



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTION PETITION NO. 6 OF 2018

IN THE MATTER OF ARTICLE 22(1), & (2), 23(1)(1) & (3)(f) 48, 50(1), 165(3)(b), (6) & (7) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 10, 11, AND 14 OF THE CONSTITUTION OF KENYA, 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF ACCESS TO INFORMATION AC, 2016

AND

IN THE MATTER OF SECTION 67(3)(b) OF THE THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF SECTION 8(1)(b) OF THE PUBLIC SERVICE (VALUE & PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF SECTION 96 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER SECTION 4, 7 AND 8 OF THE EMBU COUNTY ACCESS TO INFORMATION ACT, 2015

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 3(1), 10(2)(a) & (c), 27(1), 35, 47(1) & (2), 48, 73(1)(a), 2((b), (c), (d) & (e) 201(1)(a), 227(1) AND 232(1)(f) OF THE CONSTITUTION OF KENYA

BETWEEN

JAMES KUGOCHA.....PETITIONER

V E R S U S

CHIEF COUNTY OFFICER

DEPARTMENT OF INFRASTRUCTURE.....RESPONDENT

R U L I N G

1. The respondent raised a preliminary objection against the hearing of this petition and the notice of motion dated 21/05/2018.

2. The petition seeks for several prayers which may be summarized as follows:-

(a) A declaration that various rights of the petitioner were violated.

(b) Orders of judicial review of mandamus and prohibition in relation to the alleged infringed rights.

(c) An order for damages for violation of rights.

3. Both parties filed submissions in support of their arguments in this objection. Messrs Onyoni, Gachuba & Co. Advocates represented the petitioner while Messrs J.K. Kibicho & Co. were for the respondent.

4. The preliminary objection is premised on the fact that the dispute leading to the filing of this petition falls under the provisions of Public Procurement and Assets Disposal Act, 2015. It is contended by the respondent that Section 27(1) of the Act establishes the Central Independent Appeals Review Board known as the Public Procurement Administrative Review Board. The functions and jurisdiction of the Board are stipulated under Section 28 of the Act as follows:-

1. The functions of the Review Board shall be -

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform an other function conferred to the Review Board by this Act, Regulations or any other written law.

5. Specifically, the Board has powers to review, hear and determine tendering and asset disputes. Any person aggrieved by the process of tendering and asset disposal under the Act ought to seek administrative review from the Board. It was stated that the petitioner is the director of Arid Contractors & General Suppliers Limited which submitted bids in respect of six (6) tenders. The petitioner therefore alleges that his right of access to information under Article 35 was denied by the respondent in that his request for information in respect of the tendering process was denied.

6. The respondent further contends that no information was requested from the respondent and further that the information in question is privileged under section 67 of the Act.

7. It is further argued that the petitioner ought to have filed his dispute with the Board for hearing and determination instead of filing this petition in the High Court. The respondent relies on the "Doctrine of Exhaustion" which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court.

8. The respondent relied on some decisions in this regard, among them the Court of Appeal case of **GEOFFREY MUTHINJA KABIRU & 2 OTHERS VS SAMUEL MUNGA HENRY & 1756 OTHERS [2015] eKLR** where the court held:-

It is imperative that where a dispute resolution mechanism exist outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute.

9. It was the contention of the respondent that the petitioner ought to have first exhausted the existing dispute resolution mechanisms. The respondent argued that the company which was aggrieved by the respondent's alleged refusal to supply the information it need is a legal person and ought to sue on its own.

10. The issue of bonafides was raised as to whether the petitioner is acting in good faith by purporting to represent the residents of Embu in this petition whereas it was the company where he is a director that is aggrieved. The respondent urged the court to find that this petition cannot stand as public litigation.

11. The 2nd limb of the respondent's submissions is that the petitioner has no *locus standi* to institute this petition. He says he files it on behalf of the residents of Embu County, stakeholders and beneficiaries of the public goods, works and services procured by the respondent. In the body of the petition, the petitioner brings in his company Arid Contractors & General Supplies Ltd. to which he is a director as having submitted their tender bids. The petitioner cannot now clothe the grievances of his company as public interest suit.

12. The respondent cited the case of **THAKUR BAHADUR SINGH & ANOTHER VS GOVERNMENT OF ANDHRA PRADESH & ANOTHER ON 23rd September 1998, 1998(6) ALD 101** where it was held:-

...But a person for personal gain or private profit or political motive or any oblique consideration has no locus standi. Similarly, a vexatious petition under the colour or garb of PIL brought before the Court for vindicating any personal grievance, deserves rejection at the threshold. The court should not allow its process to be abused by mere busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest in their mind or heart except for personal gain or private profit or political mileage either for themselves or as proxy of others or for any other extraneous motivation or collateral.

13. The applicant/petitioner in his submissions argued that the petition deals with issues of violation of the petitioner's constitutional rights which have been specifically pointed out. The respondent was obligated to comply with the law in the tender process which he failed to do.

The petitioner argues that this court has the power to hear and determine the issues in the petition.

14. The other prayer in the petition include that of damages for violation of the rights complained of and demand for supply of documents in respect of the incident that led to the filing of this petition.

15. The jurisdiction of this court is donated by Article 165 of the Constitution and it is imperative that the relevant parts of the article be examined.

16. Article 165(3)(b) of the Constitution provides:-

(3) Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

17. The petitioner has cited **KATIBA INSTITUTE VS PRESIDENTS DELIVERY UNIT & 3 OTHERS [2017] eKLR** where the court held that the High Court had jurisdiction to determine the constitutional issues before it and noted that the statute law did not bar the constitutional court from dealing with issues of violation of rights arising from the implementation of statute law.

18. The issue of jurisdiction of this court to hear and determine this petition must be expanded to include the issues raised by the parties in the submissions.

19. The petition on the face of it is a constitutional petition seeking a declaration that the petitioner's right of access to information donated by Article 35 of the Constitution has been violated the other prayers are judicial review orders of mandamus and prohibition in respect of the alleged violation. An order for damages for violation has been sought.

20. This court has powers under Article 165(3) to hear and determine constitutional issues where it is alleged that a right or fundamental freedom has been threatened, denied or violated. Where the court is satisfied that the petition meets the threshold of a constitutional petition, this court will proceed to hear and determine it under the powers donated by Article 165 of the Constitution.

21. The issues that arises in regard to this petition is whether it is justifiable and whether it meets the required threshold of a constitutional petition.

22. The respondent raised the issue of *locus standi* that the petitioner cannot sue on behalf of the residents of Embu as he has indicated in the petition. Article 22 of the Constitution provides:-

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

23. The provisions of this article settled the issue of *locus standi* for it opens the door of justice for any person in regard to threat of violation or infringement of any right or fundamental freedom.

24. As to whether the petition is competent, the law was settled in the Court of Appeal case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** and that of **ANARITA KARIMI NJERU VS ATTORNEY GENERAL Petition No. 1 of 1979 1 KLR 154**.

25. A petitioner must be specific as to the rights violated and give particulars of it. This serves the purpose of generating the issues for determination before the court and assists the opposite party to prepare a comprehensive response. The Constitution of Kenya (Protection of Rights and Procedure Rules, 2013 require in Rule 10(2) that a constitutional petition shall contain the facts relied upon; the constitution provision violated; the nature of injury caused and the relief sought.

26. The petitioner alleges that his right of access to information was violated and gives the particulars of the said right. The constitutional provision is clearly stated as Article 35. He states that he suffered injury for which he seeks damages.

27. I am of the considered view that this petition is in compliance with Rule 10(2) of the Constitution of Kenya (Protection of Rights and Procedure) Rules, 2013 and therefore meets the threshold of a constitutional petition.

28. The provisions of Section 27(1)(a) of the Public Procurement and Assets Disposal Act is based on the premise that the institution concerned has made a decision which the Board will be approached to review under its powers. The petitioner has stated that the request for information was made but there was no action or response from the respondent.

29. In this scenario, the petitioner has no decision by the respondent to refer to the Board for hearing or for review. The respondent did not show or even indicate that any decision was been made by it. In my view, the petitioner is within his rights to seek a constitutional relief from this court.

30. The petitioner is a different legal person from the company in which he is the director. It is not in dispute that it is the company that submitted bids for six tenders to the respondent. The company has not been joined as a petitioner and the only person seeking relief is the petitioner who is a different legal person.

31. In this regard I do not find any malafides, malice or vested interest on the part of the petitioner.

32. Consequently, I find no merit in the preliminary objection and dismiss it accordingly.

33. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 17TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ngige for Respondent