



REPUBLIC OF KENYA



Odhiambo & another v National Police Service & 3 others; CIC General Insurance Limited & 6 others (Interested Parties) (Petition E006 of 2023) [2023] KEHC 719 (KLR) (Constitutional and Human Rights) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E006 OF 2023

HI ONG'UDI, J

FEBRUARY 9, 2023

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF SECTIONS 3(2)(A) (IV), 5(1)(G), 15(1A) & (5) OF THE NATIONAL HEALTH INSURANCE FUND ACT NO. 1 OF 2022

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLES 1, 2, 3(1), 10(1) & (2), 27, 43(1) (A) AND (2), 47 & 227 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PROTECTION OF ARTICLES 21, 22, 23, 159, 165(3B) & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED FRAUDULENT AWARD OF TENDER NO. MICNG/002/2022 – 2023 – PROVISION OF MEDICAL INSURANCE COVER FOR THE MEMBERS OF THE NATIONAL POLICE SERVICE AND THE KENYA PRISONS SERVICE

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS, CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010

BETWEEN



CHRISPNE ONYANGO ODHIAMBO 1ST PETITIONER
HENRY NAMITI SHITANDA 2ND PETITIONER

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT
KENYA PRISONS SERVICE 2ND RESPONDENT
CABINET SECRETARY – MINISTRY OF INTERIOR AND COORDINATION
OF NATIONAL GOVERNMENT 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

CIC GENERAL INSURANCE LIMITED INTERESTED PARTY
BRITAM GENERAL INSURANCE COMPANY (K) LIMITED INTERESTED
PARTY
OLD MUTUAL GENERAL INSURANCE LIMITED INTERESTED PARTY
NATIONAL HEALTH INSURANCE FUND INTERESTED PARTY
PUBLIC PROCUREMENT REGULATORY AUTHORITY INTERESTED
PARTY
CABINET SECRETARY – NATIONAL TREASURY INTERESTED PARTY
CABINET SECRETARY – MINISTRY OF HEALTH INTERESTED PARTY

RULING

1. The two petitioners filed this petition dated January 10, 2023 claiming violation of their rights under various articles of the Constitution and the public Procurement & Asset Disposal Act. They therefore seek several orders and declarations:
2. This Ruling is in respect of the Preliminary Objection (P.O) raised by the 1st, 2nd and 3rd interested parties dated January 17, 2023. In the said P.O. the applicants seek to have the petition filed herein struck out for being bad in law hence fatally defective on the following grounds:
 - i. The petitioners have ignored, circumvented and/or failed to pursue and exhaust alternative dispute resolution mechanisms relating to grievances over tender processes relating to public procurement as prescribed under the Public Procurement and Asset Disposal Act, 2015.
 - ii. In the circumstances, the petition amounts to an abuse of the Court process and this Honourable Court lacks the jurisdiction to hear and determine this petition, with the said jurisdiction reserved for appeals from decisions of the Public Procurement Administrative Review Board.
3. The P.O was argued orally. Mr. Mbaluto for the 1st, 2nd & 3rd interested parties while referring to paragraph 7 of the affidavit of Crispine Onyango and annexure C002 submitted that a tender for provision of Medical services was issued pursuant to an invitation to tender to members of the public.



- It was issued by a public entity and the petitioner obtained the tender document. The documents referred to are at page XII annexure of C002.
4. On who a candidate is under the *Public Procurement & Asset Disposal Act* (PPDA) counsel referred to section 2 of the said *Act*. He thus submitted that from the 1st petitioner's own averments he fell under that definition. In reference to the case of *Central Bank of Kenya, & another v Okiya Omtatab Okoiti & 6 others* 2018 (eKLR) ("De-la-Rue case") counsel submitted that the tender therein was never available to members of the public.
 5. Counsel further submitted that under section 167 of the *PPDA* parties aggrieved by the tender process have a right of review and appeal of the same. It is therefore not proper for this Court to deal with this matter. He referred to a number of authorities among them:
 - i. *Peter Ochara Anam & 3 others v Constituencies Development Fund Board & others* [2011] eKLR
 - ii. *Maya Duty Free Limited v Kenya Airport Authority & others* - Nairobi High Court Constitutional Petition No. 45 of 2017.
 6. On timelines as is the case here, he referred to *Vania Investments Poll Limited v Capital Markets Authority & Rea Treading Limited & others (interested parties)* paragraphs 38 – 39. He argued that the petitioners had until 30th December 2022 to move to the Tender Board. Further that the *Okiya Omtatab* ("De-la-Rue case") (*supra*) was overturned by the Court of Appeal.
 7. Mr. Marwa counsel for the respondents, 6th & 7th interested parties supported the P.O and associated himself with the submissions by Mr. Mbaluto for the 1st – 3rd interested parties.
 8. The P.O was opposed by the Petitioners. Mr. Angaya who appeared for them, submitted that the definition of a candidate as stated by Mr. Mbaluto was misleading as it was too general. On this he referred to annexure C003 which he submitted is restrictive. He argued that the petitioners are not underwriters nor consortiums hence their being left out. He argued that section 174 PPDA gives liberty to other parties to move the court. Further that the Review board has no jurisdiction to deal with constitutional issues. He submitted that the petitioners moved the court under section 165 PPDA challenging the wrong decision made.
 9. Counsel invited the Court to consider the case of *Okiya Omtata*, ("De-la-Rue case") (*supra*), which laid down all circumstances under which one files an appeal before the Board. They further submitted that the petitioners were properly before the Court and were not candidates as envisaged under section 2 of *PPDA*.
 10. In a rejoinder Mr. Mbaluto submitted that section 2 of *PPDA* was very clear and did not require elaboration. He added that there is a distinction between eligible tenderers and candidates and the petitioners ought to have challenged the decision awarding the tender.

Analysis and determination

11. I have carefully considered the P.O plus the rival submissions by the parties herein. The 1st, 2nd and 3rd interested parties supported by the respondents, 6th & 7th interested parties are challenging this court's jurisdiction to hear this petition. It is their argument that under the *PPDA* are alternative dispute resolution mechanisms which the petitioners did not exhaust before filing this petition. On the other hand the petitioners submit that they were excluded from the tender process since they are not underwriters or consortiums etc. The main issue for determination is whether the P.O dated 17th January 2023 is merited.



12. This Court is therefore called upon to address the issue of jurisdiction which is derived from the law. In the case of *In the matter of Interim Electoral Commission* [2011] eKLR the Supreme Court opined as follows:

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and principles laid out in judicial precedent....

[30] ...jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

13. The High Court's jurisdiction to entertain matters is found in article 165(3) (d) of the *Constitution* which provides as follows:

(3) Subject to clause (5), the High Court shall have –

- a. Unlimited original jurisdiction in criminal and civil matters;
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened;
- c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this *Constitution* to consider the removal of a person from office, other than a tribunal appointed under article 144;
- d. Jurisdiction to hear any question respecting the interpretation of this *Constitution* including the determination of-
 - i. the question whether any law is inconsistent with or in contravention of this *Constitution*.
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this *Constitution*.
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. A question relating to conflict of laws under article 191; and
 - v. Any other jurisdiction, original or appellate, conferred on it by legislation.

14. Upto this point one may argue that this court has jurisdiction to deal with the petition herein. However the issue raised by the 1st – 3rd interested parties and supported by the respondents, 6th & 7th interested parties is that the petitioners' issue ought to have been dealt with by the Review Board and only come to this Court by way of Review or Appeal. The petitioners have refuted this. This Court has the duty to examine the pleadings and apply the law accordingly.

15. A perusal of the prayers sought by the petitioners brings out prayers No. 3.4, 3.5 & 3.6 as outstanding and key in the petition. They state as follows:



- 3.4 4 A declaration that the advertisement and award of TENDER NO. MICNG/002/2022-2023 the provision of medical insurance coverage for the members of the national police service and the Kenya prisons service to the 1st to 3rd interested parties was contrary to section 4(2) of the Public Procurement and disposal act.
- 3.5 5 A declaration that the award of TENDER NO. MICNG/002/2022-2023 – the provision of medical insurance coverage for the members of the national service and the Kenya prisons service to the 1st to 3rd interested parties was issued contrary to sections 53 and 58(1) of the Public Procurement and disposal act and Article 227 of the Constitution of Kenya.
- 3.6 6 An order revoking award of TENDER NO. MICNG/002/2022-2023 - the provision of medical insurance coverage for the members of the national police service and the provisions.
16. These prayers show that the petitioners were not satisfied with the tendering process that was involved in the award of Tender No MICNG/002/2022-2023. Even what they are raising in their prayers No.3.1 – 3.3 is still about that same issue. I am therefore satisfied that the respondents and interested parties are challenging this court’s jurisdiction to deal with the petition which is a pure point of law as well stated in the case of Mukisa Biscuit Manufacturers Ltd v. Westend Distributors Ltd, [1969] EA. 696. The statute that governs the tendering process is the PPDA. It sets out the mechanisms for challenging the tendering and disposal of assets process through the Public Procurement Administrative Review Board established under Section 27 of the PPDA.
17. Section 28 of the Act sets out the functions of the Review Board to be as follows:
1. The functions of the Review Board shall be-
 - a. Reviewing, hearing and determining tendering and asset disposal disputes; and
 - b. To perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
 2. In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazette by the Cabinet Secretary.
18. Section 167 (1) of the PPDA provides:
- “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, or disposal process as in such manner as may be prescribed.”
- The said Act under section 2 defines a candidate as:
- “a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity”
- It further defines a Tenderer as:
- “a person who submitted a tender pursuant to an invitation by a public entity”
19. From the pleadings the petitioners have not informed the Court as to whether they were Candidates or Tenderers. What is however clear is that they had in their possession the Tender documents which have



been annexed to the 1st petitioner's supporting affidavit as "C002". They must have obtained them pursuant to the invitation notice. It follows that section 167 (1) of the PPDA applies to them.

20. Section 167(4) of the PPDA provides:

- a. the choice of a procurement method;
- b. a termination of a procurement or asset disposal proceeding in accordance with section 63 of this Act and
- c. where a contract is signed in accordance with section 135 of this act.

It has not been indicated anywhere that the petitioners' complaints are not subject to review of procurement proceedings as set out above, under section 167(4). Their complaints should have been forwarded to the Review Board. The composition of the Review Board confirms that the members have the qualifications to handle the challenges being raised by the petitioners.

21. Besides the Review Board where the procurement processes are challenged the PPDA provides for a mechanism where investigations may be carried out upon receipt of a complaint. Section 35 of the Act provides:

- (1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceedings or contract with respect to a procurement or disposal with respect to a state organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.
- (2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.
- (3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

There is no evidence to show that the petitioners gave any information of their misgivings in respect of the procurement to the National Treasury or Public Procurement Regulatory Authority. Had they done so, their complaints would have been investigated as set out by the law. Any person is allowed to file such complaint before the Authority. Avoiding that process does not assist any party. This brings me to the doctrine of exhaustion.

22. The doctrine of Exhaustion is defined in Black's Law Dictionary 10th Edition as follows;

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be hardened by cases in which judicial relief is unnecessary.”

23. Section 9 of the Fair Administrative Action Act provides for the doctrine of Exhaustion as follows:

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.
- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal



mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
24. The outlined processes must be adhered to as was held in (i) *Okiya Omtatah Okoiti & another v Kenya Power & Lighting Company & 4 others* [2020] eKLR; (ii) *Martin Kabubii Mwangi vs. County Government of Laikipia* [2019] eKLR.
25. Where an administrative mechanism for resolution of disputes has been put in place, parties have been urged to first comply with such a process before engaging in the Judicial process except in very exceptional cases. In the case of *IEBC Exparte National Super Alliance (NASA) Kenya 7 6 others* [2017] eKLR on exception to the doctrine of exhaustion the Court held that:

“As the Court of Appeal acknowledged in the *Shikara Limited* case (*supra*), the High Court may in exceptional circumstances find that exhaustion requirements would not serve the values enshrined.”

See: (i) *Night Rose Cosmetics [1972] Ltd, v Nairobi County Government & 2 others* [2018] eKLR. (ii) *Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2020] eKLR.

26. On analysis of the Petition and submissions made I do not find any special circumstances that would have this Court deal with issues reserved for the Public Procurement Regulatory Authority and the Public Procurement Regulatory Board. Even after a decision has been made by the Board, it must be known that such a decision may only be challenged before the Judicial Review division, and not this division.

The upshot is that the Preliminary Objection has merit and is allowed. Let the petitioners exhaust the processes set under the law before engaging the Judicial process. The petition is struck out with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

