



**Vihiga Contractors Association through Hassan v County Government of Vihiga & another  
(Constitutional Petition 1 of 2024) [2024] KEHC 11390 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION 1 OF 2024**

**JN KAMAU, J**

**SEPTEMBER 24, 2024**

**IN THE MATTER OF ARTICLES 10, 19, 21, 23, 27, 47 & 227 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF CONSTITUTION FREEDOM & LIBERTIES**

**BETWEEN**

**VIHIGA CONTRACTORS ASSOCIATION THROUGH RASHEED OBONDO  
HASSAN ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF VIHIGA ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER ROADS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. In his Petition dated 14<sup>th</sup> February 2024 and filed on 15<sup>th</sup> February 2024, the Petitioner sought for orders that:-
  - a. A declaration that Respondents jointly and severally in re-advertising the tenders in issue without releasing the results of the first bids for the advert of 26-1023 were acting contrary to the provisions of Articles 10, 27, 47, 227 and 232 of the Constitution .
  - b. A declaration that the Petitioner's rights in Article 27, 43, 47, 201, 227 & 232 of the Constitution had been breached.
  - c. An order of mandamus to issue compelling the Respondents to release the results for bid submitted pursuant to the advert dated 26<sup>th</sup> October 2023.



- d. An order of certiorari to bring into this court and quash the contents contained in the advert or notice dated 12<sup>th</sup> January 2024 or the re-advertisement thereof.
  - e. General damages for breach of the Petitioners right under Articles 27, 43 and 47 of the [Constitution](#) .
2. The said Petition was supported by the Affidavit of Rasheed Obondo Hassan, the Petitioner’s Chairman. He swore the same on 14<sup>th</sup> February 2024. The Petitioner’s case was that there was a threat to economic rights contrary to the [Constitution](#) of Kenya.
  3. On 26<sup>th</sup> February 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection of even date in opposition to the Petitioner’s Petition.
  4. They contended that this court lacked the jurisdiction to entertain the Petition on ground that the dispute alleged non-compliance with the provisions of the *Public Procurement and Asset Disposal Act* which dispute fell within the exclusive mandate of the Public Procurement Administrative Review Board by dint of Sections 28 and 167 of the *Public Procurement and Asset Disposal Act*.
  5. They further pointed out that the Petition was incompetent and incurably defective for violating the “Exhaustion Principle” and raising issues related to procurement whose solution lay solely within the provisions of the *Act* and the [Public Procurement and Asset Disposal Regulations](#) and therefore did not meet the minimum threshold of a constitutional petition to warrant the intervention of this court in the manner sought or at all. They asserted that the Petition herein amounted to gross abuse of the court’s process and was vexatious and scandalous.
  6. They further added that the Petitioner lacked the locus standi to institute or maintain the Petition and further lacked the audience by this court on grounds that it was a body unknown to the law. In the premises, they urged the court to struck out and/or dismiss the Petitioner’s Petition with costs.
  7. The Petitioner’s Written Submissions were dated and filed on 12<sup>th</sup> March 2024 while those of the Respondents were dated and filed on 4<sup>th</sup> March 2024. This Ruling is therefore based on the said Written Submissions which both parties relied on in their entirety.

### Legal Analysis

8. The Respondents submitted that despite the Petitioner citing a number of Articles of the [Constitution](#) alleged to have been infringed, the bottom line was that the complaints arose from a procurement exercise that was vested in the Respondents by the laws governing procurement provided for in the *Public Procurement and Asset Disposal Act* and the Regulations implementing the *Public Procurement and Asset Disposal Act*. They invoked Section 28 and 167 of the *Public Procurement and Asset Disposal Act* and submitted that the matter herein fell within the mandate of the Review Board under Section 28 and not exempted by Section 167 of the *Public Procurement and Asset Disposal Act*.
9. They argued that this court therefore lacked jurisdiction until and unless invoked at a later stage through an application for judicial review appealable to the Court of Appeal as provided in Section 175 of the *Public Procurement and Asset Disposal Act*.
10. In that regard, they placed reliance on the cases of [Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others](#) [2012] eKLR and [John Kakindu Makau V County Government of Makueni & 6 Others](#) [2018] eKLR where the common thread was that the Review Board was a specialised statutory tribunal established to deal with all complaints of breach of duty by the procuring entity and the case.



11. They pointed out that they were aware of the contrary opinion in the case of *Basorgat Investment Limited V County Government of Vihiga* [2021] eKLR which they termed as not good precedent in so far as deviating from the Court of Appeal decision was concerned. They further submitted that the Supreme Court had ruled that one could not use a constitutional petition to avoid a dispute resolution mechanism provided in a statute.
12. They pointed out that there were only two(2) exceptions to the general rule, that is where the project was being funded by the Government of Kenya and a foreign nation and where the petition before the court involved parties who did not apply for the tender in dispute as held in the cases of *NARC V IEBC; Tharaka Nithi County Assembly & 5 Others(Interested Party)*[2022]KESC 6 (KLR) and *Republic V Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power & Lighting Company* [2019]eKLR respectively.
13. They also relied on the case of *Okiya Omtata Okoiti V Commissioner General, KRA & 2 Others* [2018] eKLR. They did not set out the holding that they were relying upon. Suffice it to state that they submitted that the Petitioners' members applied for the contracts in dispute and did not therefore enjoy the benefit of that exception (sic).
14. In pointing out that the Petitioners had violated the doctrine of exhaustion, they cited the case of *Goeffrey Muthinja Kabiru & Another V Samuel Muguna Henry & 1756 Others* [2015] eKLR among others where the common thread was that where a dispute resolution mechanism existed outside the courts, the same had to be exhausted before the jurisdiction of the courts could be invoked.
15. They further invoked Section 8, 9 and 38 of the *Public Procurement and Asset Disposal Act* and were emphatic that the reliefs that the Petitioner sought through the Petition herein would be effectively and satisfactorily be addressed within the dispute resolution mechanism existing in the *Public Procurement and Asset Disposal Act* and did not require litigation least of all a constitutional petition.
16. It was their contention that the Petition herein was an abuse of the process of the court, was vexatious, frivolous and scandalous. In that regard, they invited the court to consider the requirements of a constitutional petition as set out in Rule 10 of the Mutunga Rules [ *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*].
17. They pointed out that a petitioner had to indicate the umbrella under which he or she presented a petition, whether public interest or alleged violation of rights and fundamental freedoms which concerned an individual which was not the case herein as the Petitioner purported to ride on a public interest while seeking an individual gain.
18. They further asserted that other than filing the certificate of registration of Vihiga Contractors Association and IFMIS extracts for two (2) contractors who purported to have applied, no list of the contractors was filed which information would have enable the court arrive at a just decision. They averred that in opposition to the same petition, they did in fact file an affidavit showing some of the Petitioners' members who had benefited from the award.
19. To buttress this point, they relied on the case of *Feisal Hassan & 2 Others V Public Service Board of Marsabit County & Another* [2016]eKLR where it was held that the petitioner was guilty of abuse of constitutional court process by filing a constitutional petition on matters that did not raise purely constitutional issues but which properly belonged to other competent courts of tribunals.
20. They also placed reliance on the case of *Madison Insurance Company Limited V Augustine Kamanda Gitau* [2020] eKLR where it was held that denial of a well-known fact could also be described as



scandalous and that a matter was said to be vexatious when it had no foundation or had no chance of succeeding.

21. On the issue of locus standi, they submitted that although the Petitioner presented as a registered association of contractors in Vihiga County in which he claimed to be a member and the Chairperson, no instrument (constitution) establishing the association was filed.
22. Towards this end, they cited the case of *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR where it was held that where a determinate class of persons by reason of violation of any constitutional right, by reason of poverty, helplessness, disability or socio-economic disadvantage is unable to approach the court for relief, any member of the public could maintain an application for an appropriate direction or order in the High Court under Articles 22 and 258 of the *Constitution* provided that the said person is acting bona fide with a view to vindicate the cause of justice and where the person is acting for personal gain, private profit or out of political consideration, the court should reject their application.
23. They were emphatic that the Petitioner had no locus standi to maintain this Petition in the name of Vihiga Contractors Association or even in his own name.
24. On his part, the Petitioner placed reliance on the case of *Mukisa Biscuits Manufacturing Co Ltd V West and Distributors 1969* (EA) 696 where it was held that a preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and of which if argued as preliminary point could dispose of the suit. He argued that Ground Nos (1), (2) and (3) of the Respondents' Notice of Preliminary Objection dated 26<sup>th</sup> February 2024 were within the said parameters of the Mukisa Biscuits case while Grounds Nos (4) and (5) were not.
25. He pointed out that the 1<sup>st</sup> Respondent was established under Article 76 of the *Constitution* of Kenya, 2010 and further cited Article 2 and Article 10 which he claimed that the Respondents and their officers were bound by them in their dealings with residents of Vihiga and Kenyans generally regarding award of tender. He asserted that the tender process itself was a constitution issue pursuant to Article 227 of the *Constitution*.
26. He further cited Article 165 of the *Constitution* on the jurisdiction of the High Court and was emphatic that that was the jurisdiction he was seeking. He placed reliance on the case of *Barsogat Investment Ltd V The County Government of Vihiga* (*Supra*) wherein a similar objection was raised and the court held that it could not be the case that there was no jurisdiction to entertain such petition merely because the law had provided alternative dispute resolution mechanisms or because the other mechanisms had not been exhausted.
27. He pointed out that they were seeking for a declaration that the impugned Articles had been breached and that that was clearly outside the purview of the review tribunal. He also invoked Section 28 of the *Public Procurement and Asset Disposal Act* and argued that the court could still make the determination without delving into merits of award of tenders themselves. He added that the court's jurisdiction under Article 165(3), 163(5) and (6) of the *Constitution* of Kenya could not be ousted by the provisions in a statute.
28. It was his contention that his Petition had met the threshold in *Anarita Karimi Njeru V A.G* (1979) KLR 154. He also relied on the case of Kenya Transport Association V Municipal Council of Mombasa & Another (citation not given) where it was held that although counsel for the respondents had urged that the petitioners therein ought to have sought redress by involving the administrative process provided for under the *Public Procurement and Asset Disposal Act*, such position was not to be upheld



- where constitutional rights have been infringed and the aggrieved persons had opted for enforcement by court process.
29. He further contended that a reading of his Petition showed that there were constitutional matters to be addressed in respect of Articles 10, 27, 47, 227 and 232 of the *Constitution* of Kenya regarding the process of tendering undertaken by the Respondents. In this regard, he cited the case of *IEBC V NASA and 6 Others* Civil Appeal No 224 of 2017 (eKLR citation not given) where it was held that IEBC and all procurement entities at all times remain accountable and transparent in their operations and must adhere to the values in Articles 10, 201, 227 and 232 of the *Constitution* of Kenya as incorporated in Section 3 of the *Public Procurement and Asset Disposal Act*.
  30. He further cited the cases of Christopher *Ndarathi Murungaru V Standard Limited & 2 Others* [2012] eKLR and *Republic V Cabinet Secretary for Transport and Infrastructure & 3 Others ex parte Keboro & 198 Others*[2015]eKLR where the common thread was that where there was a parallel remedy, a constitutional relief should not be sought unless the circumstances of which the complaint was made included some features which made it appropriate to take that cause.
  31. He was emphatic that his Petition fell in the descriptions in the aforesaid cases as the Respondent had admitted in their Replying Affidavit that there were some works that were ongoing in respect to tenders advertised on 26<sup>th</sup> October 2023 and in the subsequent re-advertisement of 12<sup>th</sup> January 2024. He argued that that was a clear manifestation of abuse of state power by the Respondents and was contrary to the objects of devolution in Article 174 of and abuse of power pursuant to Articles 10, 27, 201, 227 and 232 of the *Constitution* of Kenya. He asserted that there was no evidence in their affidavit that they communicated to him and other members on the results of the tenders advertised on 26<sup>th</sup> October 2023 before the re-advertisement of some or of the tenders on 12<sup>th</sup> January 2024.
  32. To buttress his point, he relied on the cases of *Revital Health (EPZ) Limited V Public Procurement Authority and 6 Others* Constitutional Petition No 71 of 2012 (eKLR citation not given) where it was held that the constitutionality of a procurement process was to be assessed on the basis of Article 227 of the *Constitution* of Kenya and that any person who felt that a procurement did not meet the constitutional threshold had a recourse to the High Court. It was therefore his argument that this court had the jurisdiction to entertain the Petition herein and grant the orders sought.
  33. In the case of *Mukisa Biscuit Manufacturing Company Limited V West End Distributors Ltd (Supra)*, a preliminary objection was defined as consisting of a point of law which had been pleaded, or which arose out of clear implication out of the pleadings and which if argued as preliminary point could dispose of the suit. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
  34. In view of the fact that the Respondents were challenging the jurisdiction of this court to entertain the Petition herein, the Preliminary Objection was a preliminary point of law as contemplated in the case of *Mukisa Biscuit Manufacturing Company Limited V West End Distributors Ltd (Supra)* and *Hassan Ali Joho & Another V Suleiman Said Shabal & 2 Others* [2014] eKLR.
  35. It is important to point out that at any stage of a case, the court had a duty to facilitate the efficient disposal of disputes before it so as not to strain the already scarce resources. The court was therefore enjoined to remove very quickly, any matter that had the potential of clogging its system and causing backlogs if it could be determined right at the outset that the said matter did not disclose a reasonable cause of action and hence ought not to be in the system.
  36. Indeed, the court was under a duty to facilitate the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative



- resources, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties as provided in Section 1B of the *Civil Procedure Act* Cap 21 (Laws of Kenya).
37. Notably, Article 227 of the *Constitution* of Kenya provides for efficient public procurement of public goods and services and for disposal of public assets. The *Public Procurement and Asset Disposal Act* was enacted to give effect to the said Article 227 of the *Constitution* of Kenya.
38. The Public Procurement Administrative Review Board was established under Section 27 of the *Public Procurement and Asset Disposal Act*. The functions of the said Public Procurement Administrative Review Board were set out in Section 28(1) of the Public Procurement Administrative Act. The functions of Public Procurement Administrative Review Board were enumerated as “reviewing, hearing and determining tendering and disposal disputes...”
39. Section 167 (1) of the Public Procurement Administrative Act further stipulates 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 (emphasis court), or disposal process as in such manner as may be prescribed.
40. Section 170 of the Public Procurement Administrative Act lists those who can be parties before the Public Procurement Administrative Review Board. These were:-
- a. The person who requested for review;
  - b. The Executing Officer of the procuring entity;
  - c. The tender notified as successful by the procuring entity; and
  - d. Such other persons as the Review Board may determine.
41. The meaning of a tenderer as per the Act was a person who submitted a tender pursuant to an invitation by a public entity. Thus, from the facts of this case, the Petitioner was a tenderer together with his fellow members (sic). They were aggrieved by the Respondent’s procurement process and fell under the categories of persons envisaged under Section 167 (1) and 170 (a) - (c) of the Public Procurement Administrative Act.
42. Accordingly, a party who was neither a candidate nor a tenderer could not challenge the tender award which he/she/it did not bid for as was held in the case of *Republic V Independent Electorate and Boundaries Commission & 2 others* [2017] eKLR.
43. Having said so, Section 174 of the Public Procurement Administrative Act states that:-
- “The rights to request a review under this part is in addition to any other legal remedy a person may have.” (emphasis court)
44. Section 174 of the Public Procurement Administrative Act did not therefore oust the jurisdiction of the High Court to deal with constitutional matters that had been presented before it under Article 23 and 165 of the *Constitution* of Kenya.



45. Indeed, Article 165(3)(b) of the Constitution of Kenya states as follows :-

“Subject to clause (5), the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

46. The Petition herein had sought a declaration that the Petitioners’ rights had been violated. It had also prayed for judicial review orders of mandamus and certiorari in respect of the alleged violation. It further sought an order for damages for the purported violation of the Constitution of Kenya.

47. This court further noted that since the Petitioner herein could not subject themselves to the Public Procurement Administrative Review Board by dint of Section 174 of the Public Procurement Administrative Act, it could seek alternative remedy under the provisions of the law as was held in Elias Mwangi Mugwe V Public Procurement Administrative Review Board & 5 others [2016] eKLR.

48. Where the court was satisfied that the Petition met the threshold of a constitutional petition, it could proceed to hear and determine it under the powers donated by Article 165 of the Constitution of Kenya. In this respect, this court came to the firm conclusion that the issues the Petitioner had raised in the Petition herein were within the jurisdiction of this court as it was aggrieved by the process of procurement which it alleged had been violated, infringed and/or contravened the Constitutional of Kenya.

49. Turning to the issue of locus standi, Article 22 of the Constitution of Kenya provides:-

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a. person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members.

50. The provisions of this Article settled the issue of locus standi as it opened the door of justice to any person where there was a threat of violation and/or infringement of any right and/or fundamental freedom. The same was restated in Article 258 of the Constitution of Kenya.

51. Article 258 (1) and (2) of the Constitution of Kenya stipulate as follows:-

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-
  - a. a person acting on behalf of another person who cannot act in their own name
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or



- d. an association acting in the interest of one or more of its members (emphasis court).
52. Article 22(2)(d) and Article 258(2)(d) of the *Constitution* of Kenya refers to an “association”. That association has to be registered under the appropriate laws of Kenya for it to have locus standi to institute proceedings.
53. In its Petition dated 14<sup>th</sup> February 2024 and filed on 15<sup>th</sup> February 2024, the Petitioner described his association as a registered organisation of taking care of the welfare of contractors in Vihiga County and annexed Certificate of Registration No 46114 dated 4<sup>th</sup> November 2014. Rasheed Obondo Hassan pointed out that he was the Petitioner’s Chairman and as its official had the right to sue on behalf of the Petitioner and its members.
54. In the premises foregoing, this court found that the Petitioner had the locus standi and/or capacity to institute the proceedings herein and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Preliminary Objection was therefore not merited in the circumstances of this case.

### **Disposition**

55. For the foregoing reasons, the upshot of this court’s decision was that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Notice of Preliminary Objection dated and filed on 26<sup>th</sup> February 2024 was not merited and the same be and is hereby dismissed.
56. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, it is hereby directed that each party will bear its own costs of this Preliminary Objection.
57. To progress this matter further, it is hereby directed that the Petitioner files and serves its Written Submissions by 29<sup>th</sup> October 2024.
58. The Respondents file and serve their respective written submissions by 29<sup>th</sup> November 2024.
59. Matter to be mentioned on 4<sup>th</sup> December 2024 to confirm compliance and/or for further orders and/or directions.
60. Orders accordingly.

**DATED AND DELIVERED AT VIHIGA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024**

**J. KAMAU**

**JUDGE**

