



**Vihiga Contractors Association Through Rasheed Obondo Hassan  
v County Government of Vihiga & another (Constitutional Petition  
1 of 2024) [2024] KEHC 11442 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11442 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION 1 OF 2024  
JN KAMAU, J  
SEPTEMBER 24, 2024**

**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**

1. In his Notice of Motion application dated 14<sup>th</sup> February 2024 and filed on 15<sup>th</sup> February 2024, the Petitioner herein sought for orders that pending the hearing of the Petition herein, a conservatory order of injunction do issue to restrain the Respondents, their agents and/or assigns from awarding, commissioning, paying or in any other manner acting on bids received in respect of the re-advertisement of the tenders advertised on 26<sup>th</sup> October 2023 and subsequently re-advertised on 12<sup>th</sup> January 2024 before releasing the results of the bids submitted by its members for the tender advertised on 26<sup>th</sup> October 2023.
2. Rasheed Obongo Hassan, the Petitioner’s Chairman, swore an affidavit in support of the said application herein on 14<sup>th</sup> February 2024 on his own behalf and on behalf of the Petitioner’s members.
3. The Petitioner asserted that the 2<sup>nd</sup> Respondent had caused to be advertised tenders for several works for the benefit of the residents of Vihiga County and that its members submitted their bids through the IFMIS system. However, some of the bids were never opened. It averred that as its members were awaiting communication, they came across another notice for re-advertisement re-advertising the same works. It also established that some works done.



4. It contended that the Respondents were expected to adhere to the guiding principles in Section 3 of the *Public Procurement and Asset Disposal Act* in dealing with its members. It averred that the Respondents had breached their rights under Article 27, 43 and 47 of *the Constitution* of Kenya as the re-advertisement was an administrative action which ought to pass the test in Article 47(2) of *the Constitution*.
5. It was emphatic that its members had been denied equal protection of the law and had been discriminated against by the Respondents pursuant to Article 27(1) of *the Constitution*.
6. It was emphatic that it had a good case as the Petition had a high chance of success as its members' economic rights were under threat. It was its contention that the Respondents were acting contrary to Article 174 of *the Constitution* and that it was therefore in the interest of justice that the conservatory order of injunction be issued and that the re-advertisement and consequential actions therefrom be stayed pending the hearing of this Petition.
7. On 26<sup>th</sup> February 2024, Rodger Etale Christopher Tunya, Chief Officer in charge of the Department of Transport and Infrastructure, Vihiga County, swore a Replying Affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and in opposition to the Petitioner's application. The same was filed on even date.
8. They denied the existence of the position the Petitioner referred to as "Chief Officer Roads" as the 2<sup>nd</sup> Respondent as was indicated in the Petition herein and that if there was such a position, then they were not responsible for the transactions which had prompted the Petition herein. They contended that the said joinder or misjoinder of the said 2<sup>nd</sup> Respondent confirmed that the Petition was being maintained by a party acting on untrue and unverified facts before the court or was on a mission to abuse the court's process and should be denied the right of audience for all purposes.
9. They explained that they advertised and invited tenders for a total of ninety three (93) projects for the financial year 2023/2024 across the twenty five (25) wards of the County and that a total of sixty (60) bids were successful and were duly awarded. They pointed out that the unsuccessful bidders were duly notified of the position through the IFMIS platform that was used to advertise and receive the bids. They asserted that among those that were successful, a number of them were members of the Petitioner and upon being notified, they commenced the work immediately and were at different stages of completion.
10. They were categorical that save for the reservations of the special classes specified by law, they had no preference for members of the Petitioner or a prior agreement to accord it or its members special treatment in the manner advanced in the Petition herein. They added that twenty three (23) were unsuccessful and were not awarded but were re-advertised in the county website as provided by law. They were emphatic that the Petitioner was aware of all those facts at the time of filing the Petition or it would have been provided with the information upon request through the correct channel and/or procedure.
11. They further stated that the *Public Procurement and Asset Disposal Act* contained procedures for addressing the nature of the complaints that had been raised in the Petition herein, the first action for redress being that the complaint had to be first preferred to the Public Procurement Administrative Review Board as provided in Section 28 and 167 of the *Public Procurement and Asset Disposal Act*, which procedure the Petitioner had ignored in favour of the Petition.
12. They further argued that this court lacked jurisdiction to entertain the Petition herein for the reason that the Petitioner had not exhausted the aforesaid procedures provided for by the Act and that the



Petition lacked supporting evidence of the legal existence of the association. They urged the court to struck out and/or dismiss the Petitioner's application with costs.

13. Rasheed Obongo Hassan also swore a Supplementary (sic) Affidavit on 6<sup>th</sup> March 2024. The same was filed on 7<sup>th</sup> March 2024.
14. The Petitioner reiterated the averments in the deponent's supporting affidavit and averred that the misdescription, non-joinder or misjoinder of the 2<sup>nd</sup> Respondent was not fatal to the Petition herein.
15. It pointed out that the said issues that had been raised went beyond Section 28 of the [Public Procurement and Asset Disposal Act](#) and that the provisions therein did not oust the jurisdiction of this court to deal with constitutional matters under Article 23 and 165 of [the Constitution](#). He was emphatic that the Petition raised constitutional issues that ought to be decided by this court.
16. The Petitioner's Written Submissions were dated and filed on 24<sup>th</sup> March 2024 while those of the Respondents were dated and filed on 4<sup>th</sup> March 2024. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

### **Legal Analysis**

17. The Petitioner cited the case of *Gitarau Peter Munya vs Dicson Mwenda Kibinji & 3 Others Application No 5 of 2014* (eKLR citation not given) where the Supreme court held that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, constitutional values and the proportionate magnitudes and priority levels attributable to the relevant courses.
18. It submitted that the actions that were taken by the Respondents were against public interest which this court was enjoined by [the Constitution](#) to protect and consequently protect the public good. It was his contention that the Petition herein had met the principles that were set out in the case of *Gitarau Peter Munya vs Dicson Mwenda Kibinji & 3 Others (Supra)*.
19. On their part, the Respondents submitted that whereas the Petitioner's application had sought conservatory orders with the aim of stopping the contracts already awarded and the new contracts from being awarded, and that all the tenders which had been advertised earlier had been re-advertised, the true position was that out of the ninety three (93) tenders, sixty (60) had already been awarded and that what was re-advertised were only twenty three (23) which were unsuccessful.
20. They asserted that the Petitioner had sought orders to punish its own members as some of them had been awarded tenders. They added that although the orders that had been sought would negatively affect the contractors who were already doing the works, it had not made an effort to identify them and enjoin them to the Petition. They averred that the said members would suffer being punished unheard.
21. They pointed out that the Petition was primarily about private pursuits and was not in the public interest to warrant conservatory orders and that the Petitioner had not made full disclosure of all the facts which they disclosed through their Replying Affidavit.
22. In that regard, they placed reliance on the case of *Kenya Electricity Transmission Company Limited vs Kitobu Limited [2019] eKLR* where it was held that conservatory orders bore a more decided public law connotation to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, a position the Supreme Court articulated well in the case of *Gatarau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR*.



23. In its Ruling of 24<sup>th</sup> September 2024, this court dismissed the Respondents' Notice of Preliminary Objection dated and filed on 6<sup>th</sup> February 2024 and found that it had the jurisdiction to hear the Petition herein. The question herein was whether or not the Petitioner had demonstrated that it would be in the interest of justice to grant conservatory orders as this court heard and determined the Petition herein.
24. At this interlocutory stage, the court had to navigate a thin line by avoiding to delve onto the merits of the Petition before hearing the parties but at the same time ascertaining whether a prima facie case had been made out to warrant issuance of conservatory orders. The question of maintaining this balance was addressed in the case of Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 others [2011] eKLR.
25. Notably, a conservatory order was a remedy that was issued to preserve a subject matter until a suit and/or petition was heard and determined. It was an order of status quo ante meant to preserve the substratum of the suit so as to not render the substantive matter an academic exercise.
26. The nature and the principles guiding the grant of conservatory orders were now well settled. In the case of Gatarau Peter Munya vs Dickson Mwenda Kithinji & 2 others (Supra), the Supreme Court held that conservatory orders "...should be granted on the merit of a case and bearing in mind the public interest, the constitutional values, the proportionate magnitudes and priority levels attributable to the relevant courses."
27. It further held that conservatory orders could only be granted if it was shown that it was in public interest that the conservatory orders be granted.
28. From the facts that had been presented before this court, it did appear to this court that a substantial number of the bids were successful, already awarded and works commenced. Indeed, the Petitioner did not rebut this averment. Neither the Petitioner nor the Respondents informed this court of the fate of the bids that were advertised on 12<sup>th</sup> January 2024.
29. As this court was unable to ascertain the status of the re-advertised bids, it found and held that the Petitioner had not established a prima facie case to persuade this court to grant conservatory orders herein. As several entities and/or persons were not parties to the suit herein and they would be affected by any orders issued herein, the balance of convenience tilted in favour of not granting conservatory orders at this interlocutory stage.

### **Disposition**

30. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated 14<sup>th</sup> February 2024 and filed on 15<sup>th</sup> February 2024 was not merited and the same be and is hereby dismissed.
31. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, this court hereby directs that each party will bear its own costs of this application.
32. It is so ordered.

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

**J. KAMAU**

**JUDGE**

