



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 371 OF 2017

BETWEEN

HARRY & STAN COMPANY LIMITED.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS...2ND RESPONDENT

SAI CARGO MASTERS LIMITED.....3RD RESPONDENT

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....INTERESTED PARTY

JUDGMENT

1. *Harry & Stan Company Limited*, the Petitioner, filed this Petition against *Inspector General of Police, Director of Criminal Investigations* and *Sai Cargo Motors Limited*, the 1st, 2nd and 3rd Respondents respectively, claiming violation of its constitutional rights and fundamental freedoms. Kenya Medical Supplies Authority was joined as an Interested Party in this Petition as the procuring entity.
2. The Petitioner averred that the 3rd Respondent and others not parties to this Petition participated in *Tender No. KEMSA/ONY61/2016-2019*, for provision of transport services for medical commodities to various Health facilities in the country for the years 2016-2017, 2017/2018 and 2018/2019, which tender was won by the Petitioner together with *BM Logistics* and *E Logistics Ltd*, while the 3rd Respondent lost in the tender .
3. The Petitioner further averred that the 3rd Respondent sought a review before the *Public Procurement Administrative Review Board* in Application *Nos. 112 of 2016* dated 30th December 2016 and *18 of 2017* dated 16th February 2017. The Review Board made a finding with regard to *Application No. 18 of 2017* to the effect that the award was properly awarded and upheld the decision for the award.
4. The Petitioner stated that the 3rd Respondent was dissatisfied with that decision and filed a complaint with the 1st and 2nd Respondents alleging procurement fraud; that on 24th July 2017, the 1st Respondent through the 2nd Respondent wrote to *New Generation Investment Cooperative Society Limited* one of the Petitioner's clients asking, them to disclose confidential information on its working relationship with the Petitioner such as contract documents, Local Purchase Orders, deliveries notes, invoices and modes of payment.
5. The Petitioner further stated that vide letter dated 25th June 2017, New Generation Investments confirmed to the 1st and 2nd Respondents that they have a working relationship with the Petitioner but declined to give documents which they considered confidential in view of their confirmation that they had a working relationship.
6. The Petitioner contended that the 3rd Respondent's complaint was made in bad faith and was intended to punish and embarrass the Petitioner; that the complaint was meant to advance a civil claim since the 3rd Respondent had lost in the bids and had also lost before the Review Board and that the 1st and 2nd Respondents are abusing their investigative and prosecutorial powers which is unreasonable and a violation of the Constitution. The Petitioner argued that the 3rd Respondent should in any case have lodged a complaint with the *Public Procurement Oversight Authority* which has the mandate to investigate fraudulent activities in Public Procurement.

7. The Petitioner therefore sought the following reliefs:

(1) An order of certiorari removing into the High Court and quashing the letter dated 24th July 2017 requiring New Generation Investments Co-operative Society Ltd to provide the contract documents, Local Purchase Orders, deliveries and supplies, RTLS or EFT from banks

(2) A prohibition order restraining the 1st and 2nd Respondents from unnecessary soliciting information concerning the Petitioner's private affairs and dealings from its clients except as provided for in Law.

(3) A declaration that the actions by the 1st and 2nd Respondents to re-open proceedings and take over investigative and judicial functions that are constitutional and statutory preserve of the Public Procurement Oversight Authority are illegal, unconstitutional and void.

1st and 2nd Respondent's Response

8. The 1st and 2nd Respondents filed ground 8 of application dated 5th December 2017 and a replying affidavit by **Sgt. Peter Kanagi**, sworn on 8th March 2018 in response to the Petition.

9. In the grounds of opposition, the 1st and 2nd Respondents contended that they have always acted within their respective mandates; that section 35 of the National Police Service Act provides for the functions of the 2nd Respondent; that the right to privacy is not absolute but subject to Article 24 of the Constitution; that the evidentiary burden required of the Petitioner to prove allegations of violation of fundamental rights has not been met and that the Petitioner's attempt to have the court quash the letter dated 24th July 2017 is made in bad faith.

10. In the replying affidavit, **Sgt. Kanagi** deposed that the 1st and 2nd Respondents have constitutional and legal mandate to investigate and facilitate the prosecution of acts of corruption, bribery, economic crimes, violation of codes of ethics and other crimes prescribed by Law. He deposed that on 24th March 2017 he and **IP Muita** were mandated to investigate a complaint by **Mr. Gichuki** of the 3rd Respondent regarding **Tender No. KEMSA/ONT 6/2017-2018** which had been awarded to **BM Logistics, Harry and Stan Co. Ltd** and **E Logistics** who were suspected to have forged tender documents.

11. **Sgt. Kanagi** deposed that they wrote a letter to the Interested Party on 13th June 2017 requesting tender documents which were supplied; that on scrutinizing the documents they found that the tender requirements were falsified and that some of the tender documents failed to meet mandatory requirements such as serialization and some documents had not been part of the main tender documents; that investigations at the Registrar of companies revealed that the companies were owned by the same person and the referees were his companies and therefore the Petition is intended to halt a lawful process.

12. He further deposed that the Petitioner had provided evidence of ownership of only 5 vehicles of between 7 to 10 times against a mandatory requirement of company vehicles and that the Petitioner did not meet the mandatory requirements but was awarded maximum points during evaluation. According to the deponent, there was substantial non-compliance on the part of the Petitioner in the bids and, therefore, there was good reason to investigate the matter.

3rd Respondent's response

13. The 3rd Respondent filed a replying affidavit by **Benson Mbugua Gichuhi**, its Managing director sworn on 3rd October 2017 and filed in court on 4th October 2017. He deposed that the 3rd Respondent had been involved in transportation of mechanical supplies with the Interested Party having won tenders for that purpose but that the 3rd Respondent's tendering had been frustrated by unethical and corrupt practices at the Interested Party and that the Interested Party has been accepting fake referrals from competitors leading to award of bids and tenders to those that do not deserve.

14. The deponent further stated that on 30th August 2016, his officers attended a tender opening for **No KEMSA/ONT3/2016-2019** where **BM Logistics Ltd** quoted a quarterly amount of Kshs.26,394,600 and that on 14th September 2016, the Interested Party awarded the tender to **BM Logistics** at Kshs. 35,841,000/= which represented an upwards variation of Kshs. 9,447,000 per quarter.

15. Mr Gichuki deposed that he reported that irregularity and attempted fraud to Kenya Anti-Corruption Commission (probably EACC) on 21st September 2016 and provided a print out to the Interested Party's CEO and by letter dated 18th October 2016, they were notified that the tender had been cancelled. He further deposed that although the tender was cancelled and a fresh one advertised, no action was taken against any individual at the Interested Party and BM Logistics Ltd was allowed to bid for the new tender instead of being blacklisted. This he stated, made him to be proactive to ensure that any further infractions of the law by the Interested Party and any bidder were dealt with in accordance with the law.

16. He contended that it is not true that the current complaint against the Interested Party and the Petitioner was due to his dissatisfaction with the ruling of 19th March 2017. He stated that although the Director General of Public Procurement Oversight Authority has power to investigate Procurement fraud, that power is not exclusive in light of section 9(b) of the Public Procurement and Asset Disposal Act. He argued that a complaint against the Interested Party can be lodged to any Public authority with the mandate to investigate fraud and that section 176 (1) (b) makes it an offence to knowingly lie or mislead a person carrying out a duty, function or exercising power under the Act.

17. The deponent contended that in the proceedings before Review Board in Application No. 18 of 2017 his advocates sought tender

evaluation summary for the tender **KEMSA/ONT/2016-2019** from the Interested which was provided and that his own referees were contacted by the Interested Party but he is aware that the World Food Programme (WFP) does not give out transport tenders worth Kshs. 20m and above to an individual transporter but is shared among shortlisted transporters; that he raised issues with the Review Board from the report and inquiries he had made with the **WFP** and Kenya Seed Company; that in response, BM Logistics filed an affidavit purporting to prove that they had contacts with **WFP** and Kenya Seed Company but close scrutiny of the documents revealed that this was not the case.

18. According to the deponent, the complainant lodged with the 1st and 2nd Respondents is not a reaction to the ruling by the Review Board; that he has no malice towards the ruling and that he has not asked the National 1st and 2nd Respondents to interrogate the Board's ruling. He also disputed the Petitioner's contention that the information sought in the letter of 24th July 2017 is confidential and relied on section 67(3) (b) for the argument that confidentiality does not arise where information sought is for purposes of law enforcement.

Petitioner's submissions

19. Miss Oindo, learned counsel for the petitioner, submitted highlighting their written submissions dated 20th March 2018 and filed in Court on 21st March 2018, that the respondents were infringing on the Petitioner's right to privacy; right to fair administrative action and right to fair hearing in contravention of Articles 31, 47 and 50(1) of the Constitution.

20. According to counsel, the Petitioner and the 3rd Respondent participated in a tender advertised by the Interested Party but after issues arose, a review was filed and a determination was made cancelling the tender award and the process had to start a fresh; that the 3rd respondent was included as one of the bidders but the tender was won by the petitioner and 2 other parties. Counsel submitted that the 3rd Respondent filed a review before the Board against the award of the tender but it was dismissed.

21. Learned counsel further submitted that the 3rd Respondent then lodged a complaint with the 1st and 2nd Respondents who then wrote a letter to the Petitioner's clients alleging procurement fraud and asked them to produce certain documents which the Petitioner considered confidential and a breach of their right to privacy guaranteed under Article 31 of the Constitution. Counsel contended that the information being sought at the behest of the 3rd Respondent is private information which has nothing to do with the tender and if released, it will compromise the Petitioner's interests. She contended that the manner in which the complaint was made and the documents sought is in bad faith.

22. According to counsel, the letters state that the 1st and 2nd Respondents are investigating fraud and not alleged fraud which means a conclusion has already been made and the 1st and 2nd Respondents are now looking for evidence to support that conclusion. In counsel's view investigations are being done in bad faith; it is an attempt by the 3rd Respondent to use the 1st respondent to reveal private business information that will compromise the Petitioner's affair and a party should be presumed innocent until proven guilty. Counsel relied on a number of decisions to support their case.

Interested Party's submissions

23. Mr. Kakala, learned counsel for the Interested Party, supported the position taken by the petitioner and associated himself with their submissions. While highlighting their own written submissions dated 24th October 2018, counsel contended that the tender was done procedurally and they did not understand where investigations were coming from. He supported grant of the reliefs sought in the Petition.

1st and 2nd Respondents' submissions

24. Mr. Marwa, learned counsel for the 1st and 2nd Respondents, opposed the Petition through written submissions dated 12th April 2019 and filed in Court on the same day. Learned counsel submitted that investigations by the 2nd Respondent are within the 2nd Respondent's mandate; that the 2nd Respondent wanted information relating to the tender and in that regard, Article 35 of the Constitution permits information held by a public body to be supplied if it is to serve public interest.

25. According to Mr. Marwa, the Petitioner's contention that their rights were being violated is not true since all the 2nd respondent did was to seek information from them. He argued that section 35 of the Police Service Act allows the 2nd Respondent to carry out investigations and it is not true that investigations were being conducted at the 3rd Respondent's behest.

26. Relying on Section 107 of the Evidence Act, learned counsel argued that the burden of proof is on the Petitioner to show that investigations were being conducted in bad faith. He relied on ***Republic v Director of Criminal Investigation Department & 4 others exparte Edwin Herold Dayan Dande & 4 Others*** [2010] e KLR for submissions that the Court should not usurp the mandate of investigative authorities. According to Mr. Marwa, all that was required was information and relied on ***Antony Kihara Gethi & 4 Others v Ben Gethi*** [2010] e KLR in support of their case. In counsel's view, the 2nd Respondents simply requested for information and nothing more and if the information did not raise any questions, the matter would end there.

27. On whether the right to privacy was being violated, learned counsel submitted that the rights alleged to be violated are not absolute. He relied on ***Stephen Kariuki Kamau & 5 Others v Kenya Ports Authority & 6 Others*** [2016]e KLR for submission that the right to privacy is not absolute. He contended that the 1st and 2nd Respondents are discharging their constitutional and statutory mandate.

3rd Respondent's submissions

28. Miss Kariuki, learned counsel for the 3rd Respondent, submitted also highlighting their written submissions dated 25th May 2018, that

the Petitioner had misapprehended the criminal process; that the complaint lodged by the 3rd Respondent was not malicious and that it was well informed. According to counsel, the 3rd Respondent had written a letter to the Review Board to authenticate documents relied on by the Petitioner which was not done and that is why it lodged a complaint with the 1st and 2nd Respondents.

29. Responding to the Petitioner's contention that its rights were being violated, Miss Kariuki submitted that those rights are not absolute in terms of Article 24(1) of the Constitution and relied on the decision in *Cord v Republic of Kenya & others* [2015]e KLR. According to counsel, although the Public Procurement and Asset Disposal Act protects privacy, where the issue is on law enforcement, the right to privacy is limited. In counsel's view, it is not true that the 1st and 2nd Respondents were not being used to get confidential information from the Petitioner.

Determination

30. I have considered the petition, responses and submissions by counsel of the parties. I have also considered the authorities relied on by both sides. This petition challenges the 1st and 2nd Respondents' decision to seek information from an entity that is not a party to this petition but which is said to be a customer to the Petitioner. That information was sought after the 3rd Respondent lodged a complaint with the 1st and 2nd Respondents in what it considered fraudulent conduct and which may have had influence in awarding the tender that had been won by the Petitioner and its associates.

31. The Petitioner took offence with that action contending that it is a violation of its right to privacy, the right to fair administrative action and the right to fair hearing, contrary to Articles 31(4), 47 (1) and 50(1) of the Constitution. The Petitioner contended that the 1st and 2nd Respondents had already concluded that there was fraud and were now looking for evidence to support that conclusion.

32. The 1st and 2nd Respondents have on their part argued that the 3rd Respondent lodged a complaint which they followed up through the impugned letter. They have therefore argued that they are discharging their constitutional and statutory mandates. On its part, the 3rd Respondent contended that there was no malice in lodging the complaint with 1st and 2nd Respondents and that there is no violation of the Petitioner's constitutional rights.

33. Article 244 of the Constitution is clear on the objectives of the 2nd Respondent. Among the objectives is prevention of corruption and promotion and practice of transparency and accountability. Further, section 35 of the National Police Service Act provides for the mandate of the 2nd Respondent which include; collecting and providing criminal intelligence; undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order and detect and prevent crime.. There is no doubt, therefore, that the 2nd Respondent has mandate to conduct investigations with a view to detecting and preventing crime once reported to him.

34. The 2nd Respondent's letter dated 24th June 2011 was directed to a different party *New Generations Investment Cooperative Society Ltd* requesting for certain documents from them for purposes of investigations. In that regard, the party to whom the letter was directed is not party to these proceedings, and is not the one complaining about the impugned letter. Instead, the petition has been filed by a party other than the recipient of the letter.

35. Secondly, apart from stating that the information sought is confidential, the Petitioner has not shown the real connection between it and the addressee of the letter in question. Moreover, the addressee has not questioned the import of the letter and has not alleged any violation of its rights including the right to privacy. I have read the affidavit by *Sgt Kanagi* sworn on behalf of the 1st and 2nd Respondents. It states that their investigations revealed valuable details that they would want to follow up with the party from whom they sought that information.

36. The Petitioner has not shown that the 1st and 2nd Respondents are acting outside their constitutional and statutory mandate; that the information sought is prejudicial to the party from whom it is sought and in what manner and further, that the Petitioner will not be accorded an opportunity to be heard or fair hearing should that be necessary given that the information is not sought from it. Furthermore, the Petitioner has not shown that there was malice on the part of the 1st and 2nd Respondents in carrying out the impugned investigations.

37. As correctly submitted by Mr Marwa, all the 1st and 2nd Respondents are interested in is information, and if there is nothing of interest from such information, the matter will end there. But if there is something to respond to, the Petitioner will be called upon to respond. As it is, the impugned letter is not addressed to the Petitioner but someone else and it is not clear to the court why the recipient of the letter did not raise objection but the Petitioner did.

38. The Petitioner has argued that section 9 (b) of the PPAD A protects privacy in so far as the tendering process is concerned. That may be so but the tender in question was awarded in 2016 and may have been performed or is in the process of implementation. The tender is not therefore the issue before this court. What is before court is the issue of release of information that the 2nd Respondent believes will assist in investigations as a means of enforcing the law. The law will not protect privacy where the information sought is for enforcement of the law and is sought in a lawful manner. Otherwise if the Petitioner's argument was to have its way that would stand in the way of the 2nd Respondent's execution of his constitutional and statutory mandate.

39. The information sought is intended to aid investigations and where possible enforce the law. That cannot be said to be a breach of privacy. Furthermore, the Petitioner has not shown how their right to fair administrative action has been violated. The right to fair administrative action encompasses two forms. The procedural and substantive rights. There was no information sought from the Petitioner and, therefore, the Petitioner has not discharged the constitutional burden placed on him. There is also no proof that its right to fair hearing was violated given that the letter, the subject of this petition, was to a different entity. The Petitioner has also not shown how the respondents have violated any of its constitutional rights.

40. It has long been held that in constitutional pleadings, a petitioner should plead with precision the rights violated, the manner of violation and the Articles of the Constitution that have been infringed. This was the holding in Anarita Karimi Njeru [1979] KLR 154, Where the court stated;

“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.” (See also Meme v Republic [2004] 1KLR 637)

41. Similarly, in any pleadings alleging violation of rights and fundamental freedoms, the petitioner must show that he has a cause of action, that is; there exists a constitutional right guaranteed by the constitution; that the right had been violated and that the respondent is the violator. (See Elizabeth v President Court of Appeal. (2010) SLR 382)

42. In the present petition, the Petitioner has not shown that the impugned letter was directed to it; that disclosure of the information sought, though for enforcement of the law, would violate its constitutional rights or that the Respondents actually violated its constitutional rights. In the circumstances of this petition, I am not persuaded that the Petitioner has discharged the constitutional burden required of it by principles in constitutional litigation to warrant grant of the reliefs sought in the petition.

43. Consequently, the petition dated 25th July 2017 is declined and dismissed with costs to the 3rd respondent.

Dated Signed and Delivered this 13th Day of September 2019.

E C MWITA

JUDGE