



REPUBLIC OF KENYA



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**Commission for Human Rights and Justice v Managing Director
Kwawasco Ltd & 4 others (Constitutional Petition E145 of 2021)
[2023] KEHC 22968 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E145 OF 2021**

OA SEWE, J

SEPTEMBER 21, 2023

**IN THE MATTER OF: ARTICLES 1,2,3(1), 4, 10, 19, 20,
21, 22, 23, 35, 73, 227 AND 232**

OF THE CONSTITUTION OF KENYA

2010

**IN THE MATTER OF: ARTICLE 227 OF THE
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: PUBLIC PROCUREMENT AND
ASSET DISPOSAL ACT**

**IN THE MATTER OF: ARTICLE 10 OF THE
CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: KWALE WATER AND SEWERAGE
COMPANY LIMITED TENDER**

NUMBER NCB NO KE-KWAWASCO-

203531 CW-RFB_LAYING OF

WATER DISTRIBUTION PIPELINE

FROM MABOKONI RESERVOIR TO

UKUNDA TOWN AND ITS

ENVIRONS

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE PETITIONER



AND

MANAGING DIRECTOR KWAWASCO LTD 1ST RESPONDENT
SOBETRA UGANDA LIMITED 2ND RESPONDENT
COAST WATER WORKS DEVELOPMENT AGENCY 3RD RESPONDENT
THE CABINET SECRETARY MINISTRY OF WATER IRRIGATION AND
SANITATION 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

- [1] The petitioner, Commission for Human Rights and Justice, approached this Court vide the Petition dated 17th March 2021 seeking declaratory orders against the respondents. It averred that on the 15th December, 2020 Kwale Water and Sewerage Company Limited, a public utility company, issued a tender for the laying of a water distribution pipeline from Mabokoni Reservoir to Ukunda town and its environs vide tender NO. NCB NO KE- KWAWASCO-203531 -CW- RFB; and that the tending process was open and interested and eligible tenderers were invited to return the tender documents on or before the 14th January, 2021. In response the bids were received and duly opened on the same date of 14th January 2021 by the procuring entity, Kwawasco Ltd.
- [2] The petitioner further averred that, after the 1st Respondent received bids, a tender evaluation committee was formed which was tasked with responsibility of evaluating the bids in accordance with the World Bank guidelines, which prohibit canvassing by bidders or their agents. At paragraph 12 of the Petition, it was averred that upon the completion of the evaluation process, it came to the notice of the petitioner that the 1st respondent was intent on awarding the tender to the 2nd respondent, whose bid was outside the limit of the engineer’s estimates. The petitioner further alleged that it discovered that the 2nd respondent had engaged in canvassing and had offered the tender evaluation committee monetary benefits to influence the award of the tender in its favour.
- [3] The petitioner further averred that it was aware that the 2nd respondent had meetings with the Ag Managing Director of Kwale Water and Sewerage Company Ltd for the purpose of giving inducements to have the tender awarded in its favour; which act amounted to a violation of Article 227 of the Constitution. The petitioner added that, although the Ag Managing Director of Kwale Water and Sewerage Company Ltd, falls under the supervision of the Coast Water Works Development Agency and the Ministry of Water Sanitation and Irrigation, no preventive action was taken; and that in view of the violation of Article 227 of the Constitution, the citizens of Kenya will be denied a fair equitable transparent, competitive, cost-effective contract of services and the right to access the basic human need that water is; in the event that the company turns out to be incapable of performing the contract.
- [4] The petitioner claims that the 3rd and 4th Respondents have failed and refused to play their supervisory role over the operations of the 1st respondent and the said failure amounts to a breach of Article 227 of the Constitution, that threatens the citizens’ rights to access basic human need on the right to access water. According to the petitioner, the actions of the Respondents amount to a breach of the provisions of the *Public Procurement and Asset Disposal Act*, and are therefore illegal; and if allowed to proceed will result in immense economic loss and damage of the taxpayers and the donors.



- [5] Accordingly, at paragraph 32 of the Petition, it was averred that the overall purpose of the Petition is to safeguard public interest under Articles 10, 35, 227 and 232 of *the Constitution* by ensuring that public bodies and their officers act in accordance with the provisions of the law and do not succumb corrupt practices. Consequently, the petitioner prayed for the following reliefs:
- (a) A declaration that the entire process of the impugned tender was skewed, unprocedural, illegal, null and void ab initio.
 - (b) A declaration that the 1st, 3rd and 4th respondents violated the provisions of Articles 10, 35, 43(1)(d), 73, 227 and 232 of *the Constitution* and presided over an illegality in violation of *the Constitution*.
- [6] In response to the Petition, the 1st Respondent filed a Reply dated 21st July, 2021 contending that the Petition is an abuse of the court process and that the petitioner has neither the requisite legal capacity nor the locus standi to bring or sustain the Petition; and therefore that the Petition should, on that score, be struck out with costs. While conceding that Kwawasco Ltd floated a tender inviting bids for the laying of water distribution pipelines from Mabokoni Reservoir to Ukunda Town and its environs, the 1st respondent denied that the procurement was irregularly or illegally processed. It set out the steps taken by Kwawasco Ltd at paragraphs 5(a) to (n) of the Reply, including the following:
- (a) That on the 8th January, 2021, a tender opening committee was formed that was chaired by the Technical Manager of Kwawasco Limited.
 - (b) That on the 11th January, 2021 a tender evaluation committee was formed and was chaired by Daniel Kibushi, the Water Engineer of the County Government of Kwale.
 - (c) That after the tendering process was completed on 14th January, 2021, the tender opening committee unveiled the bids received which were from the bidders. That the tender opening list was sent to all the bidders via email on the 18th January, 2021.
 - (d) That the bids were then handed over to the Tender Evaluation Committee which went ahead to evaluate the bids and to prepare a report in February, 2021.
 - (e) That on 17th February, 2021 the Tender Evaluation Committee carried out due diligence on two most responsive bidders: Sobetra Uganda Ltd and Thomas Piron Grands Lass Ltd, and that it was on recommendation of the Tender Evaluation Committee that the award was made by the 1st respondent vide a letter dated 10th March, 2021. The letter was sent via email, notifying the 2nd respondent of the tender award in the contract amount of Kshs. 729,696,969.72.
 - (f) That the 1st respondent also notified the other bidders on the 10th March, 2021 that the tender had been awarded to the 2nd respondent as well as the reasons why their bids were unsuccessful.
 - (g) That no appeal was filed against the award; and that any formal complaints from the unsuccessful bidders have been addressed.
- [7] Thus, it was the assertion of the 1st respondent that, contrary to the petitioner's allegations, the tendering process was carried out in strict compliance with the law and the World Bank guidelines in place for the tender. Thus, according to the 1st respondent, the 2nd respondent emerged as the lowest evaluated bidder which met the minimum qualification criteria and was therefore rightfully awarded the tender. The 1st respondent added that they are strangers to the wild and unfounded allegations that the Ag. Managing Director Kwawasco Ltd and/or the tender evaluation committee met with any of



the bidders and that they were offered monetary benefits or any inducements to award the tender to the 2nd respondent.

[8] Thus, the 1st respondent asserted that the tendering process and award of the tender herein to the 2nd respondent was done above board and is not subject to any investigation by any State agency. He denied any violation of Article 227 of the Constitution as alleged in paragraph 25 of the Petition or at all. He further pointed out that:

- (a) Kwawasco Ltd is a separate and distinct legal entity from the 3rd and 4th Respondent and is capable of entering into contracts without supervision.
- (b) That the tender has already been awarded to the 2nd respondent and is being performed and the issuance of the conservatory orders sought will be in vain as the Petition has been overtaken by events.
- (c) The alleged fear that tax payers will suffer loss and that donor funds will be wasted in the manner that it has been alleged or at all, is unfounded.

[9] The court record shows that although the petitioner filed a Notice of Motion dated 17th March 2021 along with its Petition, the same appears to have been abandoned granted the averment by the 1st respondent that the tender had been awarded and that the application for conservatory orders had been overtaken by events. Directions were accordingly given that the Petition be canvassed by way of written submissions.

[10] It appears the petitioner was the only party that filed submissions on the 21st May, 2021. In his written submissions, counsel for the petitioner, Mr. Masaka, proposed the following two issues for determination:

- (a) Whether the procurement process as provided for in the Public Procure and Asset Disposal Act was complied with.
- (b) Whether the petitioner's rights were violated by the respondents as alleged.

[11] Counsel submitted that the procurement process did not comply with Articles 201 and 227 of *the Constitution* and that there is no evidence that the subject procurement was fair, equitable, transparent, competitive and cost-effective. Thus the Court was urged to find that the entire process was shrouded in secrecy and therefore in violation of Article 35 of the Constitution. Counsel made reference to the cases of Kenya Transport Association v Municipal Council of Mombasa & Another [2011] eKLR and Eric Okeyo v County Government of Kisumu & 2 Others [2014] eKLR, among others, for the proposition that any procurement falling outside Article 227 of the Constitution cannot stand.

[12] On the allegations that the Petition has been overtaken by events, counsel maintained that the rights of the public and public funds are on the verge of being violated/wasted; and that in any event an award does not mean payment of the funds allocated to the project. He accordingly submitted that the matter being of public importance as it is, the Court shall save public funds from pilferage by granting the orders sought. In the same vein, counsel urged the Court to find that the petitioner has complied with the principles of pleading constitutional infringement with specificity as set out in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

[13] In the premises, having given careful consideration to the Petition, the Supporting Affidavit and its annexures as well as the written submissions filed herein by the petitioner, the issues for determination are:



- (a) Whether the Petitioner has locus standi to file the instant Petition.
- (b) Whether the Petitioner’s petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions.
- (c) Whether the petitioner has proved its case to the requisite standard.

A. On Whether the Petitioner has locus standi to file the instant Petition:

[14] Needless to say that the issue of locus standi is a threshold issue and must be considered in limine before the Court can engage in a consideration of the merits of the Petition. Hence, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR, it was held that:

“The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity...”

[15] It is noteworthy, however, that, although the 1st respondent asserted, in his Reply to the Petition that the petitioner lacks the legal capacity as well as the locus standi to bring the Petition, this argument was not developed further; granted that no written submissions were filed by the respondents. The petitioner described itself as a registered human rights organization based in Mombasa, committed to the promotion of basic human rights and justice. Moreover, at paragraphs 8 to 16, the petitioner set out the grounds for its locus standi. In the circumstances, I have no hesitation in holding that it was within its rights to bring a petition of this nature before the Court.

[16] Indeed, Articles 22 and 258 of *the Constitution* are wide enough in so far as they provide that every person has the right to move the court, contesting any contravention of the Bill of Rights, or *the Constitution* in general. For purposes of such matters, “a person” is defined as “a company, association or other body of persons whether incorporated or unincorporated.” (see Article 260 of the Constitution) It is therefore my finding that the petitioner falls within the provisions of Article 22, 258 and 260 of *the Constitution* and thus has locus standi to file the Petition herein and appear before this court.

B. Whether the Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions

[17] It is now a well-developed principle that in constitutional litigation, a party that alleges a violation of *the Constitution* must plead such violation with reasonable degree of precision. The standard set in *Anarita Karimi Njeru* Case, is that:

“...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

[18] Needless to say that much has happened since *Anarita Karimi Njeru*; the most profound being the promulgation of the Constitution of Kenya. In particular, Article 22 stipulates that:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—



- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or lass of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

[19] It is in the light of the foregoing that the procedure has been immensely simplified. Article 22(3) of the Constitution is explicit that:

“The chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- a. the rights of standing provided for in clause (2) are fully facilitated;
- b. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- c. no fee may be charged for commencing the proceedings;
- d. the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- e. an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.”

[20] Accordingly, Rule 10(3) and (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognize that the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom; and that such an oral application shall be reduced into writing by the Court.

[21] In the light of the foregoing, I have scrutinized the Petition filed herein and I am satisfied that it does show the legal foundation upon which it is premised; and in particular the various provisions of *the Constitution* alleged to have been infringed by the respondents and in what manner. It also states with specificity the remedies sought by the petitioner. Therefore, it can hardly be argued that the Petition is deficient as to the nature of the alleged violation and the remedies anticipated by the petitioner. In this regard, I would endorse the expressions of Hon. Odunga, J. in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* (supra) that:

“On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru vs. Attorney General* (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged



to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

[22] A similar approach was taken by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR thus:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

[23] Here, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in *Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others* [2012] eKLR in which it was held that:

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case...”

[24] My conclusion therefore is that the Petition filed herein meets the threshold envisaged, not only for purposes of *Anarita Karimi Njeru*, but more importantly the Constitution and the Mutunga Rules; and is therefore competently before the Court.

C. On the merits of the Petition:

[25] Needless to say that the burden of proof, in this case, was on the Petitioner to prove all the allegations on a balance of probabilities, for Section 107 of the *Evidence Act* is explicit that:

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

[26] Accordingly, in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR the point was made that:



65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.
- [27] Further, the court in the case of *Lucy Nyaguthii Wachira v Council for Legal Education & 3 others* [2017] eKLR, held: -
38. The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in *Lyomoki and Others vs. Attorney General* [2005] 2 EA 127, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a prima facie case of violation of their constitutional rights. Thereafter the burden shifts to the Council to justify that the limitations to the freedom from discrimination in the impugned decision is justified...”
- [28] In this instance, the petitioner has alleged violation of Articles 1, 2, 4(2), 27, 29, 35, 43(1) (d), 73 and 227 of the Constitution with regard to the tendering process for tender NCB No. KE-KWAWASCO – 203531 – CW – RFB: Laying of water distribution pipelines from Mabokoni Reservoir to Ukunda town and environs. It alleged, inter alia, that:
- “...upon completion of the evaluation process it came to the NOTICE of the Commission that the 1st Respondent was in the process of preparing to award the said tender to one of its bidders, whose bid was out of the limit of the engineer’s estimates and but has been canvassing and offering the tender evaluation committee members monetary benefits to influence them to award the tender in his favour.”
- [29] It is noteworthy however that other than the Tender Opening Document, the Request for Particulars and the Tender Document, no other document was presented by the petitioner. There is therefore no indication as to exactly how the 2nd respondent was settled upon as the most responsive bidder. More importantly, there is absolutely no evidence presented herein to demonstrate that members of the Tender Evaluation Committee were given monetary benefits to influence their decision.
- [30] Further to the foregoing, although the petitioner alleged that the 2nd respondent’s bid was above the Engineer’s estimates, no evidence was presented in this regard by the petitioner. I have nevertheless looked at the Bid Evaluation Report exhibited by the 1st respondent at pages 225 to 274 of his Replying Affidavit and noted the process employed in arriving at the impugned decision. In the absence of evidence of illegalities, I am unable to conclude that there was an infringement of Article 227 of the Constitution in so far as the procurement was concerned, or indeed any other provision of *the Constitution*. Indeed, the assertion by the 1st respondent that no appeal was filed in respect of the procurement and no investigation initiated by any investigative agency of Government all go to show that the procurement was above board.
- [31] It is my finding that, on the merits, the allegations made in Petition dated 17th March 2021 have not been proved by the petitioner. Accordingly, the said Petition is hereby dismissed with an order for each party to bear own costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF
SEPTEMBER 2023**

OLGA SEWE

JUDGE

