



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 4 OF 2020**

**IN THE MATTER OF ARTICLES 1,2,6,10,19,20,21,22,23,27,47,165,176,226,258,259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF AND THE THREATENED VIOLATION OF ARTICLES 1, 2(1), 3(1), 10(1), 47, 201(a), 227(1), 232(2)(a)(b)(c)**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, CAP 412A, LAWS OF KENYA, SECTIONS 63, 64, 79, 86, 87(1) AND 124**

**BETWEEN**

**BARSOGAT INVESTMENT LTD .....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF VIHIGA ....RESPONDENT**

**RULING**

1. The application I am called upon to determine is a Motion, dated 4<sup>th</sup> May 2020, brought under the provisions of Rule 23 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and Articles 22 and 23 of the Constitution. The applicant seeks a conservatory order to stay the decision of the respondent, and its department of roads, contained in their advertisement on their website, dated the 22<sup>nd</sup> April 2020, re-advertising the tender in respect of Ebukhaya-Esere-Olilo Road (Lot 1) and Burandi-Arende Road (Lot -2), and a temporary injunction to restrain the respondent, and its department of roads, from receiving, accepting and opening bids in respect of Ebukhaya-Esere-Olilo Road (Lot 1) and Burandi-Arende Road (Lot -2) contained in the advertisement of the 22<sup>nd</sup> April 2020.

2. The gist of the application is that the applicant submitted a tender and bid for repair and maintenance of the roads stated above. It bid for the tenders online and the same were uploaded in the IFMIS portal. At the close of the tender, the applicant emerged the winner and was ranked first with 97 points in the said IFMIS portal. The respondent, however, did not act on the results, rather it went ahead and re-advertised the same tender without any consultation or explanation to the applicant. The applicant submits that its rights have been violated and that the respondent's acts were contrary to the principles set out in Articles 10, 201 and 232 of the Constitution.

3. The respondent, despite service, and the filing of a notice of appointment by its advocates, did not file a response to the application.

4. The prayers in the application are for conservatory orders. The nature and principles governing such reliefs are now well settled. In *Centre for Rights Education and Awareness (Creaw) & 7 Others vs. Attorney General* [2011] eKLR, the court stated:

At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a 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.”

5. In *London Distillers (K) Limited vs. Cabinet Secretary Ministry of Education & 4 Others* [2020] eKLR, it was said:

“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 applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.”

(See *Johnson K. Njigoya, Chairman Mutithi Extension Rice Farmers Society Ltd & 2 Others vs. Attorney General & 2 Others* [2014] eKLR)

6. In *Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR, the court outlined the principles as follows:

“68. What then are the circumstances under which the Court grants conservatory orders? 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. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See *Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011*, *Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011* and *V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others* [2012] eKLR.”

7. The Supreme Court validated those principles in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, when it stated:

““Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold 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 orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

8. The applicant herein contends that the respondent has never responded to the participants of the tendering process despite the same being closed, and its bid being ranked as the winner. It submits that the respondent’s actions are contrary to the provisions of sections 63 and 87 of the Public Procurement and Disposal Act, and Articles 10, 201 and 227 of the Constitution.

9. Article 10 of the Constitution provides as follows:

“(1) The national values and principles of governance in this Article bind all State Organs, State Officers, public officers and all persons whenever any of them –

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law;

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability and

(d) Sustainable development.”

10. Article 227 of the Constitution which states:

“When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.”

11. It does appear quite clear from the above constitutional provision that public bodies cannot just make unilateral or arbitrary decisions in matters of procurement. They must stick to the letter and spirit of the Constitution, which is then reflected by governing statute, the Public Procurement and Disposal Act. Section 67 of the Public Procurement and Disposal Act provides that:

“(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.”

12. From the above, it is clear that the respondent was duty bound to communicate to the applicant, and other participants in the tender, to inform them of either the success or failure of their bids. In this case, the applicant has demonstrated, *prima facie*, that the respondent never communicated after it was listed as the winner of the bid. I am, therefore, persuaded that the applicant has established a *prima facie* case against the respondents for grant of conservatory orders.

13. With regard to prejudice, the court in in *London Distillers (K) Limited vs. Cabinet Secretary Ministry of Education & 4 Others* (supra), said:

“... the Petitioner having surmounted the first hurdle by proving that he has a prima facie case, the next question is whether there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by Mwongo, J in *Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others* [2014] eKLR, where expressed himself as follows: -

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

14. In the instant application, it is clear that if the tender is re-advertised or the evaluation of the tenders is repeated, the applicant will stand to lose a bid that it had clearly won, and it will be subjected to the same process without any explanation as to what happened. This has the potential of occasioning a violation of its rights unlike the respondent, who seems not to be bothered by the application. On the issue of public participation, it is clear that the respondent’s decision to re-advertise was made without considering those who had bid for the tender and were yet to know their fate.

15. In the end, I am persuaded that the applicant has satisfied all the requirements to warrant grant of the conservatory orders sought, and I accordingly grant the Motion, dated 4<sup>th</sup> May 2020, in terms of prayer 4 thereof. Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3<sup>rd</sup> DAY OF July,2020**

**W MUSYOKA**

**JUDGE**