



Mahasi v Chief Principal Kolanya Girls National School & another (Petition E002 of 2023) [2024] KEHC 3909 (KLR) (19 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E002 OF 2023
WM MUSYOKA, J
APRIL 19, 2024**

BETWEEN

VINCENT ENDEKWA MAHASI PETITIONER

AND

THE CHIEF PRINCIPAL KOLANYA GIRLS NATIONAL SCHOOL 1ST RESPONDENT

KOLANYA GIRLS NATIONAL SCHOOL 2ND RESPONDENT

JUDGMENT

1. This constitutional cause was initiated by the petitioner herein, Vincent Endekwa Mahasi, to be known hereafter as the petitioner, vide a petition, dated 21st July 2023, and subsequently amended on 29th September 2023, inviting the court to terminate a tendering process undertaken by the respondents, and to order a fresh evaluation of the said tender, following the set criteria. The cause relates to matters touching on tendering for construction of an administration block at the 2nd respondent, hence the petition names the senior most official of the 2nd respondent and the 2nd respondent itself as respondents.
2. The case by the petitioner is that the respondents, sometime in 2023, invited bids for the proposed construction, bids were presented and opened, and the 1st respondent communicated to the 7 individuals and entities that had placed bids, to effect that the tender process had been terminated, as none of the bids presented were responsive. It is stated that one of the bidders raised a concern, which was not responded to. It is asserted that the decision, to find the bids unresponsive, was dishonest, driven by ill-motive and contravened the law. It is averred that the 1st respondent appointed an evaluation committee, which was unable to carry out its mandate, as required by sections 44, 45 and 78 under the *Public Procurement and Asset Disposal Act*, Cap 412C, Laws of Kenya. It is also averred that the evaluation exercise undertaken by the evaluation committee failed to comply with section 46(4e) of the Act, lacked accountability, fairness, openness, transparency and competitiveness. The



evaluation committee is alleged to have had altered the tenders, contrary to sections 58 and 82 of the *Public Procurement and Asset Disposal Act*. It is also argued that the evaluation committee lacked a procurement professional to give the relevant technical advice. It is also averred that the 1st respondent did not release the tender security, upon termination of the process, contrary to section 61(4a) of the *Public Procurement and Asset Disposal Act*. It is averred that these acts and omissions amounted to a contravention of Article 227 of *the Constitution* of Kenya.

3. The petitioner seeks the following reliefs:

1. A declaration that termination of the tendering process contravened sections 58 and 63(1)(3) of the *Public Procurement and Asset Disposal Act*;
 2. An order that a new evaluation committee be appointed to evaluate the dismissed bids within 7 days;
 3. A ruling on whether bid security bids from reputable banks and micro-financial institutions mean the same; and
 4. Costs.
4. The affidavit, sworn by the petitioner in support of his petition, is more or less, a replica of the petition. He avers that the person who chaired the tender opening committee also chaired the evaluation committee, which contravened section 78(1a and b) of the *Public Procurement and Asset Disposal Act*.
5. The respondent reacted to the petition, by way of an affidavit, sworn on 13th September 2023, by Dan Opilio, the chairperson of the infrastructure committee of the 2nd respondent. He avers that the evaluation committee considered the bids placed, and found them to be unresponsive, hence the termination of the process. Thereafter, the bidders were notified of the same by the 1st respondent. He asserts that the termination of the tender process was within the law. He denies that the tender opening committee and the evaluation committee were chaired by the same individual. He further denies that the tender security had been withheld, for the 1st respondent had already written to the unsuccessful bidders, inviting them to collect their tender security documents.
6. The matter had been filed under certificate of urgency, in August 2023, during the High Court recess, and interim orders were granted by the court, sitting at Kakamega, and which orders I confirmed, by my ruling of 2nd February 2024.
7. Directions on the disposal of the petition were given in the said ruling of 2nd February 2024, for canvassing by way of written submissions. Both sides complied, by filing their respective written submissions, which I have read through, and noted the arguments made.
8. I have evaluated this matter, based on the averments made in the filings by both sides, and in their written submissions. The sense I get is that the petitioner is largely complaining about contraventions of legislative provisions governing tendering for contracts in the public sector. Although these proceedings are framed as a constitutional cause, the petitioner has not, in his petition identified the provisions of *the Constitution* which he alleges have been violated. He only cites Article 227 of *the Constitution*, on procurement of public goods and services. That provision only gives guidelines, and directs Parliament to pass legislation on the subject, which has been done. Article 227 sets the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. None of the material that the petitioner has placed on record indicates that the process was not fair, equitable, transparent or lacking in cost-effectiveness. The only claims he makes relate to the 2 committees being chaired by the same person, but he has provided no proof of that; that bids were altered, but no proof has been furnished; and that security bonds were not returned, but no proof has been availed.



I note that the petitioner, in his written submissions, has adverted to a variety of other Articles of *the Constitution*, such as 10, 22, 23, 48, 159 and 258, however, these provisions are not cited in his petition.

9. The material on record does not bring the petition herein within the constitutional threshold that Anarita Karimi Njeru vs. Republic [1972-1980] KLR 1272 pointed out. The petitioner has attempted to frame as constitutional issues matters that could quite properly be handled through ordinary civil litigation. The *Public Procurement and Asset Disposal Act*, 2015, establishes a dispute resolution mechanism, for handling complaints arising from tendering processes undertaken by public entities, like the 2nd respondent. The issues raised by the petitioner fall within the category of what ought to be handled through such mechanisms. The petitioner ought not have sought to constitutionalise the complaints, through a constitutional petition, before he had exhausted the process set out in the *Public Procurement and Asset Disposal Act*.
10. The respondents have raised technical issues about whether the respondents were properly sued, and have cited caselaw to support that, being Simu Vendors Association vs. Town Clerk, City Council of Nairobi & another [2005] eKLR and Yako Supermarket (K) Limited & another vs. National Land Commission & 5 others [2017] eKLR, about suits by or against unincorporated entities, such as the 2nd respondent. The argument is that no suit can be maintained against the 2 respondents, as the 2nd respondent could not be sued in its name, being unincorporated, while the 1st respondent could not be sued on behalf of the 2nd respondent, for the proper persons to be sued would be members of the Board of Management of the 2nd respondent.
11. The argument raised by the respondents is formidable, with respect to ordinary suits, commenced under the *Civil Procedure Act*, Cap 21, Laws of Kenya, and the Civil Procedure Rules. However, this cause is not subject to the *Civil Procedure Act* and the Civil Procedure Rules. It is a constitutional cause, not an ordinary suit, governed by *the Constitution* and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, both of which eschew technicalities of procedure. Under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the fact of misjoinder does not render the cause invalid, and the court is enjoined to determine the petition on its merits, any misjoinder or non-joinder of parties notwithstanding. Rule 5(b) states:

“ A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”
12. Overall, I find no merit in the petition herein, and I hereby dismiss the same. There shall be no order on costs, this being public interest litigation. The interim order, made on 24th August 2023, is hereby discharged. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 19TH APRIL 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.

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