



**Okoti v Accounting Officer Kenya Electricity Generating Company PLC & another; Consortium of Sepco III Electric Power Construction Co. Ltd and Zorlu Enerji Elektrik Uretim A.S & another (Interested Parties) (Petition E193 of 2022) [2023] KEHC 567 (KLR) (Constitutional and Human Rights) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E193 OF 2022**

**HI ONG'UDI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**OKIYA OMTATA OKOITI ..... PETITIONER**

**AND**

**THE ACCOUNTING OFFICER KENYA ELECTRICITY GENERATING  
COMPANY PLC ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ELECTRICITY GENERATING CO.PLC ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE CONSORTIUM OF SEPCO III ELECTRIC POWER CONSTRUCTION CO.  
LTD AND ZORLU ENERJİ ELEKTRİK ÜRETİM A.Ş .... INTERESTED PARTY  
JAPANESE INTERNATIONAL COOPERATION AGENCY .... INTERESTED  
PARTY**

**RULING**

1. This is the 1<sup>st</sup> interested party's preliminary objection (P.O) dated 20<sup>th</sup> May 2022 to the petition dated 29<sup>th</sup> April 2022. The petition challenges the constitutional and legal validity of awarding Tender No.KGN-BDD-03-2019 to the 1<sup>st</sup> interested party. The objection is on the grounds that:
  - i. The petition is a disguised judicial review application which is completely statutorily time barred.



- ii. The petition and all issues raised therein are res judicata in light of the judgements of the court in NRB JR E162 of 2021 as consolidated with JR E146 of 2021 and Civil Appeal No. E012 of 2022.
  - iii. The petition does not raise a constitutional point and is malafides.
2. The petitioner in response filed the following grounds of opposition dated 25<sup>th</sup> July 2022:
- i. The preliminary objection is incompetent.
  - ii. The preliminary objection is vexatious, scandalous and is brought malafides.
  - iii. The preliminary objection is an abuse of the process of the Honourable Court.
  - iv. The meritless preliminary objection should be dismissed with costs.
3. The respondents' did not file a response to the P.O but they filed submissions.

## Parties' Submissions

### The 1<sup>st</sup> Interested Party's Submissions

4. The firm of Kinyanjui, Kirimi and Company Advocates on behalf of the 1<sup>st</sup> interested party filed written submissions dated 16<sup>th</sup> December 2022. Counsel identified the issues for determination as:
- i. Whether the preliminary objection meets the threshold for its grant.
  - ii. Whether the petition is disguised as a judicial review application which is statutorily time barred.
  - iii. Whether the issues raised in the petition are *res judicata*.
  - iv. Whether the petition raises constitutional points.
5. Counsel while relying on the case of *Mukisa Biscuits Manufacturing Co. LTD v West End Distributors* (1969) EA 696 submitted that the P.O raises a pure point of law, premised on the doctrine of *res judicata*. In support he cited the case of *Omondi v National Bank Kenya LTD & 2 others* [2001]eKLR where it was held that the plea of res judicata is a pure point of law which if determined in favour of the respondents could conclude the litigation.
6. On the second issue, he submitted that the petitioner in his prayers seeks to have the award of Tender No.KGN-BDD-03-2019 to the 1<sup>st</sup> interested party quashed. Counsel argued that the prayer for certiorari orders was a judicial review relief, which was completely time barred by virtue of Order 53 Rule 2 of the *Civil Procedure Rules*, 2010. He therefore submitted that the petitioner sought to challenge an award that was issued on 18<sup>th</sup> August 2021, six months after the decision had been made. On this premise Counsel asserted that the petitioner had mischievously disguised a judicial review matter which is time barred as the instant petition.
7. Counsel on the third point submitted that all the issues raised in the petition are *res judicata*. He informed that the Consortium of TSK Electronica Y Electricidad S.A. & Ansaldo Energia had moved the Public Procurement Administrative Review Board through Application No.120 of 2021 dated 21<sup>st</sup> October 2021.Later on, the parties appealed the Board's decision at the High Court in Judicial Review Misc. Application No. E146 of 2021 on some parts of the Board's decision.



8. On the other hand, the respondents being dissatisfied with the whole decision of the Board appealed against it in the High Court in Judicial Review Misc. Application No. E162 of 2021. The two appeals were consolidated by the High Court, which in its final verdict quashed the decision of the Public Procurement Administrative Review Board. It was submitted that the High Court decision covered the issue of the validity of Tender No. KGN-BDD-03-2019.
9. The High Court decision was appealed under Civil Appeal No. E012 of 2022 which was similarly dismissed by the Court of Appeal on 28<sup>th</sup> February 2022. Considering this, Counsel submitted that the instant petition is an attempt to re-litigate the issues finally settled once more. In support of this position, Counsel relied on the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* (2022) eKLR where it was held that in making a determination in an application for *res judicata*, the Court ought to look at the decision claimed to have settled the issues in question to ascertain whether the issues were really determined in the decision, whether parties were litigating under the same title and whether the matter was decided by a court of competent jurisdiction.

Also see

- (i) *Elena D. Korir v Kenyatta University & 4 others* (2017) eKLR,
  - (ii) *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* (2022) eKLR
  - (iii) *National Rainbow Coalition v IEBC & 3 others* (2017) eKLR.
10. On the fourth point, Counsel submitted that the issue in the petition is the tender award to the 1<sup>st</sup> interested party and the denial of the award to Consortium of TSK Electronica Y Electricidad S.A. & Ansaldo Energia. It was argued that this flows from a question of review of an administrative function which falls within the jurisdiction of the Public Procurement Administrative Review Board and question finally settled by the Court of Appeal. Considering this, Counsel argued that the issues do not deal with a claim of infringement of fundamental rights and freedoms of any entity.
  11. In support of this view, Counsel relied on the case of *National Rainbow Coalition (supra)* where the Court held that it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. Also see
    - (i) *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others*, Supreme Court Civil Application No.2 of 2011,
    - (ii) *Joyce Cherop Kaspandoy & 609 others v Kenya Power and Lighting Company* (2019) eKLR
    - (iii) *Gacheri David Mukindia v Charles Murungu Mukindia & 11others* (2021) eKLR. To this end, Counsel submitted that the petition ought to be dismissed for lack of merit.

### **The Petitioner's submissions**

12. The petitioner filed written submissions dated 29<sup>th</sup> July 2022 and further supplementary submissions dated 25<sup>th</sup> January 2023. He submitted that the P.O does not have merit because it does not raise pure points of law as stated in the case of *Mukisa Biscuits Manufacturing Co. (supra)*. He also referred to:
  - (i) *Nitin Properties LTD v Singh Kalsi & another* (1995) eKLR,
  - (ii) *Oraro v Mbaja* (2007) KLR 141,
  - (iii) *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* (2014) eKLR, among others.



13. On the point that the petition is time barred, he submitted that an objection of time limitation cannot be raised as a P.O as it is not a point of law. He argued that the 1<sup>st</sup> interested party had not demonstrated that the petition was disguised as a judicial review application. Furthermore that for a claim for *res judicata* to be sustained the same ought to be raised through a pleading not a P.O. Likewise it must satisfy the requirements set out by the Supreme Court in the case of [John Florence Maritime Services LTD & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2021) eKLR. He thus submitted that the P.O lacked merit and ought to be dismissed.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

14. The respondents in support of the 1<sup>st</sup> interested party's P.O and through the firm of Mwaniki, Gachoka and Company Advocates filed written submissions dated 23<sup>rd</sup> January 2023. The issues counsel identified for determination are similar to those raised by the 1<sup>st</sup> interested party.
15. He submitted that Section 175 of the [Public Procurement and Asset Disposal Act](#) provides that a person aggrieved by the Board's decision should file an appeal with the High Court within 14 days which decision will be final. Reiterating the litigation history as submitted by the 1<sup>st</sup> interested party, Counsel submitted that the Court of Appeal in [Speaker of the National Assembly v Karume](#) (1992) KLR 21 held that where there is a clear procedure for redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed.
16. Similar dependence was placed on the cases of *R. v IEBC & others ex parte the National Super Alliance Kenya* (2017) eKLR and [Night Rose Cosmetics\(1972\) LTD v Nairobi County Government & 2 others](#) (2018) eKLR. On this premise Counsel urged this Court to invoke the principle of constitutional avoidance and further that the instant petition is an appeal or review of the Court of Appeal decision hence this Court lacks jurisdiction.
17. Counsel further submitted that the impugned Tender No.KGN-BDD-03-2019 was premised on a bilateral Agreement with the 2<sup>nd</sup> interested party dated 16<sup>th</sup> March 2018.This was to be implemented by the 2<sup>nd</sup> respondent. After the bids were tendered, the tender was eventually awarded to the 1<sup>st</sup> interested party on 17<sup>th</sup> September 2021.
18. Further, that one of the bidders, the Consortium of TSK Electronica Y Electricidad S.A. and Ansaldo Energia challenged the award by way of Review Application No.120 of 2021 before the Public Procurement Administrative Review Board. The party prayed that the award tender to the 1<sup>st</sup> interested party be set aside and a re-evaluation of the tender done. It was noted that the Board nullified and set aside the award and ordered a re-evaluation of the tender. This decision was soon after followed by the Court litigation that has been highlighted by the 1<sup>st</sup> interested party.
19. Counsel thus submitted that the Tender had been litigated on from the Review Board to the Court of Appeal and hence this Court lacks jurisdiction to entertain the petition as the issue has been conclusively decided by a competent Court. He cited the case of [Owners of the Motor Vessel 'Lilian s'v Caltex Oil \(Kenya\) LTD](#) (1989) KLR 1 where it was held that without jurisdiction a court has no power to make one more step. Also see [Communications Commission of Kenya & 5 others v Royal Media Services LTD & 5 others](#) (2014) eKLR.
20. On the principle of *res judicata*, Counsel submitted that the Court of Appeal in the case of [John Florence Maritime Services LTD & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) eKLR held that the rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive



litigation over the same matter. It was therefore stressed that the matter before this Court was *res judicata*.

21. On the final issue, he submitted that the petition had been brought in bad faith. This is because any person who seeks to institute a claim for the violation of the Constitution must do so based on a legitimate, *bona fide* and genuine claim as held by the Supreme Court of India in the case of *State of Uttaranchal v Balwant Singh Chauhal & others* CA 1134-1135 of 2002. Also see;
- (i) *Sachidanad Pandey v State of West Bengal* (1987) SCC 295
- (ii) *Jasbhai Desai v Roshan Kumar*(1976) 30 SCR 58b.
22. According to Counsel the disgruntled bidders are trying to use this petition to attack the validity of the decision of the Court of Appeal to get a different result. He therefore submitted that this Court has a duty to ensure parties do not file petitions in the guise of public interest for ulterior motives which is an abuse of the court process. He added that no public interest had been demonstrated by the petitioner in this matter and the same should be dismissed.

### **Analysis and Determination**

23. Having considered the pleadings and submissions of the parties herein, the issue that arises for determination is:

### **Whether the preliminary objection dated 20<sup>th</sup> May 2022 is merited.**

24. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Limited* (*supra*) as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

25. The Court went further to note that:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

26. Likewise, the Court in the case *Oraro vs. Mbaja* (*supra*) on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection



must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

27. The P.O in this matter is founded on the notion that the instant petition violates the doctrine of *res judicata* which in essence challenges this Court’s jurisdiction to entertain this matter. Further the objection states that the petition is statutorily time barred and does not raise a constitutional issue thus invoking the principle of constitutional avoidance.
28. An examination of the three grounds, discloses that the same do not bear factual aspects calling for proof by the parties. They are all are based on the law and its principles. In essence therefore it is precise to state that the grounds raised by the 1<sup>st</sup> interested party in the P.O meet the threshold of a pure point of law. In effect, the P.O if successful, is capable of disposing of the whole matter. The question that evidently follows this conclusion is whether the petition invokes the cited legal principles with reference to this Court’s jurisdiction to entertain the matter. I will now proceed to consider whether the objection ought to be sustained.
29. Jurisdiction is the lifeline of a Court’s ability to entertain matters and so a Court acting without jurisdiction is acting in vain. The Supreme Court clearly addressed the issue of jurisdiction in the case of *Samuel Kamau Macharia (supra)*.
30. The gist of the petitioner’s grievance is captured in paragraph 48 of the petition that bears his prayers. This paragraph states as follows:
  - i. A declaration that the award of Tender No.KGN-BDD-03-2019 to the 1<sup>st</sup> interested party by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is invalid, null and void because it was done in violation of the Constitution and the Guidelines for procurement under Japanese ODA Loans,2012.
  - ii. An order of *certiorari* to call into court and be quashed both the award to the 1<sup>st</sup> interested party of Tender No.KGN-BDD-03-2019 and the contract awarded to the 1<sup>st</sup> interested party.
  - iii. A declaration that the Deputy Registrar of this Court be directed to inform law enforcement of the outcome of this suit with a view to having the Ethics and Anti- Corruption Commission and Director of Criminal Investigations criminally investigate the 1<sup>st</sup> and 2<sup>nd</sup> respondents for purposes of the Director of Public Prosecutions criminally prosecuting them where culpable.
  - iv. ....
  - v. ....
31. The Constitution with reference to the procurement process under Article 227 of the *Constitution* provides that:
  1. When a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
  2. An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.
32. It is clear that the *Public Procurement and Asset Disposal Act* of 2015 was enacted in order to give effect to Article 227 of the *Constitution* so as to provide for procedures for efficient public procurement and asset disposal by public entities. The respondents and 1<sup>st</sup> interested party have submitted that the dictates of the law were exhausted by the parties all the way to the Court of Appeal which upheld the tender award in favour of the 1<sup>st</sup> interested party. To them this raises the issue of *res judicata*.



33. This principle of *res judicata* is provided for under Section 7 of the [Civil Procedure Act](#), CAP.21 which states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

34. The Supreme Court in the case of [Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion](#) [2016] eKLR as regards the doctrine of *res judicata* held as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights...”

35. The Court of Appeal in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR on the doctrine of *res judicata* observed as follows:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

36. The said Court concluded stating that:

“The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is.”

37. Furthermore, the Supreme Court in the case of [Communications Commission of Kenya & 5 others](#) (*supra*) paragraph 332 – 333 spoke on the same issue.

38. From the material supplied to this Court the Public Procurement Administrative Review Board in Application No.120 of 2021 which requested for review of the decision of the 1<sup>st</sup> respondent in the matter of Tender No.KGN-BDD-03-2019 in its Ruling dated 21<sup>st</sup> October 2021 quashed the 1<sup>st</sup> respondent’s decision and directed that a re-evaluation of the tenders be conducted.

39. On appeal at the High Court the parties in the case of [Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricidad S A and Ansaldoenergia & another \(Interested parties\) Ex parte Kenya Electricity Generating Company Plc \(Kengen\)](#) [2021] eKLR sought the following orders:

That this Honourable Court be pleased to grant the following Judicial Review Orders:



- a. An order of *certiorari* to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board (the) Respondent herein dated the 21<sup>st</sup> October 2021 in Review Application No.120 of 2021 in regard to Tender No. KGN BDD-03-2019 being the Tender for the Procurement of Plant Design, Supply and Installation of Olkaria I units 1,2, and 3 Geothermal Power Plant Rehabilitation Project;
- b. ....
- c. .....

40. The High Court in its finding held as follows:

- a. An order of *certiorari* be and is hereby issued to bring into this Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board (the) Respondent herein dated the 21<sup>st</sup> October 2021 in Review Application No.120 of 2021 in regard to Tender No.KGN BDD-03-2019 being the Tender for the Procurement of Plant Design, Supply and Installation of Olkaria I units 1,2, and 3 Geothermal Power Plant Rehabilitation Project;
  - b. High Court Judicial Review App. No. 146 of 2021 is dismissed.
  - c. Each party is to bear its own costs of the consolidated Applications.
41. This decision was subsequently appealed against at the Court of Appeal vide Civil Appeal No.E012 of the 2022. The said court upheld the decision of the High Court. The petitioner has not rebutted any of these facts.
42. From the substance of the petitioner’s case, it is discernable that his case challenges the process awarding the tender and ultimately the award of the tender to the 1<sup>st</sup> interested party. The issues touching on the petition therefore have their bearing on the procurement process which was challenged at the Public Procurement Administrative Review Board and subsequently appealed in the Courts.
43. The issues herein were presented as constitutional ones but their root is in the procurement process that was involved in the award of Tender No.KGN-BDD-03-2019. It is irrefutable that the issues raised in the instant petition were the subject matter of the suits cited herein and finally determined by Courts of competent jurisdiction.
44. It is also not disputed that the parties herein are the same ones that were cited in the said suits save for the petitioner and the 2<sup>nd</sup> interested party. I do find that the petition as framed has violated the doctrine of *res judicata* and this Court is barred from entertaining it.
45. Besides the issue of *res judicata* the respondents’ further argued that the petitioner in filing this petition by passed the laid down procedure as provided in the *Public Procurement and Asset Disposal Act* of 2015. It was submitted that the petition did not raise any constitutional issues and as such invoked the principle of constitutional avoidance. This was aptly discussed in the case of *Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2022] eKLR as follows:

- “ 17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A



party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. ....:

- 18., Similarly, the same court stated in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

46. I am inclined to agree with the respondents on this point, for the reason that Article 227 of the *Constitution* makes it clear that the procurement process of a public entity will be dictated by an Act of Parliament. The Act of Parliament is the *PPDA* which provides a clear dispute resolution mechanism from the Public Procurement Administrative Review Board all the way to the Courts. This legal mechanism cannot be overlooked.
47. It is therefore not proper for a party to come and claim violation of his / her constitutional rights, while snubbing the legal mechanisms provided for by the law in line with the constitution.
48. For the reasons stated above I find merit in the preliminary objection raised which I hereby allow and strike out the petition with costs.

Orders accordingly.

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

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

