



Okoiti v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 4 others (Petition E261 of 2020) [2025] KEHC 11 (KLR) (Constitutional and Human Rights) (9 January 2025) (Judgment)

Neutral citation: [2025] KEHC 11 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E261 OF 2020

LN MUGAMBI, J

JANUARY 9, 2025

BETWEEN

OKIYA OMTATA OKOITI PETITIONER

AND

CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT STATE DEPARTMENT OF CORRECTIONAL SERVICES 2ND RESPONDENT

COMMISSIONER GENERAL, KENYA PRISONS 3RD RESPONDENT

THE NATIONAL TREASURY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The Petition dated 24th August 2020 and is supported by the Petitioner’s affidavit of the same date.
2. The Petitioner in his written submissions mentions supplementary affidavits dated 17th November 2020, 17th December 2020 and 27th May 2021 respectively. These affidavits are however not in the Court file or Court Online Platform (CTS).
3. This Petition arises from Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start u-



up raw materials by the Respondents which the Petitioner challenges on grounds that the said tender is unconstitutional.

4. Consequently, the Petitioner seeks the following relief against the Respondents:
 - i. A declaration that restricted Tender No. SDC/50/2019 – 2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start – up raw materials is unreasonable and wasteful and therefore unconstitutional null and void.
 - ii. A declaration that restricted Tender No. SDC/50/2019-2020 is unconstitutional null and void to the extent that the project was not introduced through the national budget as required under Articles 220(1) and 221 of *the Constitution*.
 - iii. A declaration that the Respondents should utilize the idle but serviceable equipment and materials the government has already procured.
 - iv. An order annulling and quashing Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start –up raw materials.
 - v. An order compelling the Respondents to utilize the idle but serviceable equipment and materials the Government has already procured.
 - vi. An order compelling the Respondents to bear the costs of this suit.
 - vii. Any other relief the Court may deem just to grant.

Petitioner's Case

5. The Petitioner states that sometime in 2013, the government commenced the process of upgrading the number plate production equipment with the goal of introducing new generation number plates.
6. In effect, Tender No. KPS/T/8/2013 for supply, delivery, installation, testing, training and commissioning of modern number plate production machines was announced.
7. This Tender was awarded to Tropical Technology Limited which signed the contract on 4th April 2014. The requisitioned and delivered machines were namely: embossing machines and tools, two hot stamping machines and one pneumatic press machine. Once the prisons personnel were trained on the use of these machines they were then commissioned at Kamiti Prison.
8. Soon after, in 2015, the government initiated another process to purchase the aforementioned machines and equipment. This was through Tender No. KPS/ICB/T/10/2014/2015 -2016/2016-2017 for supply and delivery of motorized vehicle number plate blanks and Tender No. KPS/ICB/T/11/2014/2015 – 2016/2016-2017 for supply and delivery of motorized vehicle number plate hot stamping foil.
9. This Tender faced with numerous court cases was eventually once again awarded to Tropical Technologies Limited. It is averred that these machines have produced over 10,000 new generation number plates. Further, that the machines are and have been routinely inspected.
10. The Petitioner asserts that with the appointment of new persons at the Ministry of Interior and without a reasonable justification or regard to the exiting tenders, restrictive Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start u-up raw materials was secretly



floated. This Tender seeks to acquire a complete production plant for making number plates. It is alleged that this will cause job losses for the prisoners.

11. Aggrieved by this, the Petitioner vide a letter dated 6th August 2020, wrote to the 1st, 2nd and 3rd Respondents, asking them to terminate this Tender. The Petitioner reasoned that it was prudent to utilize the idle serviceable equipment procured by the previous the Tenders otherwise the machines would go to waste. He informs that he did not receive a response to his letter.
12. The Petitioner in light of this, challenges the impugned Tender on the basis that it will have a dire financial implication on the taxpayers. Equally, he contends that the impugned Tender is unconstitutional as was not introduced through the national budget as required under Articles 220 (1) and 221 of *the Constitution*. He further points out that no public participation was conducted before the procurement process was undertaken.

Respondents' Case

13. In reaction to the Petition, the Respondents' through the then 2nd Respondent, Zeinab A. Hussein filed a Replying Affidavit sworn on 7th September 2020. On a preliminary note, the Respondents take issue with the Petitioner's language in the Petition which they term as libelous. As a result, they urge the Court to direct the Petitioner to retract these statements.
14. It is as well averred that the Petitioner has failed to discharge his burden of proof since his Petition contains vague general averments which are unsupported by any evidence. In the same manner, the suit is accused of failing to meet the threshold set for constitutional petitions, as the Petitioner fails to demonstrate how his constitutional rights were violated by the Respondents.
15. Additionally, it is pointed out that the Petitioner fails to cite the specific breached provisions in the Public Procurement and Assets Disposal Act, 2015 (PPAD Act). Equally, that he failed to utilize the dispute resolution mechanism before the Public Procurement Regulatory Authority before filling this suit. In view of that, this Court is urged not to usurp the Authority's mandate.
16. Turning to the substantive issues, she depones that modernization of motorized vehicle number plates production is aimed at curbing the rampant number plates theft and number plates production by crooked dealers.
17. She states that owing to the numerous suits and disputes before the Court and the Public Procurement Regulatory Authority in light of the previous tenders, the intended modernization of motorized vehicle number plates' production was not fully attained.
18. She asserts that the Petitioner's call in this Petition is for this Court to substitute its decision with that of the Ministry of Interior and Co-ordination of National Government, yet the matter concerns a policy decision. Nonetheless it is argued that the procurement process was conducted in accordance with the PPAD Act where the contrary has not been proved by the Petitioner.
19. Furthermore, it is argued that the Petitioner's assertions on the prisoners' job losses and public participation is misguided. Further without any legal basis and based on speculation and misrepresentation of facts. On this premise the Respondents contend that the Petition lacks merit and thus should be dismissed.
20. The Respondents' case was additionally supported by the 2nd Respondent's further affidavit dated 19th November 2020. This affidavit is however not in the Court file or Court Online Platform (CTS).



Parties' Submissions

Petitioner's Submissions

21. The Petitioner filed submissions dated 13th November 2023 in support of his Petition. He identified the key and only issue for determination as: whether the impugned Tender is unconstitutional thus null and void.
22. The Petitioner answered this in the affirmative. He submitted that the Tender process had been conducted contrary to Article 227 of *the Constitution* which requires State organs to conduct the process in a manner that is fair, equitable, transparent, competitive and cost effective.
23. Furthermore, in a legal manner which procedure is underscored in the under the PPAD Act. Specifically, Section 93, 94 and 95 of the Act. According to him this restricted tendering process was utilized to avoid pre-qualifying bidders which is in direct violation of *the Constitution* and the Act.
24. Moreover, the Petitioner submitted that Article 220(1) (a) of *the Constitution* requires that the procurement process as envisaged under the PPAD Act be guided by the budgeting process under Article 221 of *the Constitution*. He asserted that this procedure was also not adhered to.
25. Additionally, he argued that the impugned tender overshot the approved project budget by over Kshs.55,963,482.31. This is despite the approved amount by the 4th Respondent being Kshs.250 million only. He alleged that this goes against the principles of public finance under Article 201 of *the Constitution* and proper and economic use of public resources under Article 232 (1) (b) of *the Constitution*.
26. Correspondingly, the Petitioner argued that the tendering process was not subjected to public participation as provided under Article 10 (2) (a), 201(a), 221(5) and 232 (1)(d) of *the Constitution*. He pointed out that the Respondents had failed to show that they indeed carried out public participation. Reliance was placed in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017*; [2017] eKLR where it was held that:

“In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles. Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable and violation of the Article can find a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.”
27. Like dependence was placed in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5* and *Mombasa Consolidated Constitutional*



Petition Nos. 159 of 2018 and 201 of 2019 William Odhiambo Ramogi & Others vs. The Attorney General & Others (unreported).

28. To this end the Petitioner argued that in addition to the tendering process being unconstitutional, the Respondents had acted ultra vires, unreasonably and in a wasteful manner.

5th Respondent's Submissions

29. On a preliminary note, the 5th Respondent and other Respondents submissions with regard to the instant Petition are not in the Court file or Court online Portal (CTS).
30. The 5th Respondent however in relation to the Petitioner's application dated 12th September 2022, filed submissions dated 19th April 2023 through State Counsel Jackline Kiramana. This Respondent sought to have the same adopted as its submissions.
31. In a nutshell, the Petitioner's application was stated to revolves around: the suspension of the rollout of the new securitized motor vehicle number plates set for 1st October 2022, leave to amend his Petition, an Order compelling production of documents relating to the roll out of the new number plates and an order denying the Respondents audience until they purge their contempt of Court.
32. On whether the application is competent, Counsel submitted that the application was full of glaring inconsistencies. First, it addressed the wrong Respondents as at the time other persons were holding the cited positions. According to Counsel this discrepancy cannot be cured by the dictates of Article 159(2) (d) of *the Constitution*.
33. To buttress this point Counsel cited the case of Samuel M.N. Mweru & others vs National Land Commission & 2 others (2020) eKLR where it was noted that for an action to be contemptuous, it must have been willful and with malafides. As such it is not possible to infer malafides where it's not clear whose individual acts are being considered.
34. Furthermore, Counsel argued that the Petitioner's assertion that the roll out of the securitized number plates set for 1st October 2022 was in violation of this Court's orders dated 8th September 2020 was misguided. This is because a party is bound by their pleadings in that the Petitioner's contention in the Petition only concerned the impugned Tender No. SDC/50/2019- 2020 which was suspended owing to the conservatory orders granted herein not the roll out of the securitized number plates.
35. Counsel equal pointed out that the Petitioner had not served the alleged contemnors personally as required in law. Instead the Petitioner served the 5th Respondent. It was stated that no supporting evidence was adduced to support service to the relevant parties who are now former office holders. Counsel added that it was not enough to argue that the alleged contemnors' advocates were present and aware of the orders. Counsel stressed that proof of the same is on a balance of probabilities as one must show that the contemnor was aware of the order as held in Mutitika v Baharin Farm Limited (1985) KLR.
36. Counsel further contended that the Petitioner had not attached the supposed amended Petition to grant the Respondents an opportunity to review on the same and make a response. This was argued to be in error as the same ought to have been attached to the Application.
37. Counsel as well informed that the Petitioner was also challenging the same process in the application in Petition No.E463 of 2022 also before this Court.
38. Counsel further submitted that the Petitioner although sought information on the procurement of the new generation number plates, he did not demonstrate his compliance with the dictates of the *Access*



to Information Act before approaching this Court. Reliance was placed in Anthony Miano & others v Attorney General & others (2021) eKLR where it was held that:

“The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

39. Similar dependence was placed in Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015) eKLR.
40. Consequently, Counsel argued that owing to the foregoing submissions, the Petitioner was not entitled to the reliefs sought.

Analysis and Determination

41. In light of the averments and arguments made herein, it is my considered view that the issues that arise for determination are:
 - i. Whether the Petition invokes the Doctrine of exhaustion in light of the dispute mechanisms set out in the PPAD Act, 2015 and the Access to Information Act.
 - ii. Whether issuance of Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start u-up raw materials meets the relevant statutory and constitutional legal threshold.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition invokes the Doctrine of exhaustion in light of the dispute mechanisms set out in the PPAD Act, 2015 and the Access to Information Act.
42. One of the ways in which the Court sitting as Constitutional Court will abdicate jurisdiction is where it is demonstrated that there alternative legal means that legislation or regulatory regime has provided for resolution of the dispute before the matter is ripe for presentation in Court for adjudication. This principle is anchored in Article 159 of the Constitution which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated thereunder including promoting ‘alternative forms of dispute resolution...’
43. The Court of Appeal firmly affirmed the doctrine of exhaustion of remedies in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 Others (2015) eKLR when it held thus:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”



44. Likewise in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment)* the Supreme Court held thus:
118. In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.
119. Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”
45. It is therefore imperative to consider if there is an alternative dispute resolution procedure under the Public Procurement and Disposal Act, 2015.
46. The Act has a complaint mechanism that allows any person to report procurement related complaint to Public Procurement Regulatory Authority established under Section 8. Among the Authorities functions under Section 9 (h) includes:
- 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;
47. Section 35 provides that the Public Procurement Authority can the undertake investigations. The Act provides:
- Investigations
- a. The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.
- b. An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.
- c. Investigation shall be conducted by an investigator appointed for the purpose by the Authority.
48. Upon conclusion of the investigations, if any breach is found to have occurred, Section 38 states as follows:



- a. If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—
 1. direct the procuring entity to take such actions as are necessary to rectify the contravention;
 2. terminate the procurement or asset disposal proceedings;
 3. prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or
 4. require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.
 - b. Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—
 1. the procuring entity; and
 2. any other person whose legal rights the Director-General believes may be adversely affected by the order.
49. If a party is aggrieved by the Orders issued may seek judicial review under Section 39 as hereunder:
- The procuring entity and any other person who was entitled to be given an opportunity to make representations under Section 38 (2) may request for Judicial Review against an order of the Director-General to the High Court within fourteen days after the order is made.
50. In the instant case, the Petitioner's chief complaint is that the tender is wasteful, illegal and in violation of *the Constitution*. It is not in dispute that restricted tendering is provided for in Section 92(1)(d) of Public Procurement and Disposal Act, 2015.
51. Despite the elaborate complaint procedure under the Act, the Petitioner did not lodge any complaint with the Public Procurement Authority which is the first port of call under Section 35 (2) of the Public Procurement Act, 2015 which allows any person to lodge a complaint to the Public Procurement Regulatory Authority to initiate an investigation into the matter with a view to 'determining whether there has been a breach of this Act or the Regulations made thereunder'.
52. Under Section 9 (h) of the Act, one of the functions of the Public Procurement Regulatory Authority is 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'.
53. In approaching this Court directly to determine the validity of the procurement, the Petitioner was outrightly in breach of the doctrine of exhaustion of remedies. In *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR the Court was critical of the obsession by which parties disregarded clear procedures provided in legislation by rushing to courts for settlement of such disputes. The Court stated:
- “ ... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with



in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

54. This is exactly what transpired in this case. Instead of the petitioner utilizing the statutory provided mechanism first, he rushed into filing this Petition seeking a resolution from the Court. In the circumstances, this Court declines to exercise jurisdiction under the doctrine of exhaustion of remedies.
55. Without jurisdiction, this Court finds that determining any other issue is immaterial.
56. The Petition is hereby dismissed. Being a public interest litigation, I shall not make any orders as to costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

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L N MUGAMBI
JUDGE

