



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC PETITION NO. 8 OF 2018

HON. PETER. A. IMWATOK (MCA).....PETITIONER

VERSUS

THE NAIROBI CITY COUNTY.....1ST RESPONDENT

HIS EXCELLENCY MIKE MBUVI SONKO.....2ND RESPONDENT

MR STEPHEN LEBOO MORINTAT.....3RD RESPONDENT

MRS VESIKA KANGOGO.....4TH RESPONDENT

THE DIRECTOR GENERAL PUBLIC

PROCUREMENT OVERSIGHT AUTHORITY.....5TH RESPONDENT

THE CONTROLLER OF BUDGET.....6TH RESPONDENT

AAR INSURANCE KENYA LIMITED.....7TH RESPONDENT

BLISS GVS HEALTHCARE LIMITED.....8TH RESPONDENT

AND

THE HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

THE AUDITOR GENERAL.....2ND INTERESTED PARTY

RULING

1. The Petitioner moved this court by way of a petition dated 20th April 2018, in which he sought the following orders:-

(a) A declaration that the 2nd respondent abdicated, neglected and or failed to uphold his duties as envisaged under Article 179(4) of the Constitution of Kenya, 2010, and sections 128, 135 and 154 of the Public Finance Management Act and Regulation 39 of the Public Finance Management (County Governments) Regulations, 2015.

(b) A declaration that the 3rd respondents abdicated, neglected and or failed to uphold his duties as envisaged under Section 59 of the County Governments Act and sections 128, 135 and 154 of the Public Finance management act and Regulation 39 of the Public Finance Management (County Governments) Regulations.

(c) A declaration that the 4th Respondent abdicated, neglected and or failed to uphold her duties as envisaged under section 36 of the Count Governments Act and Sections 128, 135 and 154 of the Public Finance Management Act and regulation 39 of the Public Finance Management (County Governments) Regulations, 2015.

(d) A declaration that the 5th Respondent abdicated, neglected and or failed to uphold his duties as envisaged under Section 9 of the Public Procurement And Asset Disposal Act No 33 of 2015 and Sections 128, 135 and 154 of the Public Finance Management Act and Regulation

(e) A declaration that the 6th Respondent abdicated, neglected and or failed to uphold her duties envisaged under Section 5 of the Controller of Budget Act, 2016 and Section 128, 135 and 154 of the Public Finance Management Act and Regulations 39 and 41 of the Public Finance Management (County Governments) Regulations, 2015.

(f) A declaration that the cancellation of tender no. NCC/PSM/002/2017-2018 by the 1st Respondent was illegal and un procedural.

(g) A declaration that the 7th respondent did not have the authority to sub contract the services of the 8th respondent without the approval of the 1st respondent.

(h) A declaration that the 2nd 3rd, 4th 6th 7th and 8th Respondent have failed to comply with, and/or breached the provisions of the Constitution of Kenya, 2010, the County Governments Act, the Public Procurement and Asset Disposal Act no 33 of 2015, the Controller of Budget Act,2016 the Public Finance Management Act and the Public Finance Management (county governments regulations, 2015) in discharging their duties in gross violation of the law.

(i) A declaration that the 2nd, 3rd 4th 6th 7th and 8th Respondents using their positions and/or power have involved themselves in corrupt ways and activities.

(j) A declaration that the actions of the 2nd 3rd 4th and 6th Respondents amounts to gross misconduct of persons holding their respective offices.

(k) An Order do issue that the 2nd 3rd 4th 6th 7th and 8th Respondents herein be surcharged for all the public funds lost in the procurement process of medical insurance cover for members of staff of the 1st Respondent for the Financial years 2016-2017 and 2017-2018.

(l) A declaration that the 2nd 3rd 4th and 6th respondents are unfit to hold any public office in the Republic of Kenya.

(m) An Order that all the monies paid to the 7th respondent with respect to the two extensions of 1st July, 2017 to 30th September, 2017 and 1st October, 2017 to 31st December 2017 be returned back to the 1st respondent.

(n) An Order do issue for the audit of the financial books of the 7th and 8th respondents for the Financial years, 2015/2016, 2016/2017. 2017/2018 by the 2nd interested Party.

(o) The Honourable Court be pleased to issue such other or further Orders, Directions and Writs as may be necessary to safeguard and prevent the violation of the Petitioners' Fundamental Rights and Freedoms under the Constitution of the Republic of Kenya.

(p) The costs consequent upon this petition be borne by the respondents in any event.

2. Accompanying the Petition was a Notice of motion dated 20th April 2018 Seeking the following Orders:

(a) The 1st Respondent provides copies of the invoices and other relevant documentary evidence forwarded to them by the 7th respondent for purposes of payment in the two extensions granted to them for provision of medical insurance services for the period 1st July, 2017 to 30th September, 2017 and 1st October, 2017 to 31st December, 2017 respectively amounting to **Kshs. 652,791,602/-**

(b) The 2nd 3rd and 4th respondents to provide certified copies of payment vouchers used for processing of payment by the 1st respondent for the extension of the period 1st July, 2017 to 30th September, 2017 and 1st October, 2017 to 31st December, 2017 respectively amounting to **Kshs. 652,791,602/-**

(c) The 2nd 3rd and 4th Respondent to provide certified copies of payment vouchers used for processing of payment by the 1st respondent for purposes of payment of **kshs 1,062,123,010** for the contract No. NCC/PSM/T/032/2017-2018.

(d) The 1st respondent provides copies of the invoices and other relevant documentary evidence forwarded to them by the 7th respondent for purposes of payment of **kshs. 1,062,123,010** for the contract No. NCC/PSM/T/032/2017-2018.

(e) The 7th respondent provides the Utilization report for the medical insurance services rendered to the staff of the 1st respondent between the period 1st July, 2017 and 31st December, 2017 during the period they were granted extension for provision of medical insurance cover.

(f) The 7th respondent provides the sub-contract entered between the 7th Respondent and the 8th Respondent for provision of medical services to the 1st Respondent's members of staff.

(g) The costs consequent upon this petition be borne by the respondents in any event.

3. Upon filing notices of appointment counsels for the respondents save for the 5th respondent filed notices of preliminary objection on both the Petition and the Notice of Motion.

The Preliminary Objection

4. The Grounds raised by the respondents are as follows:

1st Respondent

(i) THAT this honorable court lacks the jurisdiction to hear and determine the Notice of Motion Application dated 20/4/18 and the Petition of even date by dint of the provisions of articles 93(1), 96(3), 119(1) and 125(1) of the Constitution of Kenya 2010 and Sections 8 and 9(h) of the Public Procurement and Asset Disposal Act No. 33 of 2015.

(ii) THAT the orders sought in the Notice of Motion dated 20/4/18 cannot be granted as:

2.1 They are final in nature

2.2 They are not sought in the main petition,

2.3 The petitioner has not laid any basis for the 1st respondent to supply the documents he is seeking,

2.4 The petitioner has not indicated the reason for seeking the documents.

2.5 The petitioner has not met the conditions for the grant of mandatory injunctions at an interlocutory stage.

(iii) THAT the Notice of Motion dated 20/4/18 is fatally and incurably defective as it is not premised on any provisions of the law.

(iv) THAT the purported supporting Affidavit of the Petitioner is not commissioned as required by the provisions of Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya.

(v) THAT all the exhibits allegedly accompanying the supporting affidavit of the Petitioner are not exhibits within the meaning of Rule 9 of the Oaths and Statutory Declaration Rules as they are not duly marked, not dated neither are they securely sealed under the seal of the Commissioner.

5. 2nd – 4th respondents

(i) This Honourable Court is divested of Statutory and Constitutional jurisdiction to entertain the proceedings herein.

(ii) The Petition and Motion have no evidence offered in support, there being no exhibits as defined and identified within the prescription of the Oaths and Statutory Declarations Act, Cap 15.

(iii) The Petition essentially is an oblique appeal on a procurement decision of the 1st respondent and hence ought to have been lodged as an appeal to the relevant entity so vested under Statute.

(iv) The 2nd, 3rd and 4th Respondents are non suited, and no relief can lawfully issue against them in the circumstances of the pleadings herein by dint of which they ought to be removed from these proceedings.

(v) The Petitioner failed to exhaust all availed avenues for ventilation of his perceived grievances by reason of which the Petition ought to be struck out, with costs to the 2nd, 3rd and 4th Respondents.

(vi) The Motion dated 20th April 2018 is not anchored on any Statutory or Constitutional provisions by reason of which this court cannot grant the relief sought in a vacuum.

(vii) The proceedings are an abuse of Court process and are vexatious

(viii) The Petition has no merit, is prolix and constitutes an extortion scheme against the 2nd, 3rd & 4th Respondents.

(6) 6th & 8th Respondents

(i) That the said application is totally misconceived, bad in law and an abuse of the court process.

(ii) That the said application lacks merits as against the 6th and 8th Respondents.

- (iii) That the supporting affidavit sworn on 20th April 2018 is fatally defective.
- (iv) That the said application and petition violate the mandatory provisions of the Constitution of Kenya & Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013.
- (v) (a) This court has no jurisdiction to sit in judgment over policy decisions taken by a County Assembly or Controller of Budget on matters falling within their mandate and which do not involve any violation of the law.
- (b) The Controller of Budget has no role to play with regards to procurement of goods and services by the County Government.
- (c) The release of funds by the Controller of Budget precedes procurement of service and accordingly suing the Controller of budget for alleged procurement irregularities is an abuse of process of the court.
- (d) Public procurement disputes fall within the jurisdiction of the Public Procurement Administration Appeals Tribunal and not this honourable court.
- (e) No cause of action is disclosed against the 8th respondent in the said application nor in the petition.

7. 7th Respondent

- (i) The Petition herein is fatally defective, frivolous, bad in law, lacks merit, the same is premature and an abuse of court process.
- (ii) The Petitioner herein fails to cite the provisions of law on which the Notice of Motion dated 20th April, 2018 is premised.
- (iii) The orders sought in the Notice of Motion dated 20th April, 2018 cannot issue as the same are prayers that ought to be in the Petition itself and further, the Petitioner has failed to state the purpose for which the documents are sought in the Notice of Motion.
- (iv) The Honorable Court lacks jurisdiction to entertain a petition from a member of the County Legislative Assembly in exercise of his oversight and authority under article 185(3) of the Constitution of Kenya, 2010.
- (v) The court cannot clothe itself with jurisdiction reserved for the Public Procurement Regulatory Authority under part IV of the Public Procurement and Asset Disposal Act No 33 of 2015.
- (vi) The Petition and the Notice of Motion herein ought to be struck out *in limine*.

SUBMISSIONS IN SUPPORT OF THE PRELIMINARY OBJECTIONS

The 1st Respondent

8. Mr. Mukua for the 1st respondent relied on the grounds in the notice of preliminary objection dated 7th May 2018 and their bundle of authorities dated 14th May 2018. It was his submission that this court lacked jurisdiction to hear this case. He cited Article 96(3) of the Constitution which grants power to the Senate to oversee the county's finances. His view was that the allegation here was on misappropriation of funds. He submitted that under article 125(1) of the Constitution the two houses can summon parties to supply the documents sought by the petitioner/applicant.

9. Secondly under section 9(10)(h) of the Public Procurement and Asset Disposal Act (PPADA), the Regulatory Authority has the power to investigate and deal with the issue being raised by the petitioner/ applicant. He further submitted that once a procedure has been laid down in law it ought to be strictly followed. He argued that the authorities filed by the petitioner can be clearly distinguished from the case before the court where the procedure laid down was not adhered to.

10. Counsel also raised issue with the supporting affidavit which he said had not been signed as required under Section 5 of the Oaths and Statutory Declarations Act. He stated further that the documents served on them were not certified and were not properly before the court. He cited the case of **Jeremiah Nyangwara Matoke v (Independent Electoral and Boundaries Commission) IEBC & 2 Others 2017 eKLR** in support.

The 2nd 3rd and 4th Respondents

11. Mr H. Kinyanjui for the 2nd 3rd & 4th respondents submitted that the petitioner though a member of the County Assembly did not appear to know under which provisions of the law he sought the orders in the Notice of Motion. Counsel reiterated what Mr. Mukua had submitted on the supporting affidavit and annexures. He argued that under the law there were no documents before the court and so the Petitioner could not be assisted. He said the Petitioner could not hide under Article 159 of the Constitution as this omission was not a technicality.

12. Referring to the Nairobi City County Assembly Standing Order No. 83 he submitted that there was a procedure laid down for handling complaints such as what the petitioner was raising. He also cited the case of **Narok County Council vs Trans Mara County Council & Anor Court of Appeal (Kisumu) Civil Appeal No 25 of 2000** and **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR** to buttress this point.

13. Mr Kinyanjui submitted that these proceedings cannot be sustained in public interest owing to the violation of the law. He referred the court to the case of **Republic vs County Government of Mombasa [2014] e KLR.** to buttress this point.

The 5th Respondent

14. There was no preliminary objection raised by the 5th respondent. However, M/s Barno appearing on its behalf associated herself with the submissions made by her colleagues especially on the issue of Jurisdiction.

The 6th & 8th Respondents

15. Mr Aruwa on their behalf submitted that the Notice of Motion is not premised on any provisions of the Law and cannot therefore elicit any orders from this court. Further that the Petition and Notice of Motion were supported by one defective affidavit, which did not comply with provisions of the Law. On this he cited the case of **Kanyua v Nganga [200]2 E.A. 104.** On the issue of uncertified documents he referred to

(i) **Fredrick Mwangi Nyaga vs Garanu Investments & Anor 2013 eKLR**

(ii) **Justus Mongumba Omiti vs IEBC (Independent Electoral & Boundaries Commission) & Anor. Kisii High Court Election Petition no. 3 of 2017.** His submission on this was that failure to certify the documents would lead to them being expunged and considered as not existent.

16. Counsel argued that the Petitioner's grievances could only be addressed through a set out procedure in the following manner:

(i) First Forum being the County Assembly

(ii) Regulatory Authority

(iii) Public Procurement Administrative Review Board

(iv) Senate.

He submitted that the petitioner's action was therefore premature and defective.

17. He also argued that the pleadings did not disclose anything against the 6th and 8th respondents. There was therefore nothing for them to respond to.

The 7th Respondent

18. Mr Nyamu submitting on behalf of the 7th respondent stated that no specific writs had been sought from this court by the Petitioner and the Petition was a non-starter. He cited the cases of **Narok County Council vs Mara County Council (supra) and Speaker of the National Assembly vs Hon. James Njenga Karume Nairobi Civil Application No. 92 of 1992** in support of this.

19. He further submitted that, the Public Procurement & Assets Disposal Act was enacted pursuant to Article 227 of the Constitution. That the NASA case (Speaker of the National Assembly (supra) he said was premised on the repealed Public Procurement Disposals Act, whereas under the PPADA (Public Procurement and Assets Disposal Act) jurisdiction is not confined to Tenderers and Accounting Officers only. He said the Petitioner had an avenue under that Act and also before the Tribunal to raise his complaints.

20. Counsel submitted that the prayers sought in the Notice of Motion amounted to a prayer under Article 35 and ought to have been anchored in the petition itself. He further stated that the petitioner had other avenues through which he could have addressed his grievances e.g addressing the County Assembly itself and/or utilizing Article 195(1) of the Constitution.

21. Referring to the Petition he submitted that the orders sought are merely declaratory as there is no specification of any writ. He wondered why the petitioner had not enjoined the Ethics & Anti Corruption Commission (EACC) as an interested party for it to be forced to investigate the complaints. He asked the court to down its tools at this time.

The Petitioner's response

22. In his opening remarks Mr. Ashioya submitted that the preliminary objections lacked substance, were irrelevant and inconsistent with the goals of justice. That they failed to meet the requirements set out in the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696**

23. He submitted that the Petitioner filed the petition in his capacity as an MCA and as a member of the public under Article 258 of the Constitution. Under Article 3 of the Constitution the operative word is "every person" which the petitioner had satisfied.

24. Mr Ashioya submitted that it is not only the tender that was being questioned. There was fear of the loss of KShs 1.7 Billion perpetrated by the actions of the respondents through irregular procurement. He added that the Petitioner is raising several issues in this petition, having

exhausted all avenues in addressing the same.

25. On the contested annexures he submitted that the same were certified and marked. Referring to the **Litein Tea factory Company Ltd & Anor vs Davis Kiplangat Mutai & 5 Others [2015] eKLR** case he submitted that the omission if any was a matter of form and the documents should not be struck out. The same he said applies to the Notice of Motion which was in line with forms A & D of the Mutunga Rules.

26. Mr Magara also for the Petitioner submitted that the prayers seeking the supply of documents were not final in nature and are not in the petition. The petitioner was however seeking for information under article 35 of the Constitution which falls under the Bill of Rights, and they also relied on Article 20(3) of the Constitution. He added that what had been filed is what was served on the respondents.

27. Ms Nkatha for the petitioner further submitted that the court had jurisdiction to interfere with matters including those before the County Assembly as long as there were irregularities. Referring to article 225 of the Constitution, sections 2, 34 & 167 of the PPADA, she submitted that the petitioner was neither a candidate or tenderer. Further that though the Authority may investigate, the petitioner elected not to go to those agencies.

28. Mr Ashioya further submitted that the petitioner has set out all that he seeks. That the reason for seeking those declarations will clearly come out during the hearing of the petition. He said section 174 PPADA provides for a remedy to review whereas section 9 PPADA is not mandatory as the operative word is "MAY". It was his position that the petitioner has a right to file this suit while this court has jurisdiction to hear it. He referred to the case of **Republic v Independent Electoral and boundaries Commission (IEBC) CORD [2017] eKLR** to support this argument.

29. It was his submission that the Petitioner was not mandated to follow the procedures cited because he does not fall in the categories cited. He still referred to the cases of **Republic vs Independent Electoral and Boundaries Commission (IEBC) CORD** (supra) and **Republic vs IEBC Exparte National Supper Alliance (NASA) Kenya & 6 Others [2017] eKLR** to buttress that point. He asked the court to sustain the suit as it is a case with a lot of public interest.

Response by the respondents

30. In a brief rejoinder Mr. Mukua for the 1st respondent submitted that what was before the court was a preliminary objection on a pure point of law which if allowed would dispose of the suit. That this court's jurisdiction can be limited by various legislation e.g. PPADA. Further that due process has to be followed whether the issue is merits or processes. The operative word in section 9 of the PPADA is SHALL.

31. Mr. Kinyanjui joined issue with what Mukua had submitted. He added that no consumer rights were pleaded and the EACC was missing in the pleadings. That uncommissioned affidavits, uncertified and undated documents were filed in court, and served on the parties which he found strange.

32. M/s Barno submitted that section 9(1) (h) of the PPADA is mandatory and has to be complied with. She argued that the petition is about procurement and the petitioner wants this court to investigate the said matter. This would go against Article 227 she said.

33. Mr. Aruwa submitted that the **Litein case** (supra) does not say that unmarked documents are admissible. In the said case the 1st document had the word "bundle" used to refer to all documents which is different from what is before this Court. He said his issue in respect of the 6th and 8th respondents being erroneously enjoined was never responded to by the petitioner.

34. Mr. Nyamu reiterated all that the learned counsels had told the court.

DETERMINATION

35. I have duly considered the contents of the four (4) Notices of Preliminary Objection, submissions by all counsel, plus the authorities cited. Mr Ashioya for the Petitioner is of the view that the preliminary objections raised herein do not meet the requirements set out in the **Mukisa Biscuit case** (supra)

36. It behoves this court to consider the principles that guide the court in determining preliminary objections. In the celebrated case of **Mukisa Biscuit** Law JA stated thus:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Nbold P. said.

" A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of preliminary objection does nothing but unnecessarily increases costs, and on occasion, confuses the issues, and this improper practice should stop."

37. One of the issues raised in the Preliminary Objections by the respondents is the issue of jurisdiction. They have submitted that this court lacks jurisdiction to hear this petition and Notice of Motion. In the case of Owners of the **Motor Vehicle “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR1** Nyarangi JA (as he then was) at pg 14 stated thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

38. Jurisdiction being an issue that goes to the root of any matter, it follows that once raised, it must be dealt with before any orders or judgment is given. Any orders or judgment given without jurisdiction amount to nothing. The issue of jurisdiction cannot be taken lightly as Mr. Ashioya says. I will therefore have to determine whether this court has jurisdiction to hear and determine this matter in the first instance.

39. The Petitioner herein is a member of the Nairobi City County Assembly representing Makongeni Ward and is the Minority Chief Whip of the minority party in the County Assembly and a member of the House business committee, Finance, Budget & appropriation committee, Water & Sanitation committee and chair person of County Assembly Sports association. A reading of the Petition brings out a picture of an MCA who is out to ensure that the Nairobi City County Assembly does not fleece Kenyans of the public funds allocated to them and that the laid down procedures are followed.

40. He has given a history of the expenditure of finances and in particular the medical insurance cover since the financial year 2015/2016. His major complaint is on how the two extensions of the staff medical cover were done from:

(i) 1st July 2017 – 30th September 2017 - Paid Kshs 326,395,233/-

(ii) 1st October 2017-31st December 2017 - Paid Kshs 326,395,369/-

41. Secondly he is questioning how the 7th respondent won the tender to give the staff medical cover. In other words he faults the procurement process if at all any was carried out. The Nairobi City County Assembly is a public entity. Article 227 of the constitution deals with Procurement of Public Goods and Services. It provides as follows:

(1) 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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

42. Pursuant to Article 227(2) Parliament enacted the following legislation to deal with issues of Procurement & Finances namely:

(i) Public Procurement & Asset Disposal Act 2015 (PPADA)

(ii) Public Finance Management Act (PFMA)

43. Section 121 of the PFMA deals with Procurement for County Government entities and it provides:

“For purposes of this Act, all procurement of goods & services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution & the Public Procurement & Disposal Act. “(emphasis added).

44. The PPADA therefore deals with all procurement of goods and services and disposal of assets in respect of the County Government. The said Act under section 8 establishes the Public Procurement Regulatory Authority, (PPRA).

45. The functions of the PPRA are set out at section 9 of the PPADA as follows:

(a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national

- values and other provisions of the Constitution, including article 227 and make recommendations for improvements;
- (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) enforce any standards developed under this act;
- (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the cabinet Secretary;
- (e) monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) prepare, issue and publicize standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) provide advice and technical support upon request;
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are subject of administrative review;
- (i) research on the public procurement and asset disposal system and any developments arising from the same;
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- (m) create a central repository or database that includes
- (i) complaints made on procuring entities;
 - (ii) a record of those prohibited from participating in tenders or those debarred;
 - (iii) market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that are non-compliant with procurement laws;
 - (vi) Statistics related to public procurement and asset disposal;
 - (vii) Price comparisons for goods, services and works; and
 - (viii) Any information related to procurement that may be necessary for the public;
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant county executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the authority, including material breaches of the measures established under this act;
- (o) generally report to Parliament and the relevant County Assembly;
- (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
- (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
- (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
- (s) perform such other functions and duties as provided for under this act and any other relevant law.

(2) If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a state organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.

46. It is clear that one of the functions of the PPRA is to receive complaints on procurement and asset disposal proceedings. The Petitioner claims not to be one of the group of persons listed in section 9(1) (h) of the PPADA and so could not raise his complaint with the Authority. At **para 19** of his petition he states this:

“The Petitioner presents this humble Petition to the Honourable Court both in his capacity as an elected member of the Nairobi City County assembly and for and on behalf of various members of staff of the Nairobi City County and in the public interest pursuant to article 22(2)(b) and (c) of the Constitution of the Republic of Kenya.”

47. He is therefore in this petition representing not only his interest but a wider interest of the various staff members of the Nairobi City County and the public. Section 9(1) PPADA has listed the **general public** that are not subject to administrative review as among those who can lodge such complaints with the PPRA. Once the Authority is of the opinion that civil or criminal proceedings ought to be preferred it refers the matter, to the relevant authorities (see **section 9(2) (PPADA)**) It is not therefore correct when the petitioner states that he came to court because he is not covered under section 9(1)(h) of the PPADA, in terms of raising complaints.

48. The Ethics and Anti corruption commission by virtue of Article 252(1)(a)

“May conduct investigations on its own initiative or on a complaint made by a member of the public;”

Member of the public includes the Petitioner herein, and the staff of Nairobi City County.

49. The Ethics and Anti Corruption Commission Act (EACCA) at section 11(1)(d) provides:

“In addition to the functions of the commission under article 252 and chapter six of the Constitution, the commission shall:

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant the Chapter Six of the Constitution;

50. In this petition, the Petitioner has accused all the respondents at different levels of fraud, impropriety, unethical conduct in the process of procurement, budgeting, approval of supplementary budgets, award of tenders among others.

51. I wish to point out some of the glaring paragraphs in the Petition on these allegations.

Para 62:

“The Petitioner avers that the 1st 2nd 3rd 4th 5th and 6th Respondents action to allow and/or approve the 1st respondent to overrun its approved budget for provision of medical insurance service in the 2017/2018 Financial year by more than 103% was illegal.”

Para 122

“ The effect of the foregoing paragraph read and interpreted against the conduct of the 1st, 2nd 3rd, 4th, 6th, 7th and 8th Respondents as pleaded hereinbefore is such as to lead to the real, reasonable and present apprehension by the Petitioner that the Cancellation of the first tender, the re-advertisement, the Addendums, the deliberate interruption of the 8th Respondent and the ultimate award of the tender to the 7th Respondent was a well-choreographed scheme by the 1st, 2nd 3rd and 4th Respondents to ensure that the 7th respondent is awarded the tender with clear undoubted vested interest of fleecing the tax payers of Kenya and the Nairobi rate payers public funds at the expense of development and service delivery and for self-enrichment.”

Para 151

“This further confirmed that the 1st, 2nd 3rd 4th 6th, 7th and the 8th respondents are in full conspiracy of defrauding the 1st respondents, citizens and the Kenyan public.”

Para 155

“The Petitioner is apprehensive that the 1st, 2nd 3rd, 4th and the 6th Respondents have corruptly and fraudulently been conspiring with the Directors of the 7th and 8th respondents in the award of the tender for provisions of medical insurance services for the members of staff for the 1st respondent since the year 2015 contrary to the Public Procurement and Disposal Act, the Public Finance Management Act, and other laws, the effect of which was that a substantial sum of the money paid by the 1st respondents as premium of the Scheme ended up in the accounts of individuals without a corresponding benefit to

the intended beneficiaries and their dependants.

52. All these are allegations which if found to exist would lead to criminal charges. A clear procedure has been set out in section 9(1) of the (PPADA) on how such complaints should be addressed. Secondly the PFMA sets out how issues of budgeting, supplementary budgeting and all other matters of finance should be dealt with. Sections 196-198 of the said PFMA also enumerates the offences under the said Act.

53. Thirdly the EACC and the Police investigate corruption and economic crime related offences which is part of the Petitioner's complaint. There is nothing in this petition to show that the petitioner at any point made a complaint or report to any of these investigative bodies and no action was taken. These bodies are the ones endowed with the power and machinery to investigate complaints and more so complaints of the nature cited by the Petitioner.

54. This court has jurisdiction to deal with constitutional matters but where a clear procedure has been set out, that procedure must first be exhausted. This court cannot be turned into an investigating agency. It's important that room is given to the various agencies mandated to carry out investigations to do so before a matter is rushed to the court. I am in agreement with what **Aburili J** said in a similar scenario in the case of **Catherine Muthoni Mwamra v Hamida Yoroj Shek Nuri & 5 others 2018 eKLR** where she stated:

“57: However, it is not in doubt that the jurisdiction of this court is not unlimited and that even where the court has jurisdiction, where there is an alternative effective remedy, then this court's jurisdiction would be limited to the extent that a party must first exhaust that other remedy before resorting to judicial review. This is the spirit and letter of Article 159(2)(c) of the Constitution and section 9 of the Fair Administrative Action Act, 2015

55. In the case of speaker of the **National Assembly vs James Njenga Karume [1992] e KLR** the Court of Appeal expressed itself thus;

“In our view, there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

56. More recently the Court of Appeal in the case of **Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor [2015] eKLR** expressed itself thus:

“Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.”

In **Rich Productions Ltd V. Kenya Pipeline Company & Another, Petition No 173 of 2014**, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need, not go into there. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”

57. The court went further on to state:

“On the same reasoning this court in Republic V The National Environmental Management Authority CA No. 84 of 2010 upheld a decision of the High court, which de-linked to entertain judicial review application by a party who had a remedy, which he had not utilized under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in Vania Investment Pool Ltd V Capital Markets Authority & 8 Others CA No 92 Of 2004 this court also upheld a decision of the high court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the Capital Markets Act.”

58. Guided by the above findings by the superior courts I find that the Petition herein falls in the same category. The Petitioner ought to have filed his numerous complaints with the well established agencies which have the competencies to investigate them and make decisions. I find the petition to have been filed prematurely before exhausting the laid down procedure, calling for investigations by various bodies and/or agencies.

59. In the circumstances of this case, I find that this court lacks the jurisdiction to entertain the petition and Notice of Motion dated 20th May 2018. That being the case, I have no choice but to down my tools and I find it needless to address the other issues raised by the respondents in the Preliminary Objections.

60. The result is that the preliminary objection in respect of the jurisdiction of this court in this specific matter succeeds. The Petition and Notice of Motion dated 20th May 2018 are hereby struck out with costs.

Orders accordingly.

Signed, dated and delivered this 13th day of June 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE