



Mahasi v Chief Principal, Kolanya Girls National School & another (Constitutional Petition E002 of 2023) [2024] KEHC 800 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CONSTITUTIONAL PETITION E002 OF 2023
WM MUSYOKA, J
FEBRUARY 2, 2024**

BETWEEN

VINCENT ENDEKWA MAHASI PETITIONER

AND

THE CHIEF PRINCIPAL, KOLANYA GIRLS NATIONAL SCHOOL 1ST RESPONDENT

KOLANYA GIRLS NATIONAL SCHOOL 2ND RESPONDENT

RULING

1. The petitioner presented a tender for the purpose of the construction of an administration and tuition block at the 2nd respondent, in response to an advertisement by the respondents inviting such tenders for tender number KGNS/T/N/02/2023. The applications for tenders closed on 3rd July 2023, and a meeting was held the same day, for opening the tenders, in the presence of some bidders. It emerged that 7 bidders had showed interest, and at that stage no bidder was disqualified. The person who chaired the tender opening committee meeting went on to chair the tender evaluation committee for the same bids. On 26th July 2023, it was communicated that the tender processing had been terminated, as none of the bidders was responsive. It is averred that the finding that none of the bids were responsive was dishonest and ill-motivated. That is the background, as set out in the petition filed herein, dated 21st July 2023, and the affidavit, sworn on 21st August 2023, by the petitioner, as subsequently amended.
2. Attached to the affidavit of the petitioner are the tender notice/advertisement, dated 19th June 2023; a letter, dated 26th July 2023, from the respondents, addressed to Reenah (K) Ltd; a standard tender document for procurement of works, issued by the Public Procurement Regulatory Authority (PPRA); a letter from Reenah (K) Ltd, dated 2nd August 2023, addressed to the 1st respondent.
3. The complaint is that the acts of the respondents, of finding the bids unresponsive, of not responding to concerns raised by some of the bidders, and failing to properly constitute an evaluation committee,



violated Article 227 of the Constitution of Kenya and various provisions of the Public Procurement and Asset Disposal Act, 2015.

4. The petitioner seeks that the decision to terminate tender proceedings relating to tender number KGNS/T/N/02/2023 be suspended, and a fresh evaluation exercise as per the criteria in the standard tender document be ordered. The petition was subsequently amended to reinforce the facts and the prayers. The prayers are now to effect that a declaration be made that the decision to terminate the tender was, under section 63 of the Public Procurement and Asset Disposal Act, 2015, was null and void for criteria used did not meet the set standards, an order that a new tender evaluation committee be appointed to conduct a fresh evaluation of the 7 bids and to award the tender to the lowest bidder in compliance with the applicable law; and a declaration whether a bid security from a reputable banks and microfinance institutions was the same as that per the mandatory terms of the tender advertisement.
5. The petition was filed simultaneously with a Motion, dated 21st August 2023, seeking a temporary order, to suspend the decision of the 1st respondent terminating the tender proceedings and re-advertisement of the tender, number KGNS/T/N/02/2023, pending hearing and determination of the application and the petition.
6. The respondents were served. The Attorney General filed a notice of appointment, on 31st August 2023. There is an affidavit, replying to both the Motion and the petition, on 13th September 2023, by Dan Opilio, the chairperson of the infrastructure committee for the 2nd respondent. He avers that the evaluation committee conducted 2 evaluations, and found all the 7 bidders unresponsive, and recommended termination of the tender proceedings, and re-advertisement. He asserts that the tender evaluation committee followed the criteria set in the standard tender document as stipulated in the relevant legislation, and argues that the petitioner had not demonstrated the clauses allegedly omitted. He asserts that the tender proceedings were in consonance with the Constitution and the legislation governing public procurement. He asserts that the provisions of the Public Procurement and Asset Disposal Act, 2015 were not violated. He states that the petitioner is not a director of any of the 7 bidder companies. He further argues that the criteria set in Anarita Karimi vs. Republic [1972-1980] KLR 1272 was not met, for the petitioner had not demonstrated with precision how the Constitution was violated. He asserts that the Motion and the petition were bad in law, and ought to be struck out.
7. Attached to that reply are several documents: minutes of the tender opening committee meeting of 3rd July 2023; the tender notice/advertisement, dated 19th June 2023; the minutes of the tender evaluation committee meeting, dated 3rd July 2023; the minutes of the tender evaluation committee, dated 11th July 2023; individual letters, all dated 26th July 2023, to all the 7 bidders, advising that their bids were unresponsive; the tender document, relating to number KGNS/T/N/02/2023, dated 9th June 2023; and individual letters, all dated 29th July 2023, to the 7 bidders, forwarding their tender security documents.
8. The petitioner reacted to that reply, by way of an affidavit, sworn on 14th September 2023. He asserts that the tender evaluation committee did not follow the mandatory requirements of the tender documents, and that the committee proceeded to the next stage of evaluation contrary to the law. He states that minutes of the evaluation committee and the decision to terminate the tender were signed only by the chair and the secretary, contrary to what the law required. He asserts that the evaluation committee did not use the standard tender document, and the respondents introduced a new criterion under financial evaluation. He argues that there was no evidence that the evaluation committee did due diligence, by visiting the site. He further argues that the criteria used to inform the decision to terminate the tender was not disclosed. He asserts that the law did not allow the chair and secretary of



- the tender opening committee to also sit as the chair and secretary of the tender evaluation committee. He states that the tender security documents were not released promptly, after the decision to terminate the tender was made. He asserts that he is qualified, under Article 22 of the Constitution, to institute the proceedings.
9. The Motion was initially placed before PJ Otieno J, under certificate of urgency, on 24th August 2023. It was certified urgent, for hearing during the court recess. Orders were made for maintenance of status quo, in terms of there being no re-advertisement of the tender, pending further orders of the court. Hearing was fixed for 31st August 2023. On that date, *inter partes* hearing of the Motion was fixed for 18th September 2023, at Busia, and the interim orders were extended. Directions were given on 26th September 2023, for disposal of the matter by way of written submissions. Both sides complied, by filing their respective written submissions.
 10. The petitioner cites Article 22 of the Constitution, to argue that any person has a right to institute court proceedings on any rights infringed, whether that right is personal, or accrues to another, or the matter is of public interest. He cites Article 23 of the Constitution, to submit that the High Court has jurisdiction, to entertain the matter. He submits that he did not place the matter before the Public Procurement and Regulatory Authority Board, for it would have cost him Kshs. 250,000.000. He further argues that the Public Procurement and Regulatory Authority was part of the problem, and an issue of public interest arose. He asserts that the respondents were legal entities with capacity to defend the petition, especially as the 1st respondent was an accounting officer by dint of the provisions of the Public Procurement and Asset Disposal Act, 2015. He submits that the tender was terminated un-procedurally.
 11. The submissions made by the respondents turn on the petition, and not on the Motion.
 12. Going by the directions given on 26th September 2023, I am called upon to determine the Motion, and not the petition. My call is to assess whether I should confirm the interim orders that the petitioner was granted on 24th August 2023, pending the final determination of the petition.
 13. On the nature of conservatory orders, Muslim for Human Rights (Muburi) & 2 others v Attorney General & 2 others [2011] eKLR (Ibrahim, J) and Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR (Odunga, J), caution that the court ought to proceed with care, to obviate determining the petition finally at the interlocutory stage. On the principles which guide grant of interim orders, Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others [2015] eKLR (Onguto, J), Wilson Kaberia Nkunja v the Magistrates and Judges Vetting Board and Others [2016] eKLR (Lenaola, J), Naftali Rutbi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR (Nambuye, Musinga & Murgor, JJA) and David Ndi & others v Attorney-General & others [2021] eKLR (M. Ngugi, Odunga, Ngaah, J. Mulwa & Mwita, JJ) are relevant. They set out the principles upon which interim conservatory orders may be granted. These include demonstration of a *prima facie* case, whether failure to grant conservatory orders would render the petition nugatory, and the incidence of public interest.
 14. As both sides have submitted on both the Motion, and the petition, I am careful not to make a determination that will dispose of the petition, at this preliminary stage, where I am only determining the interlocutory application. The application was initially placed before PJ Otieno J, who was persuaded that, *prima facie*, the petition established a probable case, and granted interim relief. From the material on record, it would appear that there is an arguable case. If temporary relief is not granted, the tender may be re-advertised, and the process repeated, which would render the petition herein otiose. The matter is of public interest. It is about expenditure of public funds, in the development of infrastructure at a publicly-funded institution.



15. I am persuaded, from the material on record, that a *prima facie case* has been established, for confirmation of the interim relief, that was granted on 24th August 2023, which has been extended severally since then. I hereby confirm grant of the said orders, and direct that they shall remain in force until the petition is heard and determined.
16. On the disposal of the petition itself, directions have not yet been given, but I have noted that the parties have already filed their respective written submissions. They have not cited any caselaw to support their arguments, and I hereby direct them to file and serve their respective lists and copies of the judicial decisions that they rely on to back their arguments. That should be done within 14 days. The matter shall be mentioned, virtually, on 26th February 2024, for compliance, and allocation of a date for judgment. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 2ND DAY OF FEBRUARY 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Vincent Endekwa Mahasi, the Petitioner, in person.

Advocates

Mr. Tarus, instructed by the Attorney-General, for the Respondents.

