 14, 2022, April 25, 2022 and May 23, 2022. The learned counsel for the petitioner and respondents filed their submissions dated the June 24, 2022 and September 16, 2022 respectively, which the court has given due considerations.
4. That on the September 21, 2022, the court observed that as no oral evidence had taken before the judge who was then proceeding on transfer to ELC Mombasa, the matter would be mentioned before the incoming judge for a ruling date. However, during the subsequent mention of October 12, 2022, an order was made transmitting the file to this court for writing and delivering a judgement. The correct position is that the matter was pending ruling on the application heard entirely through affidavit, preliminary objection and written submissions, which had informed my directions of September 21, 2022. The foregoing notwithstanding, I will proceed to write and deliver the ruling upon notices being issued to avoid any further delay that may be occasioned if I was to refer the matter back to ELC Eldoret.
5. The following are the issues for the court's determinations;
 - a. Whether the court has jurisdiction to hear and determine the application.
 - b. That in case the court has jurisdiction, whether the petitioner has established a *prima facie* case with a probability of success upon which the conservatory order sought may be based.
 - c. Who pays the costs.



6. The court has carefully considered the grounds on the application and preliminary objection, affidavit evidence, submissions by both counsel, superior courts decisions cited thereon, and come to the following findings;

- a. The learned counsel for the petitioner has submitted that Section 167 (1) of the *Public Procurement and Assets Disposal Act* provides that only a candidate or a tenderer has the locus to seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process. The Counsel submitted that the petitioner herein was neither a candidate nor a tenderer within the meaning of Section 2 of the *Act*. That the petitioner is a prospective tenderer who was yet to submit the tender documents pursuant to the invitation notice for the public auction of Eucalyptus trees by the 1st respondent, and therefore lacks locus to commence the review proceedings before the board. The learned Counsel for the respondents on their part submitted that the petitioner is in breach of the doctrine of exhaustion of administrative remedies, which requires that where a dispute resolution mechanism exists outside courts, the same ought to be exhausted before the jurisdiction of the court is invoked. That by virtue of Section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015, the review board has the first instance jurisdiction to hear and determine the issues herein. Counsel submitted that any party aggrieved by the decision of the board, may thereafter apply to the High Court for judicial review orders within 14 days of such decision. That as they had raised the preliminary objection raised on the jurisdiction of the court, it must be heard and determined first, and if the court finds that it has no jurisdiction to hear and determine the suit, it must down its tools at the earliest, as it was decided in case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) eKLR, where it was held that;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

- b. The *Public Procurement and Asset Disposal Act*, 2015 (PPAD Act) was enacted by Parliament to give effect to Article 227 of the *Constitution* and to provide procedures for efficient public procurement for assets and disposal by public entities. Section 167 (1) of the *PPAD Act* provides that:

“Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

The above provision leaves no doubt that any aggrieved person may seek administrative review before the Review Board, which is a creation of Section 28 (1) of the *PPDA Act*, which provides that:

“The functions of the Review Board shall be—



- (a) reviewing, hearing and determining tendering and asset disposal disputes; and
 - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law”.
- c. It is not disputed that the petitioner is neither a candidate nor a tenderer in the impugned auction or procurement process. The petitioner is however legally registered as an association, as seen from their certificate of registration No 11429 dated December 21, 1982. The petitioner claims to draw membership from over 600 forestry industry membership as verified by the Kenya Forest Service. It is therefore safe to state that the petitioner is a group of concerned investors with the potential and willingness to be part and parcel of the procurement process. Therefore, Section 170 of the PPAD Act, which provides for the parties to a review is relevant and it provides that:

“The parties to a review shall be—

- (a) the person who requested the review;
 - (b) the accounting officer of a procuring entity;
 - (c) the tenderer notified as successful by the procuring entity; and
 - (d) such other persons as the Review Board may determine.”
- d. In the case of Ezekiel Otieno v Funds Account Manager, Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties) [2022] eKLR, the court was faced with an issue similar to the one before this court where the petitioner argued that he has no locus to file the petition before the review board as per the dictates of Section 167 (1) of the Act and that the only avenue for him is the High Court. The learned judge held that:

“Who is or who are these other persons that are mentioned under section 170 (d) of the Act? They are persons other than the contractor or tenderer. Does the petitioner herein belong to that class of people who may be enjoined in the review proceedings under section 170(d)?

A review of the petition shows that the petitioner has so much information about the tendering process that took place. There is no iota of evidence to show that he ever raised an issue with the Public Procurement Review Board seeking leave to participate in any review proceedings involving the award of the tenders and the leave was denied. Section 174 of the Act provides:

“The right to request a review under this Part is in addition to any other legal remedy a person may have.”

There is nothing that stopped the petitioner from requesting the Review Board to hear his claims.

Further, under this Act, there is the formation of the Public Procurement Regulatory Authority. One of the functions of this body is under section 9(h) which states:

The functions of the Authority shall be to:

- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors, or the general public that are not subject of administrative review.



The two bodies i.e the Public Procurement Regulatory Authority and the Public Procurement Review Board have the technical officers to carry out the required investigations into complaints such as those raised by the petitioner herein. The petitioner never reported his complaints to the Regulatory Authority. Once a decision has been made by the Review Board an aggrieved party has the right to move to the High Court for Judicial Review.

The petitioner has tied a number of claims of violation of his constitutional rights to the occurrences above this court. This court does not however lose sight of the fact that the basis of all these claims and the substratum of this matter is the alleged non-compliance with the processes and procedures under the [Public Procurement and Asset Disposal Act](#).

When there are such breaches of the Act the first point of call is the Review Board or the Regulatory Authority, which have the mandate to deal. If a party is aggrieved with the decision made, it then moves to the High Court for review of the decision.”

- e. What the petitioner is seeking to challenge is the 1st respondent’s decision as a public entity of taking down and changing the initial notice of July 16, 2021 that invited interested bidders to participate in a public auction of Eucalyptus trees at Eldoret International Airport. Section 165 of [PPAD Act](#) empowers the 1st respondent as a procuring entity to dispose assets which may include natural resources such as trees by way of public auction. Where any party is aggrieved by any decision pertaining to the said process, the [PPAD Act](#) has put in place a dispute resolution process that ought to exhaust before parties come to court. It is trite law that where there is an alternative statutory remedy, the courts have over time held that they must be exhausted first, before invoking the court’s decision. In the case of [Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others](#) [2017] eKLR, the court held that:

“I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant’s grievance. In my view, it would not be fair, convenient or conducive to the proper administration of justice to require a litigant to split his case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the litigant in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought and if it turns out that that Tribunal is the High Court an objection as to the availability of alternative remedy ought not to be sustained.

However, where the dispute false squarely within the jurisdiction of an alternative Tribunal I agree that the High Court ought not to readily entertain the matter. To do so on occasions has the effect of depriving the litigants of a wrung in the dispute resolution system since in most cases, the determinations of the inferior tribunals are subject to the supervision by the High Court. It is in this context that I understand the decision in Constitutional Petition Number 359 of 2013 - [Diana Kethi Kilonzo vs IEBC and 2 Others](#) in which it was held that:

“We note that the [Constitution](#) allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the [Constitution](#) so long as they comply with [Constitution](#) and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the [Constitution](#), found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected,



guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

I, also associate myself with Majanja, J’s his views expressed in *Dickson Mukweluine vs Attorney General & 4 Others* Nairobi High Court Petition No 390 of 2012 that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the *Constitution* of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realizing, promoting and protecting certain rights.”

In view of the foregoing, I find that the petitioner has not exhausted the remedies provided by the *PPAD* and in particular Section 170 (d), 174 and 175 of the said Act, which it must before coming to court. I therefore find the Notice of Preliminary Objection by the 1st respondent dated December 23, 2021 is merited and is upheld, and the Petition and the Notice of Motion both dated December 17, 2021 are for striking out for being premature.

- f. That on the issue of costs, the petitioners will pay the 1st respondent costs as it filed replies in opposition.
7. That flowing from above the court finds and orders as follows;
- a. That the 1st Respondent’s preliminary objection on jurisdiction is upheld and both the Petition and Notice of Motion dated the December 17, 2021 are hereby struck out for having been filed in the wrong forum and before exhausting the other statutory processes provided before coming to court.
 - b. That in view of the apparent finding in (e) above, the interim orders issued on the December 21, 2021 and last extended on the May 23, 2022 is hereby vacated.
 - c. The costs awarded to the 1st Respondent.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 20th DAY OF DECEMBER 2022.

S. M. Kibunja, J.

IN THE PRESENCE OF;

PETITIONER : Absent

RESPONDENTS : Absent

COUNSEL : M/s Momanyi for Kisila for Petitioner.

WILSON .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA

