



Terer v Public Procurement Regularoty Authority & 3 others; Kenya Alliance Insurance Company Limited & 2 others (Interested Parties) (Constitutional Petition E002 of 2024) [2024] KEHC 2200 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E002 OF 2024
AC MRIMA, J
MARCH 6, 2024**

BETWEEN

TABITHA CHEPKOECH TERER PETITIONER

AND

**THE PUBLIC PROCUREMENT REGULAROTY AUTHORITY 1ST
RESPONDENT**

**THE DIRECTOR GENERAL PUBLIC PROCUREMENT REGULATORY
AUTHORITY 2ND RESPONDENT**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD 3RD RESPONDENT**

COUNTY GOVERNMENT OF TRANS NZOIA 4TH RESPONDENT

AND

KENYA ALLIANCE INSURANCE COMPANY LIMITED INTERESTED PARTY

AMANA INSURANCE BROKERS LIMITED INTERESTED PARTY

SCORELINE INSURANCE BROKERS LIMITED INTERESTED PARTY

RULING

Introduction:

1. The contention in this Petition relates to the processing of the Tender for Provision of Medical Insurance Cover for Trans Nzoia County Government Staff ITT No 1373510-2023/2024.



2. The proceedings were brought by Tabitha Chepkoech Terer, the Petitioner herein, who described herself as a resident of Trans Nzoia County, an Advocate of the High Court of Kenya and an expert on the law of public procurement.
3. Pending the determination of the Petition, the Petitioner filed an application by way of a Notice of Motion dated 26th February 2024 wherein she sought for several reliefs.
4. Due to the extreme urgency of this matter, this Court issued directions to the effect that the parties address prayer 2 of the instant application.
5. This ruling is, therefore, on whether the said relief be granted.

The Application:

6. The application sought the following orders: -
 1. That the Honourable do certify the application and the petition filed herewith as urgent and apt for hearing on a priority basis and *ex parte* in the first instance.
 2. That pending hearing and determination of the application this honourable court be and is hereby pleased to issue a Conservatory Order staying the 1st and 2nd Respondent's Letters dated 22/01/2024 referenced PPRA/COMP/40/62/VOL.1(12): 9/02/2024 referenced PPRA/COMP/40/62/VOL.1(16) AND 20/02/2024 referenced PPRA/6/1/3 VOL.1(112) and all consequent proceedings in respect of the 2nd and 3rd Interested Parties' complaints stemming from the Notification of Intention to Award dated 6/01/2024 pending before the 1st and 2nd Respondents.
 3. That pending hearing and determination of the Petition this honourable court be and is hereby pleased to issue a Conservatory Order staying the 1st and 2nd Respondent's Letters dated 22/01/2024 referenced PPRA/COMP/40/62/VOL.1(12): 9/02/2024 referenced PPRA/COMP/40/62/VOL.1(16) AND 20/02/2024 referenced PPRA/6/1/3 VOL.1(112) and all consequent proceedings in respect of the 2nd and 3rd Interested Parties' complaints stemming from the Notification of Intention to Award dated 6/01/2024 pending before the 1st and 2nd Respondents.
 4. That pending hearing and determination of the application/petition this honourable court be pleased to allow further processing of the Tender for provision of Medical Insurance cover for Trans Nzoia County Government Staff ITT No 1373510-2023/2024 as per the Notification of Intention to Award dated 6/01/2024 issued by the 4th Respondent to all the bidders.
 5. Costs of this application together with the petition.
 6. Any other orders this honourable court may deem fit to grant in the circumstances of the case.
7. The application was supported by the Affidavit of the Petitioner sworn on 26th February, 2024.
8. The 1st and 2nd Respondents and the 2nd Interested Party herein opposed the prayer for an interim conservatory order. The 1st Interested Party supported the application whereas the 4th Respondent prayed that the Court balances the interests of the parties and ensures that its staff do not suffer any continued exposure to lack of a medical cover. The 3rd Respondent did not take part in the matter despite service.



9. The parties made brief oral submissions and also referred to some decisions on the subject of conservatory orders.

Analysis:

10. At this point in time, this Court is called upon to exercise restraint and to resist the temptation of making final findings. The foregoing was fittingly captured by Ibrahim, J (as he then was) in *Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others* (2011) eKLR where the Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defenses without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

11. Therefore, a Court dealing with an interim application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, this Court will, therefore, restrain itself from dealing with such issues.

12. The nature of conservatory orders was discussed in Supreme Court of Kenya Civil Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, at paragraph 86 as follows: -

(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.

13. The Court in Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother* (HW) [2016] eKLR defined a conservatory order as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

14. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.



15. In dealing with an application for conservatory orders, a Court is to consider well-settled legal principles in exercising its discretion.
16. The said principles were discussed in the locus classicus case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others case* (*supra*) where at paragraph 86 stated the Court stated as follows: -
 - (86) Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.
17. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -
 - (a) An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
 - (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - (c) The public interest must be considered before grant of a conservatory order.
18. The Court will now consider the said principles as they apply in this matter.
19. On whether a *prima facie* case was established, this Court having carefully considered the Petition and the parties' submissions alongside the decision in *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, is satisfied that the matter raises substantial constitutional issues on public procurement worth consideration.
20. On public policy considerations, the *Black's Law Dictionary* 10th Edition at page 1425 defines 'public interest' as follows: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.
21. As stated earlier, the Petition deals with the issue of procurement of Medical Insurance Cover for Trans Nzoia County Government Staff. The matter, therefore, relates to inter alia Article 43(1)(a) rights. It seeks to interrogate the relationship between the various entities created in law on public procurement. It is that relationship that is governed by the *Constitution* and the law.
22. Public policy in this matter, therefore, militates in favour of complying with the procurement law in place. In this case, Article 227 of the *Constitution* and the provisions of the Public Procurement and Disposal Act and the Regulations made thereunder come to play.
24. The scenario in this case is that the 4th Respondent initiated a procurement for the Tender for Provision of Medical Insurance Cover for Trans Nzoia County Government Staff ITT No 1373510-2023/2024 and made an award to the 1st Interested Party.
25. Dissatisfied with the award, the 2nd and 3rd Interested Parties, instead lodged complaints before the 1st Respondent well after the timelines within which they ought to have filed for review before the



- 3rd Respondent lapsed. The 1st and 2nd Respondents stayed the procurement and directed the 4th Respondent to make a direct procurement.
26. Part XV of the *Public Procurement and Asset Disposal Act* provides for the administrative review of procurement and disposal proceedings. The law calls for any entity aggrieved by a procurement process to request for a review before the 3rd Respondent. That is the prevailing law.
27. However, the 1st and 2nd Respondents contended that Section 9(h) of the *Public Procurement and Asset Disposal Act* vested it with the powers to investigate procurement processes.
28. Section 9(h) of the *Public Procurement and Asset Disposal Act* states as follows: -
9. Functions of Authority
- (1) 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 (emphasis added).
29. Public policy considerations in the unique circumstances of this matter will, therefore, call upon the parties to comply with the law as it is, as they await the outcome of the interpretations or declarations sought. It is on that basis that this Court, without deciding the issues raised by the 1st and 2nd Respondent as well as the 2nd Interested Party at this point in time, finds favour in the parties complying with the current procurement law in place.
30. On the aspect of prejudice, the *Black's Law Dictionary* 10th Edition Thomson Reuters at page 1370 defines 'prejudice' as follows: -
- Damage or detriment to one's legal rights or claims.
31. Will the 1st and 2nd Respondents and 2nd Interested Party suffer any damage or detriment if the conservatory orders are granted? This Court does not think so. There are two reasons for the Court's position. The first reason being that the 1st and 2nd Respondents are the entities which are inviting this Court to interpret the law in a manner according them jurisdiction over challenges to administrative reviews in procurement and disposal proceedings. From the outset, Section 9(h) of the *Public Procurement and Asset Disposal Act* provides to the contrary.
32. The second reason is that the 2nd Interested Party is a beneficiary of the actions of the 1st and 2nd Respondents. One wonders how the 2nd Interested Party would benefit from the actions of the 1st and 2nd Respondents in instances where, on a *prima facie* basis, the 1st and 2nd Respondents' actions seem to run contrary to the law.
33. Who, therefore, stands to suffer prejudice in this case? The answer to the question seems not to be far-fetched. Outrightly, it is the staff of the 4th Respondent. It is on record that the staff's medical cover lapsed on 31st December 2023. As such, since 1st January 2024, the staff are not on any medical cover. The adverse effects of such an exposure cannot be overestimated.
34. Next is whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory. That is indeed the position. If the direct procurement is allowed to proceed then a contract for the entire period 2023/2024 will be executed. If that happens then the Petition will be largely rendered academic.



35. Having addressed all the principles guiding the subject of conservatory orders, it turns out that the orders are merited in this case.

Disposition:

36. Drawing from the foregoing discussion, this Court finds favour with the Petitioner/Applicant. Therefore, Prayer 2 of the Notice of Motion dated 26th February 2024 shall issue.

37. The grant of prayer 2 will effectively allow the 4th Respondent to proceed on with the Tender for Provision of Medical Insurance Cover for Trans Nzoia County Government Staff ITT No 1373510-2023/2024 so as to cushion the now vulnerable staff.

38. In the end, the following orders hereby issue: -

- a. Pending further orders of this Court, a Conservatory order hereby issues staying the 1st and 2nd Respondents' letters dated 22/01/2024 referenced PPRA/COMP/40/62/VOL.1(12); dated 09/02/2024 referenced PPRA/COMP/40/62/VOL.1(16); and dated 20/02/2024 referenced PPRA/6/1/3 VOL.1(112) and all consequent proceedings in respect of the 2nd and 3rd Interested Parties' complaints stemming from the Notification of Intention to Award dated 06/01/2024 pending before the 1st and 2nd Respondents herein.
- b. The process in respect of the procurement of the Tender for Provision of Medical Insurance Cover for Trans Nzoia County Government Staff ITT No 1373510-2023/2024 initiated by the 4th Respondent shall proceed forthwith.
- c. Directions on the hearing of the Petition and the Notice of Motion dated 26th February 2024 shall issue.
- d. Costs in cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

Mr. Omaiyo and Mr. Wachira, Learned Counsel for the Petitioner/Applicant.

No appearance for Mr. Ngalatu, Learned Counsel for the 1st and 2nd Respondents.

No appearance for the 3rd Respondent.

Mr. Mango and Mr. Otieno, Learned Counsel for the 4th Respondent.

Mr. Dunstan Omari and Mr. Owiti, Learned Counsel for the 1st Interested Party.

Mr. Muganda, Learned Counsel for the 2nd Interested Party.

No appearance for the 3rd Interested Party.

Chemosop/Duke – Court Assistants.

