



**Transnational Computer Technology Limited v Attorney General;
National Assembly & another (Interested Parties) (Petition E091 of 2022)
[2023] KEHC 3661 (KLR) (Constitutional and Human Rights) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3661 (KLR)

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

PETITION E091 OF 2022

M THANDE, J

APRIL 14, 2023

BETWEEN

TRANSNATIONAL COMPUTER TECHNOLOGY LIMITED PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

AND

THE NATIONAL ASSEMBLY INTERESTED PARTY

THE SENATE INTERESTED PARTY

For the High Court to entertain a matter in which the Court of Appeal had pronounced itself would be to violate the constitutional judicial hierarchical norm

The petition challenged the constitutionality of section 175(3) and (4) of the Public Procurement and Asset Disposal Act, 2015. The court noted that the issue of the constitutionality of section 175 of the Public Procurement and Asset Disposal Act had been determined by the Court of Appeal. The court thus held that to entertain the matter in respect of which the Court of Appeal had pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm.

Reported by Kakai Toili

Jurisdiction - jurisdiction of the High Court - jurisdiction in matters that had been determined by the Court of Appeal - whether the High Court could entertain a matter in respect of which the Court of Appeal had pronounced itself.

Brief facts

The instant petition challenged the constitutionality of section 175(3) and (4) of the , 2015 (). The petitioner took issue with the section 175(3) and (4) of the which provided that judicial review applications in public procurement matters in the High Court and appeals in the Court of Appeal were to be determined within 45



days from date of filing the appeal. The petitioner contended that the provisions did not take into consideration the impracticability of hearing and concluding such matters within the prescribed period. More so because of the increase in challenges to administrative actions in view of the expansive Bill of Rights which included the right to fair administrative action. It was the petitioner's case that the impugned provisions violated the right to access to justice. Further that the national values and principles of governance could not be sacrificed at the altar of finality and expedition and that there must be a balance. Additionally, the petitioner stated that the impugned provisions were unconstitutional to the extent that they limited the jurisdiction of the High Court and Court of Appeal to 45 days.

Issues

Whether the High Court could entertain a matter in respect of which the Court of Appeal had pronounced itself.

Held

1. The of Kenya, 2010, provided for the hierarchy of courts in Kenya. At the helm was the Supreme Court followed by the Court of Appeal. The instant court fell below the Court of Appeal. The decisions of the Court of Appeal were binding on the court. The issue of the constitutionality of section 175 of the had been determined by the Court of Appeal. To entertain the matter in respect of which the Court of Appeal had pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm.

Petition dismissed.

Citations

Cases

1. Al Ghurair Printing And Publishing LLC v Coalition for Reforms and Democracy , Independent Electoral and Boundaries Commission & Public Procurement Administrative Review Board (Civil Appeal 63 of 2017; [2017] KECA 565 (KLR)) — Explained
2. Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others — Explained
3. Dida, Mohammed Abduba v Debate Media Limited & Media Council of Kenya (Civil Appeal 238 of 2017; [2018] KECA 642 (KLR)) — Mentioned
4. Jacques Charl Hoffman v South African Airways (CCT 17 of 2000) — Followed
5. Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020; [2022] KESC 62 (KLR)) — Explained
6. Republic v Public Procurement Administrative Review Board; Kenya Ports Authority & 7 others (Interested Party); Liason Group (Insurance Brokers) Limited & 3 others (Exparte) (Judicial Review Application 3A & 30 of 2020 & Judicial Review Miscellaneous Application 2 of 2020 (Consolidated); [2022] KEHC 285 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — article 2(4); 10; 47; 48; 50; 159; 160; 164; 165 — Interpreted
2. Fair Administrative Action Act (Act No 4 of 2015) — article 47 — Interpreted
3. Public Procurement And Asset Disposal Act (Act No 33 of 2015) — section 175, 175(3)(4) — Interpreted

Advocates

None mentioned



JUDGMENT

1. By a Petition dated March 7, 2022, the Petitioner challenges the constitutionality of Section 175(3) and (4) of the [Public Procurement and Asset Disposal Act](#), 2015 (PPAD Act) and seeks the following reliefs:
 - a) A declaration that sections 175(3) and (4) of the [Public Procurement and Asset Disposal Act](#), offend Articles 2(4), 10, 47, 48, 50, 159, 160, 164, 165 & 259 of [the Constitution](#).
 - b) A declaration that sections 175(3) and (4) of the [Public Procurement and Asset Disposal Act](#), 2015 are unconstitutional, null and void.
 - c) Costs of this Petition.
 - d) Or that such other Orders as this Honourable Court shall deem just.
2. In an affidavit sworn by Wond Wossen Mesfin on even date, the Petitioner takes issue with the Section 175(3) and (4) of the [PPAD Act](#) which provide that judicial review applications in public procurement matters in the High Court and appeals in the Court of Appeal are to be determined within 45 days from date of filing the appeal. The Petitioner contends that the said provisions do not take into consideration the impracticability of hearing and concluding such matters within the prescribed period. More so because of the increase in challenges to administrative actions in view of the expansive Bill of Rights which include the right to fair administrative action espoused in Article 47 and the [Fair Administrative Action Act](#). It is the Petitioner's case that the impugned provisions violate the right to access to justice under Article 48 as well as the provisions of Article 159 of [the Constitution](#). Further that the national values and principles of governance under Article 10 cannot be sacrifices at the altar of finality and expedition and that there must be a balance. Additionally, the impugned provisions are unconstitutional to the extent that they limit the jurisdiction of the High Court and Court of Appeal to 45 days. They also offend the provisions of Article 50 which guarantees to all persons the right to a fair hearing. Further that Article 227 provides that procurement of public goods and services shall be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The provision does not limit the determination by the Court of judicial review applications or appeals in public procurement matters.
3. The Petition further contends that the need for expedited process in procurement matters cannot override justice. Deserving litigants are likely to suffer injustice if the time for determination of a procurement dispute is limited to 45 days. Additionally, the [PPAD Act](#) does not take into consideration the time required to seek leave under Sections 8 and 9 of the [Law Reform Act](#) and Order 53 Rule 1 of the Civil Procedure Rules, 2010. As such, the impugned provisions of the PPAD Act are inconsistent with the values, purposes and principles of [the Constitution](#) and therefore unconstitutional. The said provisions offend Articles 2(4), 10, 47, 48, 50, 159, 160, 164, 165 and 259 of [the Constitution](#).
4. The Respondent filed grounds of opposition dated March 3, 2022 in opposition to the Petition. The grounds are that: there is always a presumption that all legislations conform with the provisions of [the Constitution](#) and that Parliament does not make mistakes when enacting legislation and if mistakes are found, they must be corrected by Parliament; that Section 175 of the [PPAD Act](#) states the clear intention of Parliament to constrict the time for filing, hearing and determination of public procurement disputes in keeping with the avowed intent of the Act and its object of expeditious resolution of those disputes as was held in the case of Republic v Public Procurement Administrative



Review Board & Another Exparte Wajir County Government (2016) eKLR; that three is nothing in the *PPAD Act* that goes against *the Constitution* or that is injurious or detrimental to the constitutional underpinning of the remedy of judicial review as was held in *Al Ghurair Printing and publishing LLC vs. Coalition for Reforms and Democracy and 2 others* (2017); that the said provisions are tailored to accelerate finality of public projects and hence feed into the letter and spirit of *the Constitution* of expeditious disposal of matters; that for purposes of judicial review, an enactment may perfectly provide a shorter period within which challenge to a decision of the review board may be taken and if not, the decision would be final. According to the Respondent, the Petition lacks merit, is an abuse of the Court process and should be dismissed with costs.

5. The 1st Interested Party filed grounds of opposition dated April 20, 2022. The grounds are that the Petition is misconceived and without any basis in law as the orders sought violate the constitutional and statutory mandate of the National Assembly; that laws enacted by Parliament are presumed constitutional and fair and the burden falls on the person who alleges otherwise to rebut this presumption; that if the purpose and the effect of a statute claimed to be unconstitutional do not infringe on a right guaranteed by *the Constitution*, the statute is not unconstitutional; that the Petitioner has failed to demonstrate the manner in which the timelines set under the impugned provisions violate *the Constitution*; that the said provisions ought not to be construed in isolation but should be read together with sections 167 to 175 of the *PPAD Act* and Articles 159, 48, 47, 50 and 227 of *the Constitution*; that the rationale for the timelines imposed under the impugned provisions is that once the procurement dispute resolution mechanism established under Part XV of the *PPAD Act* is engaged, the procurement entity is required, under section 168 of the Act, to suspend the procurement proceedings pending the conclusion of the dispute resolution process; that the imposition of timelines under any statute, does not perse, amount to violation of *the Constitution* or the Bill of Rights; that the Petitioner has failed to demonstrate that it attempted to appeal the Aprim decision; that the Petitioner ought to have first petition Parliament under Article 119 of *the Constitution* and the Petitions to Parliament (Procedure) Act, 2012, for the review of the impugned provisions including the entire Part XV of the *PPAD Act*. The 1st interested Party urged that the Petition be dismissed with costs.
6. The 2nd Interested Party opposed the Petition vide a replying affidavit sworn on May 6, 2022 by Jeremiah Nyegenye CBS, the Clerk of the Senate. He averred that the Senate procedurally considered the Bill for the *PPAD Act* and passed it in accordance with the Senate Standing Order and *the Constitution*; that time limits for the courts to determine disputes are not unconstitutional as the principle flows from *the Constitution*, an example being the determination of a disputed regarding the presidential election under Article 140 of *the Constitution*; that the Petitioner had failed, to rebut by evidence, in relation to the impugned provisions, the presumption that all laws enacted by Parliament are constitutional and further failed to provide with specificity and clarity, the nature of violation against its fundamental rights and freedoms; that the imposition of time limits through the impugned provisions cannot be deemed unconstitutional as they were procedurally enacted for the purpose of guaranteeing expedient access to justice.
7. It was further deposed that the impugned provisions have not only provided an avenue for challenging any administrative issues, but have also ensured that the same are expeditiously dispensed with, in order to ensure efficient access of justice especially as regards to procurement of public goods and services for the benefit of the citizenry at large; that the right of access to court is not absolute and may be limited in terms of Article 24; that the limitation imposed is thus not in conflict with *the Constitution* and serves to ensure speedy resolution of procurement disputes and to avoid prolonged litigations and the shortfalls that come with it; that the constitutionality, propriety and legality of the statutory timelines as set out in the impugned provisions vis-a-vis the limitation of access to justice under Article 48 of *the Constitution*, was adjudicated upon in *Republic v PPARB & Another, exparte, Teachers' Service*



Commission, *infra*, and in *Republic v PPARB & Another, ex parte, Wajir County Governor*, and the courts in the said cases found no conflict; that the differentiation in the application of legislation is also permissible, provided that a certain criterion is met; that the test to be applied in determining whether any provision offends the anti-discrimination provisions in *the Constitution* was set in the cases of *Jacques Charl Hoffman v South African Airways*, CCT 17 of 2000 and *Mohammed Abduba Dida v Debater Media Limited & another* [2018] eKLR.

8. The 2nd Interested Party asserted that the Court's role is to ensure that the statute does not violate *the Constitution*. Its jurisdiction can only be invoked in the event of an excess of jurisdiction by way of a breach of *the Constitution* and there has been no such violation of *the Constitution* in the enactment and implementation of the impugned provisions. On public interest, he averred that the impugned sections serve the purpose of ensuring timely conclusion of matters in order to ensure that justice is served. Further, to the extent that these provisions guarantee access to justice that is expeditious, efficient, lawful, reasonable and procedurally fair, then they have upheld the principles of *the Constitution*. The 2nd Interested Party urged that the Petition be dismissed with costs.
9. Despite this being its case, the Petitioner did not file submissions as directed. The Court has however considered the submissions filed by the Respondent and the Interested Parties.
10. The issue before Court for determination, is the constitutionality of the provisions of the Section 175(3) and (4) of the *PPAD Act*.
11. Section 175 of the *PPAD Act* has been the subject of consideration by our superior courts and decisions on the constitutionality thereof have been handed down. In the case of *ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others* (Civil Appeal E598 of 2021) [2022] KECA 407 (KLR) (4 March 2022) (Judgment), the Court of Appeal stated:

9. Section 175 has been the subject of consideration by this Court in *Aprim Consultants v Parliamentary Service Commission & Another*, CA No E039 of 2021 ("the Aprim case") and in *The Consortium of TSK Electronica Y Electricdad SA & Ansaldoenergia v PPARB & 3 Others*, CA No E012 of 2022 ("the TSK Electronica case"). Indeed, the last decision was delivered barely three days ago, on 28th February

10. In the Aprima case, the Court stated that section 175 was couched in mandatory terms. The Court expressed itself thus:

"A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes.

Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality.

Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment



the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.”

12. And in *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR, Gatembu, JA stated:

40. In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against *the Constitution* or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Nyamu, J (as he then was) in *Republic vs. Public Procurement Administrative Review Board & another Ex-parte Selex Sistemi Integrati* [2008] KLR 728 opined that the elaborate provisions and ouster clauses in the then Public Procurement and Disposal Act, 2005 “were tailored to accelerate finality of public projects.”

13. Similarly, in the case of *Republic v Public Procurement Administrative Review Board; Kenya Ports Authority & 7 others (Interested Party); Liason Group (Insurance Brokers) Limited & 3 others (Exparte)* (Judicial Review Application 3A & 30 of 2020 & Judicial Review Miscellaneous Application 2 of 2020 (Consolidated)) [2022] KEHC 285 (KLR) (16 March 2022) (Ruling), Mativo, J (as he then was) stated:

Because this ruling seeks to address the import of the Court of Appeal decision in *Aprim Consultants v Parliamentary Service Commission & Another* (supra) to these proceedings, it is important I generously reproduce excerpts from the said judgment so as to distil the legal principles determined by the Court and the ratio decidendi of the decision which is binding to this court. Discussing section 175 of the Act, the Court of Appeal stated:

“We think, with respect, that the provisions of section 175 are couched in terms that are plain, and unambiguous, admitting to no interpretative wriggle. The section sets strict timelines for applicants, the High Court and this court in sequential manner... Whereas judges of the High Court have questioned and with good reason, the wisdom and practicality of the particular timelines in the Statute, the position of the court has been an express endorsement of their constitutionality.

14. It is evident from the foregoing that the issue of the constitutionality of Section 175(3) and (4) of the *PPAD Act* is not disputed and is now well settled. Gatembu, JA found in the *Al Ghurair Printing and Publishing LLC case* (supra) that there is nothing in the elaborate provisions under Section 175 of the Act that goes against *the Constitution* or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Similarly, in the *Aprim Case*, the Court of Appeal stated that its position is that it has expressly endorsed the constitutionality of Section 75 of the *PPAD Act*.
15. *The Constitution* of Kenya provides for the hierarchy of courts in Kenya. At the helm is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. The decisions of the Court of Appeal are binding on this Court. The issue of the constitutionality of Section 175 of the *PPAD Act* has been determined by the Court of Appeal. In light of this, entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am



guided by the holding in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* [2020] eKLR, where the Court of Appeal stated:

Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.

It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

16. In the end and in view of the foregoing, I find that the Petition herein dated March 7, 2022 lacks merit and the same is hereby dismissed. The circumstances herein do not call for an award of costs.

DATED AND DELIVERED IN NAIROBI THIS 14TH DAY OF APRIL 2023

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M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....**for the Respondent**

..... **for the 1st Interested Party**

.....**for the 2nd Interested Party**

..... **Court Assistant**

