



REPUBLIC OF KENYA



KENYA LAW
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**Blue Sea Services Limited v Kenya Ports Authority (Constitutional Petition
E028 of 2022) [2023] KEHC 17375 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E028 OF 2022**

OA SEWE, J

MAY 11, 2023

IN THE MATTER OF ARTICLES 1, 2(4), 10, 21, 22, 23, 28, 35, 43, 47

OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE TENDER FOR PROVISION OF CLEANING AND
LANDSCAPING SERVICES FOR ZONES 2 & 3 AND THE NEW
CONTAINER TERMINAL LOCATED WITHIN THE PORT OF MOMBASA**

AND

**IN THE MATTER OF THE FAILURE BY KENYA PORTS AUTHORITY TO
COMPLY WITH THE MANDATORY LEGAL REQUIREMENTS IN THE
ACQUISITION OF THE SAID SERVICES**

BETWEEN

BLUE SEA SERVICES LIMITED PETITIONER

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated June 23, 2022. It was filed by the petitioner, Blue Sea Services Limited, pursuant to Articles 1, 2(4), 10, 21, 22, 23, 28, 35, 43, 47 of the Constitution of Kenya, 2010 as well as Sections 60, 62, 68, 74 and 96 of the Public Procurement and Assets Disposal Act, No 33 of 2015 for orders that:

- (a) Spent



- (b) Spent
 - (c) Pending the hearing and determination of the Petition, a conservatory order be issued restraining the respondent from proceeding further with the exercise of procuring a service provider for cleaning and environmental hygiene services for Zones 2 & 3 and the new container terminal located within the Port of Mombasa in pursuance of the public opening of tenders to that effect that took place on June 17, 2022 following the participating by the interested parties herein.
 - (d) Spent
 - (e) That costs of the application be provided for.
2. The application was premised on the grounds that, at all material times, the petitioner provided cleaning and environmental hygiene services for Zones 2 & 3 at the new container terminal situated within the Port of Mombasa operated by the respondent; and that the respondent thereafter proceeded, in a secretive manner to selectively invite a select group of people/entities to bid for the said tender instead of using the open tender method of procurement. The petitioner further complained that the respondent failed to upload the tender on its public portal for the benefit of the public, thereby flouting the provisions of Articles 10, 28, 35, 44, 47, 201 and 219 of the Constitution and the applicable provisions of the Public Procurement and Asset Disposal Act. Thus, the petitioner posited that, unless the application is granted, it will suffer huge losses that cannot be compensated by an award of damages.
 3. The petitioner's grounds were explicated in the Supporting Affidavit sworn by Benson Maina, sworn on 23rd day of June 2022. He exhibited documents in proof of the fact that the petitioner was awarded a tender, namely, Tender No KPA,111.2016-17/MO-Provision of Cleaning and Landscaping Services, Zone 3 for a period of 3 years effective June 1, 2019 to May 31, 2022. The documents include an Invitation to Quote and Notification of Award, among other tender documents. The petitioner stated that although the tender came to an end in May 2022, it remained on site pending procurement of a service provider, and was hopeful that it would be invited to participate in the bidding in an transparent process.
 4. At paragraph 6 of his Supporting Affidavit, Mr Maina deposed that he was surprised to learn, on the June 17, 2022, that there would be a tender opening meeting for cleaning services in respect of Zones 2 and 3, yet the petitioner had not been invited to participate in the tender process. Mr Maina added that, in so doing, the respondent acted in a manner that fundamentally violates the law; and that unless the orders sought are granted, the petitioner would be locked out from participating in the tender process, thereby occasioning it irreparable loss. Thus, the petitioner prayed that conservatory orders be granted as prayed in the Notice of Motion dated June 23, 2022.
 5. The respondent resisted the application vide the Replying Affidavit sworn by Mr Daniel Amuyunzu, its Head of Procurement & Contract Management. Mr Amuyunzu averred that, since public procurement is strictly governed by the Constitution and procurement laws, they do not create any legitimate expectation or any preference whatsoever for subsequent tenders. He added that, in its procurement plan and budget for the Financial Year 2021/22, the respondent planned for procurement of Industrial and Mechanized Cleaning Services, which was advertised on June 8, 2022 under the Tender No KPA/140/2021-22/MO. He further stated that the tender was accordingly advertised in the respondent's Supplier Relationship Management (SRM) Portal under Prequalified Youth Group category.
 6. Mr Amuyunzu further deposed that the tender was opened on June 17, 2022 and had been planned for and approved in accordance with Article 227(2) of the Constitution and Section 53(6) and (10)



of the Public Procurement and Asset Disposal Act (PPADA); and therefore the orders sought are not available to the petitioner in so far as the tender was reserved for the youth. Mr Amuyunzu filed a Further Affidavit on October 3, 2022 with leave of the Court. He reiterated his assertion that the subject tender was reserved for the youth; and therefore that it was only advertised in the SRM portal for the attention of the applicable category. He explained that, ordinarily, upon advertisement of a tender in the portal, all registered suppliers in that category are automatically notified through their email addresses provided at the time of registration to enable them proceed to submit their bids on time.

7. Thus, Mr Amuyunzu concluded his affidavit by reiterating that, since the petitioner was not registered as a supplier in the Youth Category, it could not have been notified of the subject tender. He therefore added that none of the petitioner's rights had been infringed by the respondent's implementation of the subject procurement. He accordingly urged the Court to dismiss the application and discharge the interim conservatory orders issued herein on June 29, 2022, contending that the application had been made in bad faith for the sole purpose of exerting undue influence on a public procurement process.
8. The petitioner also sought for leave to file a Further Affidavit, which it did to respond to the respondent's assertions. Thus, Mr Maina denied, in the Further Affidavit filed on November 11, 2022, that the application had been brought in bad faith, or that its intention is to exert undue influence on a public procurement process as alleged by the respondent. He added that the petitioner's only intention is to point out the flaws in the procurement process. Mr Maina added that the petitioner's interest is limited to Zone 3 where it had been working since 2019; and is concerned that the intention of the respondent is to amalgamate Zones 2 and 3 in the new tender.
9. According to the petitioner, the creation of the SRM Portal by the respondent is itself unlawful as it locks out qualified suppliers whose names are not registered in the respondent's portal which has restricted access, as opposed to an open state portal accessible to all and sundry. He added that the assertion by the respondent that the petitioner does not qualify to bid for tenders reserved for the youth is false; and pointed out that the petitioner is a holder of an Access to Government Procurement Opportunities (AGPO) Certificate of Registration dated February 22, 2022, issued under the provisions of the PPADA. A copy thereof was annexed to the Further Affidavit as Annexure "BM-1".
10. Lastly, Mr Maina averred that, although the tender documents annexed to the respondents Further Affidavit indicated that the tender opening day was Thursday June 16, 2022, the respondent irregularly and unlawfully postponed the tender opening date to June 17, 2022 without any written memorandum through the public portal, thereby vitiating the entire tender process. Accordingly, the petitioner reiterated its assertion that it is only fair that the orders sought in the application dated June 23, 2022 be granted.
11. The application was urged by way of written submissions, pursuant to the directions given herein on June 29, 2022. The petitioner's written submissions were filed on November 10, 2022 by Mr Gikandi. He relied on Article 227(1) of the Constitution and submitted that based on that Article, the PPADA was enacted in 2015 to ensure that public procurement is carried out in a transparent manner, devoid of discrimination, favouritism or bias. He urged the Court to find that, as a holder of an AGPO Certificate, the petitioner cannot be denied the right to participate in any type of tender. Counsel further submitted that it was clearly irregular for the respondent to create a portal that only allowed certain suppliers to access the information thereon; and therefore that the respondent was unable to justify its decision to only allow certain pre-qualified youth group category participants to access the alleged SRM Portal, while leaving out other holders of AGPO Certificates. He relied on Car Importers



Association of Kenya v Kenya Revenue Authority & 3 Others [2019] eKLR in which the Petition was allowed on the ground of discrimination, among others.

12. On behalf of the respondent, written submissions were filed herein by Mr Turasha Kinyanjui on November 14, 2022. He reiterated the factual basis of the dispute, namely that the petitioner was one of the contracted service providers of the respondent; and that its contract terminated by effluxion of time. He further reiterated that the tender was advertised on June 8, 2022 under Tender No KPA/140/2021-22/MO in the SRM Portal under prequalified Youth Group Category, because it was a procurement reserved for the youth. Accordingly, counsel submitted that, in the light of the foregoing, the application is ill-founded. He relied on *Republic v Public Procurement Administrative Review Board & 2 Others, Ex Parte Niavana Agencies Limited; M/s Five Blocks Enterprises Ltd (Interested Party)* [2021] eKLR for the rationale behind preferences and reservations.
13. Mr Turasha also submitted that since the petitioner's contract with the respondent was a fixed term contract, no rights, obligations or expectations arose beyond the date of expiry. He relied on *Presbyterian Church of East Africa & Another v Ruth Gathoni Ngoto* [2017] eKLR and urged the Court to find that there is no loss that the petitioner risks suffering as a result of the advertisement of the tender. To support this argument, counsel relied on *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. He accordingly prayed that the application be dismissed with costs and that the interim orders be discharged.
14. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as explicated on the face of the application and in the two affidavits filed in support of the application. I have likewise considered the response filed on behalf of the respondent as set out in the affidavits sworn by Mr Daniel Amuyunzu. It is worth stating at the outset that, at this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others* [2011] eKLR that:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

15. Similarly, in Nairobi High Court Petition No 16 of 2011: *Centre for Rights Education & Awareness (CREAW) & 7 Others vs Attorney General*, it was held:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”

16. As to the nature of a conservatory order, the Supreme Court had the following to say in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects



of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

17. Hence, it is now settled that an applicant for conservatory orders for purposes of Articles 22 and 23(3) (c) of the Constitution must satisfy the Court as to the following three elements:
 - (a) A *prima facie* case with a high likelihood of success;
 - (b) That the Petition will be rendered nugatory;
 - (c) That public interest weighs in the applicant’s favour.
18. What amounts to a prima facie case was aptly stated in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. Similarly, in Kevin K Mwiti & others v Kenya School of Law & others (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.
20. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner’s Notice of Motion and its Supporting Affidavit. It raised pertinent issues as to whether the subject tender was floated in accordance with Article 201 of the Constitution and the applicable provisions of the PPADA. Since the respondent has conceded that it floated the tender to a select target group, namely, the Youth, its contention being that the petitioner was not eligible under the said category, a triable issue arises as to whether or not the petitioner was discriminated against, granted its AGPO Certification. Thus, allegations of infringement of the petitioner’s rights under Articles 27 and 43 would arise for consideration.
21. From a public interest angle, the petitioner raised the issue as to whether the respondent as a procurement entity contravened Articles 10, 35, 43, 47, 201 and 227 of the Constitution as to the obligation to act in a transparent, accountable and credible manner in its procurement activities.
22. I am therefore satisfied a *prima facie* case has been made out by the petitioner, judging by the material presented by the plaintiff vide its application and the response thereto by the respondents. In the premises, I find merit in the petitioner’s application dated June 23, 2022. The same is hereby allowed and orders granted as hereunder:



- (a) Pending the hearing and determination of the Petition, a conservatory order be and is hereby issued restraining the respondent from proceeding further with the exercise of procuring a service provider for cleaning and environmental hygiene services for Zones 2 & 3 and the new container terminal located within the Port of Mombasa in pursuance of the public opening of tenders to that effect that took place on June 17, 2022 following the participation of the interested parties herein.
- (b) That costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF MAY
2023**

OLGA SEWE

JUDGE

