



**Meta Suppliers Limited & 2 others v National Project Coordinator,  
National Project Implementation Unit Kenya Development Response to  
Displacement Impacts Project (KDRDIP) & 6 others (Constitutional Petition  
E004 of 2023) [2023] KEHC 22526 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22526 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CONSTITUTIONAL PETITION E004 OF 2023**

**JN ONYIEGO, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**META SUPPLIERS LIMITED ..... 1<sup>ST</sup> PETITIONER  
LIBANA CONSTRUCTION AND GENERAL SUPPLIERS LIMITED .... 2<sup>ND</sup>  
PETITIONER  
TARTIB INVESTMENT COMPANY LIMITED ..... 3<sup>RD</sup> PETITIONER**

**AND**

**NATIONAL PROJECT COORDINATOR, NATIONAL PROJECT  
IMPLEMENTATION UNIT KENYA DEVELOPMENT RESPONSE TO  
DISPLACEMENT IMPACTS PROJECT (KDRDIP) ..... 1<sup>ST</sup> RESPONDENT  
COUNTY PROJECT COORDINATOR, COUNTY INTEGRATED PROJECT  
IMPLEMENTATION UNIT (CCIPU) KENYA DEVELOPMENT RESPONSE TO  
DISPLACEMENT IMPACTS PROJECT (KDRDIP) ..... 2<sup>ND</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH SERVICES  
WAJIR COUNTY ..... 3<sup>RD</sup> RESPONDENT  
HABASWEIN SUB-COUNTY, HOSPITAL PROJECT MANAGEMENT  
COMMITTEE ..... 4<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF WAJIR ..... 5<sup>TH</sup> RESPONDENT  
MINISTRY OF EAST AFRICA COMMUNITY, ASALS AND REGIONAL  
DEVELOPMENT ..... 6<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**



## RULING

1. Through a constitutional petition dated June 8, 2023, the petitioners herein sought reliefs against the respondents as hereunder;
  - a. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> respondents' act of interfering with the work of the Habaswein sub-county Hospital project management committee to the extent of totally frustrating the commencement of the project in regards to Habaswein sub-county referral hospital, the second respondent has contravened the provisions of article 10 of the Constitution on principles of good governance and article 73 and article 75 of the constitution on leadership and integrity.
  - b. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> respondents' act of interfering with the Habaswein sub-county referral hospital project to the point of stalling the whole project in totality while failing to consider and ignoring in totality the aspirations, views and objectives of the community and the impact of their actions to the successful contractors and residents in Habaswein sub-county in Wajir county, the 2<sup>nd</sup> respondent has contravened the provisions of articles 1(1), 10, 174(d), 201 and 232(1)(4) of the Constitution and the 4<sup>th</sup> schedule of the Constitution part 2(14) on the involvement of the people in the process of policy making in the community
  - c. A declaration that the 3<sup>rd</sup> respondent's Act of interfering with the work of the Habaswein sub-county hospital project management committee to the extent of totally frustrating the commencement of the project in regards to Habaswein sub-county referral hospital, the 3<sup>rd</sup> respondent has contravened the provisions of article 10 of the Constitution on principles of good governance and article 75 of the Constitution on leadership and integrity.
  - d. A declaration that the 3<sup>rd</sup>, and 5<sup>th</sup> respondents' act of interfering with the Habaswein sub-county referral hospital project to the point of stalling the whole project in totality while failing to consider and ignoring in totality the aspirations, views and objectives of the community and the impact of their actions to the successful contractors and residents in Habaswein sub-county in Wajir county, the 3<sup>rd</sup> respondent has contravened the provisions of articles 1(1), 10, 174(d), 201 and 232(1)(4) of the Constitution and the 4<sup>th</sup> schedule of the Constitution part 2(14) on the involvement of the people in the process of policy making in the community
  - e. An order of prohibition be issued to prohibit the 4<sup>th</sup> respondent from further interfering and frustrating the implementation of the Habaswein sub-county referral hospital project and from interfering with the Habaswein sub-county project management committee to the extent of disabling it from carrying out its legal mandate.
  - f. An order of prohibition be issued to prohibit the 4<sup>th</sup> respondent from re-advertising the eight tenders that have already been duly awarded to the successful contractors after the procurement process in regards to Habaswein sub-county referral hospital project.
  - g. An order of *mandamus* be issued to compel the 4<sup>th</sup> respondent to immediately hand over the site to contractors and provide all necessary support to contractors to enable the implementation of the public project to wit Habaswein Sub-county Referral Hospital project to commence without any further delay.
  - h. Costs of the suit.



2. The petition is premised upon grounds set out on the face of it and the averments contained in the affidavit in support sworn by Yusuf Dan Allan a director with the first petitioner sworn on the June 8, 2023. It was averred that during the financial year 2022 and 2023, Habaswein sub-county hospital was allocated Kshs 44 million by Kenya Development Response To Displacement Impacts Projects (hereafter KDRDIP) being money advanced to the Kenyan government by the International Development Association (IDA) to assist in implementation of specific projects in Arid areas identified through community participation. That the KDRDIP fund in Habaswein hospital is managed by Habaswein Hospital project management committee.
3. He stated that on September 2, 2022, the said hospital management committee advertised for submission of tender bids in respect of various projects within Habaswein Sub-county Hospital. That successful bidders among them the petitioners were awarded their respective contracts and were to commence implementation at the specified time. That on October 25, 2022, Habaswein sub-county hospital project management committee invited KDRDIP project coordinator (2<sup>nd</sup> respondent) to hand over the projects but the said invitation was rejected *vide* the e-mail of October 28, 2022 stating that there were outstanding issues which needed to be addressed first.
4. He further averred that despite the Habaswein Sub-county Hospital's committees' assurance to the 2<sup>nd</sup> respondent that all pending grievances had been resolved, the 2<sup>nd</sup> respondent was reluctant to give in and without justification went ahead to demand re-advertisement of the tenders amid resistance from the hospital committee. That the petitioners have since received threats not to commence implementation of the stalled projects thus necessitating the institution of this suit.
5. In their response, the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents filed a replying affidavit sworn by Jimale Hassan Sheikh the project coordinator KDRDIP Wajir county on June 29, 2023 in which he averred that the second respondent only participated in the development of the tender document and not any other procurement process. That the procurement process was not done in accordance with article 227 of the [constitution](#) hence not fair nor equitable as; the community was not duly represented; opening of the tender was irregularly done as no opening register was provided and generally, there was no transparency.
6. On the other hand, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents through the firm of Garane & Somane Advocates filed a notice of preliminary objection dated June 30, 2023 thus stating that:
  - i. This court lacks jurisdiction to adjudicate the issues raised in the petition as provided under article 47(3)(a) of the [constitution](#) of Kenya and section 9(2) & (3) of the [Fair Administrative Actions Act](#) by dint of:
    - a. Section 8 of the [Public Procurement and Assets Disposal Act, 2015](#) which establishes the Public Procurement Regulatory Authority with powers to investigate and act on complaints lodged against a public entity by tenderers, contractors or the general public.
    - b. Section 27 of the PPDA. 2015 establishes the Public Procurement Administrative Review Board whose main mandate under section 28 is to hear and determine disputes relating to public procurement or as referred to by the Authority.
    - c. Section 4 of the [Public Procurement and Asset Disposal](#) provides that the provisions of the act shall apply to all state organs and public entities with respect to procurement planning, procurement processing, inventory and asset management, disposal of assets and the contract management.



- ii. The issues raised in the petition are to be dealt by statutory bodies established under the Act of *Public Procurement and Asset Disposal* No 33 of 2015 at the first instant, in furtherance of objectives of article 47(3) of the *Constitution* of Kenya.
  - iii. The issues raised in the petition and orders sought do not amount to constitutional issues necessitating the intervention of this honourable court and can adequately be addressed through enforcement mechanisms under the *Public Procurement and Asset Disposal* No 33 of 2015.
  - iv. The petition is otherwise premature, incompetent, misconceived, misplaced and an abuse of the process of this honourable court.
  - v. That from the foregoing, the petition dated June 8, 2023 should be dismissed with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.
7. The court directed that the notice of preliminary objection be canvassed by way of written submissions and that parties file and exchange the same.
  8. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents filed their joint submissions dated June 30, 2023 thus submitting on three issues to wit; whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents' preliminary objection is sustainable; whether the petitioner's suit is bad in law and whether the honourable court is divested of jurisdiction by dint of the doctrine of exhaustion of remedies and, whether the petitioners ought to first have filed their grievances before the Public Procurement Administrative Review Board.
  9. On the 1<sup>st</sup> issue, it was submitted that the validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. That it is therefore mandatory for a court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence. To that end, support was placed inter alia on the cases of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* (1969) EA 696 where the court observed that a preliminary objection should only raise pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. Further reliance was placed in petition No 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara & six others* [2014] eKLR where it was held that jurisdiction is a pure question of law and the same should be resolved on a priority basis.
  10. On the 2<sup>nd</sup> and 3<sup>rd</sup> issues, it was contended that where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the court, the court ought to ensure that the dispute is resolved in accordance with the relevant statute making provisions of such remedy. The respondents placed reliance on section 8 of the *Public Procurement and Assets Disposal Act, 2015* which establishes the Public Procurement Regulatory Authority, a body fettered with authority to allegedly hear issues raised in the petition herein. That the petitioners ought to have exhausted the available dispute resolution mechanisms provided by the Act of Parliament before approaching this court.
  11. The 4<sup>th</sup> respondent also filed its submissions on July 18, 2023 in opposition of the preliminary objection. It was submitted that this court is clothed with the jurisdiction to hear and determine the petition herein. That the petitioners are not aggrieved by the process of procurement to warrant the intervention of the Public Procurement Administrative Review Board. It was urged that to the contrary, the petitioners are satisfied with the whole tendering process and that the grievances that existed were amicably dealt with. That the petition is premised on the fact that declaratory orders are needed to ensure that the violations of rights as provided for under article 22 is dealt with. It was



prayed that the preliminary objection is misplaced and misconceived and therefore, the same ought to be dismissed with costs.

12. The 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents did not participate in the notice of preliminary objection herein.
13. The petitioners filed their submissions on the July 13, 2023 thus submitting that this court has wide powers under articles 259(1) and 165(3) of the Constitution to address violations, infringement and/or a threat to a right of fundamental freedom. That jurisdiction is not exhaustive given that article 165(3)(e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation. It was contended that the jurisdiction of the Public Procurement Administrative Review Board does not apply in the present case as they are specifically ousted by the fact that the petitioners are not seeking for review of the procurement process nor any of the listed aspects provided by the said Act.
14. They further contended that the petition seeks to get orders against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from interfering with the Habaswein Sub-County Referral Hospital project and further mandate the 4<sup>th</sup> respondent to commence the implementation of the project. It was thus prayed that the preliminary objection herein be dismissed with costs and the petitioners be granted an opportunity to prosecute their case.
15. I have considered the preliminary objection herein, responses thereof and rival written submissions by the parties. The only issue that arises for determination is whether the preliminary objection herein meets the requisite threshold.
16. It is trite law that in litigation, jurisdiction is everything and without it, a court ought to down its tools and move no further step. These were the wise words from Nyarangi JA (as he then was) in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil(Kenya)Ltd (1989) e KLR. However, jurisdiction is not self-made but a donation from the constitution or statute. See Samuel Kamau Macharia vs Kenya Commercial Bank Ltd and 2 others (2021) e KLR where the Supreme Court held that jurisdiction flows from the constitution or the statute or both.
17. Similarly, in Mitu-Bell welfare Society v Kenya Airports Authority & 2 others; Initiative for strategic Litigation in Africa (amicus curiae) (2011) eKLR the Supreme Court held that the high court has jurisdiction in accordance with article 165 to hear and determine applications for redress of denial, violation or infringement of or threats to a right or fundamental freedom in a bill of rights.
18. For a party to challenge a petition on a preliminary objection, the same should be based on points of law which if favourably determined would dispose of the matter with finality. In the case of Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others SCK petition No 10 of 2013 [2014] eKLR the Supreme Court had this to say:

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”
19. Similar position was held in Mukisa Biscuit(supra). Therefore, when a court is faced with such a situation, it must act with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process/es.
20. However, for a petition to qualify as raising a constitutional issue, it must meet the criteria advanced in the most celebrated case of Anarita Karimi Njeru v Republic (1979) eKLR where it was held that a party seeking constitutional redress ought to express himself or herself with a reasonable degree of precision the nature and extent of constitutional rights violated or threatened or likely to be infringed.



21. In the matter of the Interim Independent Electoral Commissions, constitutional application No 2 of 2011(2011)eKLR, the supreme court expressed itself that where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits; it cannot expand its jurisdiction through judicial craft or innovation; nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution.
22. Before me is the question whether this court has jurisdiction to grant the orders sought or not. The respondents have contended that instead of the petitioners coming to the constitutional court, they should have approached the public procurement regulatory Authority under section 8 of the Public Procurement and Asset Disposal Act 2015 or the public procurement Administrative Review Board. The role of the public procurement regulatory authority under section 8 of PP&ADA is purely administrative oversight on public procurement processes. It has nothing to do with resolution of disputes on tender awards. On the other hand, the public procurement administrative review board under section 28 of the PP&ADA 2015, has the mandate of reviewing, hearing and determining tendering and asset disposal disputes and to perform any other function conferred to the review board by the Act, regulations or any other written law.
23. It is not lost in my mind that the petitioners are not challenging the procurement process nor is the procuring entity which is the 4<sup>th</sup> respondent. The two parties are not questioning the integrity or otherwise the transparency or legality of the entire procurement process. They cannot be forced to seek a remedy from the public procurement regulatory authority or review board when they have no dispute or claim to justify their action or intervention. The question of exhaustion of the alternative dispute resolution mechanism does not apply on their part. If anything, it is the party aggrieved to the contract award who should be exhausting such mechanism.
24. The above holding notwithstanding, the key question as to whether the petitioners have met the threshold of what constitutes a constitutional petition still remains. From the petition, the facts that presents clearly as constituting the dispute is purely breach of contract. The petitioners having won their various contracts which have not been overturned by any legally established body or court of law can only be enforced through civil proceedings for specific performance of the contract and not through a constitutional petition.
25. A constitutional court cannot arbitrate over all manner of claims including those that have clear legal provisions for enforcement. The petitioners are purporting to seek enforcement of the 4<sup>th</sup> respondent's rights through them. I do not see any specific breach or threat of violation of the petitioners' rights. Mere refusal by the respondents to hand over the contracted site does not amount to a constitutional breach to warrant declaration of the orders sought. In my view, these are issues to do with enforcement of contract (award) as a civil right under the law of contract.
26. In view of the above finding, it is my holding that the petition herein does not meet the threshold of a constitutional petition hence the same is struck out. Regarding costs, I do not find it appropriate as the petitioners were forced to seek redress by the respondents hence each party shall bear own costs.

**Dated, signed and delivered virtually at Garissa this 25<sup>th</sup> day of September, 2023**

**J.N. ONYIEGO**

**JUDGE**

