



**Chairman, Garissa Juakali Association v Secretary, County Government of Garissa & another
(Constitutional Petition E009 of 2024) [2024] KEHC 13063 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E009 OF 2024**

JN ONYIEGO, J

OCTOBER 17, 2024

**IN THE MATTER OF ARTICLES 10(2)(A) AND (C) 22(1) AND
(2), 55(B) AND 259(1)(A) AND (C) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THREATENED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10(2)(A)
22(1), 27(1) AND (2), 55(B) AND 259 (1)(A)(B)(C) OF THE CONSTITUTION**

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

**IN THE MATTER OF THE BILL OF RIGHTS UNDER
CHAPTER FOUR OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENT OF GARISSA
IN THE MATTER OF COUNTY GOVERNMENT ACT NO. 17 OF 2012**

BETWEEN

CHAIRMAN, GARISSA JUAKALI ASSOCIATION PETITIONER

AND

SECRETARY, COUNTY GOVERNMENT OF GARISSA 1ST RESPONDENT

SUB COUNTY ADMINISTRATOR, GARISSA TOWNSHIP . 2ND RESPONDENT



JUDGMENT

1. The petitioner instituted this suit by way of a petition dated 02.04.2024 filed together with a notice of motion of even date seeking orders that:
 - i. A declaration that there is a violation of *the constitution* of the republic of Kenya and an infringement of the petitioners' Garissa Jua Kali Association, youths, Vocational Training Institute students right to sharing of devolution and good governance.
 - ii. A declaration that the respondent's act in ordering wheelbarrows and spades is unlawful ab initio.
 - iii. A mandatory injunction to issue against the respondents herein to stop ordering wheelbarrows, rakes and spades outside the county when the same can be manufactured locally. Compel the respondents to register the petitioner as a public health officer forthwith.
 - iv. The respondents be condemned to pay the costs of this petition together with interest at court rate.
2. The petition is supported with an annexed affidavit of Osman Mohamed Barkhadale sworn on 02.04.2024 on his behalf and that of Jua Kali Association of Garissa. It was deponed that the respondents have continually offered contracts to people outside Garissa County to supply goods such as wheelbarrows, rakes and spades yet the same are readily available and can easily be supplied by the locals and more so the petitioner.
3. That the youths in Garissa County are likely to be rendered jobless yet what they are able to do is being taken away from them. It was urged that the respondents have curtailed the Vocational Training Students right to career progression. Additionally, that given that these students have placements in this sector, taking such work outside the county is thus not only unfair but also inhuman.
4. The background of this matter is pegged on the fact that the Garissa Jua Kali Association is a dully registered organization under the *Societies Act*. That its objective inter alia is; to promote value addition for their products; easier accessibility; marketing products; expanding knowledge through interacting with traders and; wealth creation through trading.
5. That the respondents have continually offered contracts to persons outside Garissa County to supply wheelbarrows and spades yet locals are available and ready to provide such services. This court was therefore urged to intervene by issuing the orders sought so that the petitioner can realize its full potential and objectives.
6. The respondents in a replying affidavit sworn by Mohamud Mursal on 01.07.2024 opposed the petition thus urging that the same was incompetent for the reason that the petitioner lacked the locus in presenting this suit before this court. It was urged that the petition did not meet the threshold of a petition as provided for in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and therefore, the same ought to be struck out.
7. The deponent further averred that Garissa County is a public entity whose procurement of goods and services is provided for under article 227(1) of *the constitution*, the Public Procurement and Disposal Act, 2015 and Public Procurement and Asset Disposal Regulations, 2020. That the said provisions demand a fair, equitable, transparent, competitive and cost effective process.



8. That no evidence was tabled before this court to show how contracts were offered, how the alleged contracts of supply and items were issued to the detriment of the petitioner and/or any evidence showing violation of rights and/or infringement of the legitimate expectation of the petitioner and/or public at large.
9. The respondents wondered how the petitioner expected the respondents to award it tenders to supply goods yet it had not applied for the said tenders. It was further averred that the respondents have no powers to dictate contractors or suppliers awarded contracts on where to source their supplies from. That the orders sought herein are tantamount to the court gagging the respondents on whom to transact business with and the same thus violate the principles of free trade and seamless procurement process. The respondent thus urged this court to dismiss the petition as the same was frivolous, misconceived and an abuse of the court process.
10. The court directed that the petition be canvassed by way of written submissions.
11. The petitioners through the firm of Upendo Allan and Associates filed submissions dated 17-07-2024. They listed three issues for determination as follows:
 - i. Whether the petition is properly before the court.
 - ii. Whether the petitioner is entitled to the prayers sought.
 - iii. Who shall bear the costs of the petition.
12. In regards to the first issue, the petitioner relied on the case of Makupa Transit Shade Limited & Another vs Kenya Ports Authority [2015] eKLR to urge that the absence of a resolution to institute a suit or authority to swear an affidavit is not fatal to a suit. The petitioner conceded that indeed, it did not attach a resolution or authority to swear an affidavit but further added that, the deponent in the verifying affidavit stated on oath that he was authorized by the petitioner and due to the fact that the deponent was a director general of the petitioner's corporation, the said deficiency was cured.
13. On whether the petitioner is entitled to the prayers herein, counsel urged that ordering the said equipment from manufacturers outside the county was an affront to the aspect of devolution and the same went contra the provisions of articles 10(2), 27(1)(2), 55(b) and 269(1) (a) (b) (c) of *the constitution*. That the petitioner's youths are likely to be rendered jobless given that what they are capable of producing have been given away to other persons who don't belong to the county in question. It was thus urged that the petition be allowed as prayed and the respondents be condemned to pay the attendant costs in this suit.
14. In opposing the petition, the respondents filed submissions dated 17.07.2024 wherein three issues for determination were listed as follows: whether the petitioner has locus standi to institute this suit; whether the petition meets the competence threshold; whether the petitioner's constitutional rights were violated by the respondents and; whether the petitioner is entitled to the reliefs sought.
15. On the first issue, it was submitted that locus is a point of law that goes to the root of the jurisdiction to entertain a certain party and as such, the same should be dealt with in limine. Reliance to that end was placed on the case of Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000 where the court held that locus signifies a right to be heard and therefore, a person must have sufficient interest to sustain his standing to sue in court.
16. Further reliance was placed on section 41 of the *Societies Act* which stipulates that a society can sue and appear in the name of a duly authorized representative in writing. That the petitioner by just stating that he was a chairman of an association did not fit in the description under the said section



- and therefore, the petitioner lacked standing to move this court. It was argued that in as much a representative of an association can bring a matter before the court, the same in view of articles 22 and 258 of *the constitution* can only happen through a representative authorized in writing as stipulated under section 41(2) of the *Societies Act*.
17. The respondents reiterated that in *Kipsiwo Community Self Help Group vs attorney General and 6 others* [2013] eKLR, it was noted that unincorporated entities have no legal capacity and cannot therefore sue in their own names. In the end, it was urged that the suit herein be struck out with costs as being incompetent.
 18. On whether the petitioner's constitutional rights were violated, it was urged that the petition did not meet the test of a constitutional petition as laid down in the case of *Anarita Karimi Njeru vs Republic* (No. 1) (1979). That the same requires that a party cites how his/her rights have been violated as citing the constitutional provisions alone is not enough. It was contended that the petitioner apart from citing omnibus provisions of *the constitution* and making mere allegations, did not adduce evidence in support of the alleged violations.
 19. It was stated that it remains undisputed that the County Government of Garissa is a public entity and when procuring goods and services, the county is under statutory duty to subject the procurement exercise to due process as is required under article 227(1) of *the constitution*, the Public Procurement and Disposal Act, 2015 and Public Procurement and Asset Disposal Regulations, 2020.
 20. That no proof was provided by the petitioner to show that the alleged tenders were advertised or processed contrary to the law; That the petitioner failed to adduce evidence of expression of interest and/or rebuttable evidence to prove that their application to supply juakali products were unreasonably declined by the respondents.
 21. The respondents reiterated shock that the petitioner expected the respondents to award it tenders to supply goods yet it had not applied for the same. Further, it was contended that the respondents cannot dictate contractors or suppliers on where to source their supplies from. In the end, this court was urged to dismiss the suit herein with costs to the respondents.
 22. I have considered the petition herein together with the response thereof and submissions by both parties. Issues for determination are:
 - i. Whether the petitioner has locus.
 - ii. Whether the constitutional threshold has been established
 - iii. Whether the prayers sought herein can issue.
 23. In the instant case, the petitioner urged that the absence of a resolution to institute a suit or authority to swear an affidavit is not fatal to a suit. That the fact that the deponent in the verifying affidavit stated on oath that he was authorized by the appellant and due to the fact that the deponent was a director general of the petitioner's corporation, the same sufficed. The respondents on the other hand contended that the petitioner by just stating that he was a chairman of an association did not fit in the description under the said section and therefore, the petitioner lacked standing to move this court. It was urged that the threshold that a person purporting to be a representative shall be appointed by the society as an entity in writing is the legal position.
 24. In the case of *Islamia Madrassa Society vs Zafar Niaz & 8 others* (2021) eKLR it was held that it is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its officer's. [Also see *Veronica Wanjira Maringa & 26 others vs A C K Buxton Diocese of Taita Taveta & another* [2022] eKLR].



25. It therefore follows that for a society to sue and be sued, the same can only happen through its officers or the names of the members of the said society. Upon perusing the petition herein, I note that the same was brought before this court via the chairman of the Jua Kali Association on his behalf and that of its members. It therefore follows that in as much as the petition was filed, the same ought to have been done in the name of Osman Mohamed Barkhadle in his capacity as the chairman of the society or in the names of the association's members.
26. The above notwithstanding, a reading of articles 22 and 258 of *the Constitution* in my view, act as the anchor provisions on locus standi. Article 22 provides the right of every person to institute proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened while article 258 makes provision for every person's right to institute proceedings that *the Constitution* has been contravened or is threatened with contravention.
27. In reference to the foregoing, it follows that in both instances, such proceedings may be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members. Be that as it may, the petitioner swore an affidavit that he is the chairman of the Jua Kali Association and as such, it is my view that the same was sufficient. [Also see The Court of Appeal in Mombasa Civil Appeal No. 75 of 2016, Juletabi African Adventure Limited & another vs Christopher Michael Lockley [2017] eKLR and Alfred Njau & 5 others vs City Council of Nairobi [1983] eKLR].
28. On the issue whether the orders sought could issue, the threshold as to what constitutes a Constitutional Petition, Rule 10 of the Mutunga Rules, 2013 clearly provides what a competent petition should include. Rule 21(3) of the Mutunga Rules, 2013 provides that the court may frame the issue for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case and lastly, Rule 22(2)(b) provides that submissions shall contain a brief statement of facts with reference to exhibits, if any, attached to the petition, issues arising for determination ; and a concise statement of argument on each issue incorporating the relevant authorities referred to, together with the full citation of each authority.
29. The Court of Appeal affirmed the test outlined in Anarita Karimi Njeru (1979) eKLR and in Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR to the effect that a petition must state with reasonable precision the constitutional provision infringed or violated and the nature of violation or threat to violation or infringement of a fundamental freedom or bill of rights. On its part, the Supreme Court confirmed the importance of complying with the stated principle by stating in the case of Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR as follows:
- “(349) ...Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between



the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

30. The first question therefore is, whether the petitioner has disclosed a violation of *the Constitution*, the constitutional provisions violated and the manner in which the provisions were violated. In the petition, the petitioner allege violation of their rights and principles enunciated and protected by inter alia article 10(2) (a) of *the constitution* which enables good governance and sharing of devolution power and that the County Government of Garissa has gone contrary to the same by ordering jua kali equipment from outside the county.
31. Article 27(1) (2) of *the constitution* provides for right to equality before the law and freedom from discrimination. For the petitioner to seek preferential treatment from the County Government of Garissa is in itself discriminatory hence unconstitutional.
32. The petitioner’s claim that the youths in Garissa County are likely to be rendered jobless given that what they are capable of producing have been given away to other persons who don’t belong to the county in question is in my view an absurdity in itself as it seeks to isolate the rest of Kenyans in the jua kali sector from trading within Garissa.
33. The question is whether the petitioner’s rights were violated as alleged and to what extent. The respondent in rebuttal urged that the petitioner could not be heard claiming that its rights were infringed upon when there was no proof provided to show expression of interest and/or rebuttable evidence to prove that their application to supply juakali products were unreasonably declined by the respondents.
34. In as much as the petitioner urged that the said equipment should be supplied by the youths of Garissa County, clearly, my perusal of the record herein did not meet any good reason as to why the petitioner should be treated differently to other suppliers. The petitioner did demonstrate that they have ever applied for tenders and were discriminated against. They can not seek preferential treatment contrary to the laid down procurement rules which apply nationally.
35. The foregoing notwithstanding, article 227 (1) stipulates that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
36. As is correctly argued by the respondents, the County Government of Garissa is a public entity and it would thus be expected in reference to article 227(1) of *the constitution* that when procuring goods and services, it is under statutory duty to subject the procurement exercise to the dictates provided for under *the constitution*, the Public Procurement and Disposal Act, 2015 and Public Procurement and Asset Disposal Regulations, 2020.
37. Section 157 of the said Act makes provision on how the candidates may participate in preference and reservations. It states that:
 - (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.
 - (2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.



- (3) The preferences and reservations referred to in subsection (2) shall—
- (a) be non-discriminatory in respect of the targeted groups;
 - (b) allow competition amongst the eligible persons; and
 - (c) be monitored and evaluated by the Authority.
- (4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—
- (a) candidates such as disadvantaged groups;
 - (b) micro, small and medium enterprises;
 - (c) works, services and goods, or any combination thereof;
38. It therefore follows that the above is the criterion which persons ought to follow and the preferential treatment that applies when bidding for a tender. As such, there is no favoritism or hoodwinking of whatever form as urged by the petitioner herein. After all, it is within the County Government to trade with whomever it pleases as long as the procurement procedures and regulations have been met. Thus urging this court to direct that the County Government only trades with the petitioner would amount to an affront to the provisions of free trade and the provision(s) of *the constitution*.
39. In my view the petitioner has failed to discharge the burden of proof to the required standard. The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] SGCA*: -
- “The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”
40. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In a nutshell, I do not find any provision of *the constitution* that has been violated or infringed or likely to be violated nor has the petitioner established with any degree of precision the nature of violation, threat to violation or infringement suffered or likely to be suffered in line with the *Anarita Karimi Njeru* case above quoted.
41. In the foregoing, I am unable to agree with the petitioner that it deserves the prayers sought herein and as such, the petition is dismissed for want of merit with no order as to costs.

DATED, DELIVERED AND SIGNED VIRTUALLY THIS 17TH DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE

