



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 331 OF 2016

KATIBA INSTITUTE.....1ST PETITIONER

AFRICA CENTRE FOR OPEN GOVERNANCE.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

ISEME, KAMAU AND MAEMA ADVOCATES.....INTERESTED PARTY

RULING

1. This is a ruling on the petitioner's preliminary objection dated 26th June 2018, objecting to the appointment of the firm of ***Iseme, Kamau and Maema Advocates***, a private law firm, to act for the Attorney General in this petition. The petitioner contends that a private firm of advocates has no ***locus standi*** under article 156 (4) (b), (6) and (7) of the Constitution as read together with sections 4(2) and 14(I) of the Office of the Attorney General Act and sections 38, 43 and 45 of the Interpretation and Provisions Act (Cap2), to represent the Government in civil litigation, a constitutional mandate of the Attorney General.
2. In this regard, the petitioner has filed a Notice of Preliminary objection together with a motion on notice both dated the same day seeking an order striking out the notice of appointment filed by the said firm of Advocates who have been referred in the Motion interested party, though not formally enjoined in the proceedings. The grounds upon which the objection is premised are that a private law firm cannot represent the 1st respondent; that it lacks capacity to address the Court and, therefore, could not file a Notice of Appointment to represent the 1st respondent in this petition.
3. The petitioner takes the view that only the Attorney General is authorized by the Constitution (Article 156 (4) to represent the national government in civil proceedings in which the government is a party. It is further contended that under article 156(7) as read together with Article 259 (3) (a) and (b) of the Constitution, the Attorney General's mandate to represent the national government may only be exercised by person holding that office or a subordinate officer acting in or otherwise performing functions of that office at any particular time.
4. It is the petitioner's further contention that section 4(2) of the Office of the Attorney General Act, allows the Attorney General to discharge his mandate in person or through a subordinate officer by delegating his function to that officer. The petitioner argues that a private law firm is not a subordinate to the Attorney General as contemplated by the constitution and the law. Also advanced is the view that section 14(I) of the Act permits the Attorney General to delegate to the Solicitor General or to a State counsel, any of his powers and functions but not to a private law firm.
5. Based on the above grounds it is the petitioner's contention that section 38 of Interpretation and General Provisions Act permits the Attorney General where not expressly forbidden, to delegate exercise of a power or performance of a duty by notice in the Gazette to a person by name or one holding an office specified in the notice, to perform such functions or duties subject to any conditions he may specify. It is the petitioner's case that for the Attorney General to pay a private law firm to act on his behalf would amount to improper use of public resources and is unconstitutional.
6. The 1st respondent has filed a replying affidavit to the preliminary objection by ***Christine Agimba*** sworn on 3rd July 2018 and filed in court on the same day. ***Ms Agimba*** deposes that it is wrong for the petitioner to characterize the law firm of ***Iseme, Kamau and Maema***,

Advocates as interested party in the objection; that the prayer for striking out the Notice of Appointment of Advocates is not contemplated or supported by the enabling provisions referred to in the supporting affidavit; that Article 156 (4), (6) and (7) only relate to the position, function and powers of the Attorney General but do not contain a prohibition against engagement of external counsel.

7. According to *Ms Agimba*, Article 259 (3) (a) and (b) of the constitution only provides guidance on the construction of the Constitution and is facilitative in nature to ensure that powers conferred by the constitution are performed or exercised notwithstanding absence of the substantive office holder. She contends that sections 4(2) and 14(I) of the Office of the Attorney General Act are not relevant given that section 4(2) is a general provision on administrative delegation.

8. It is also contended that general provisions do not relate to the appointment of external counsel; that the state, like any other party, is entitled to professional services and to receive technical legal support where necessary for effective representation; that there is no delegation but appointment of external counsel and that section 38 of Interpretation and General Provisions Act or any other provisions cannot be read into the constitution or statute in a manner that introduces substantive prohibitions.

9. *Ms Agimba* deposes therefore, that there is no breach of procedure or illegality in the appointment of the external counsel and that the Attorney General has acted to protect public interest. She also states that this is not a real preliminary objection in terms of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696.

10. *Mr Ochiel*, learned counsel for the petitioner, submits, highlighting their submissions dated 26th June 2018 and filed together with the motion, that the Attorney General cannot delegate his powers or functions to a private law firm to act for him in civil proceedings on behalf of the national government. Learned counsel relies on Articles 10, 156(6) and (7) and sections 4(2), 14(I) and 25 of the Office of the Attorney General Act as well as section 38 and 45 of Interpretation and General Provisions Act to support his contention.

11. According to learned Counsel, the petitioner objects to the appointment of a law firm to represent the Attorney General in the petition because it violates Article 156(6) which requires the Attorney General to protect and uphold the rule of law and Article 156(7) which allows the Attorney General to delegate his functions to a subordinate officer. He therefore argues that the Attorney General cannot delegate his functions to a private law firm to represent him. Learned counsel relies on section 2 of the Office of the Attorney General Act on the definition of “*delegate officer*” as a Public officer. He maintains that a private law firm is not a public officer for purposes of delegation of power. He also makes reference to section 14(I) of the same Act on the same issue. He is of the view that the power to delegate is limited to public officers only.

12. *Mr Ochiel* relies on several authorities in support of their submissions, including *Steven Katuka v Attorney General* 2016/CC/00102016 /CC/0011 where it was held that the Attorney General cannot initiate actions or represent private persons no matter how well-meaning his action; *Isaac Oluoch Polo Aluochier v Uhuru Kenyatta* [2014] EKLK and *Raila Amolo Odinga vs Independent Electoral and Boundaries Commission* [2017] EKLK, for the submission that the Office of the Attorney General is an integral part of the executive; bears the privilege of executive authority; is bound by the necessary and sacred structures of exercise of power and that the power must be exercised in a manner compatible with the principles of service to the people of Kenya for their well-being and benefit pursuant to Article 192(2) of the constitution.

13. Learned counsel further relies on the case of *Attorney General v Michigan Public Service Commission Docket* NO. 215919 5 for the submission that the Attorney General is designated as the legal representative of state officers and agencies sued in their official capacities. He once again refers to an article by John Wills Delegatus *Non Potest Delegate* (1921) Canadian Law Review (P. 257 to 264) on the definition of delegation, contending that the delegation as generally used, does not imply parting with powers by the person who delegates but confers authority to do things which otherwise the person delegating would have to do himself. He also relies on the Supreme Court of India case of *Siddhartha Caravaggis v Board of Trustees for Kolkata* for a similar meaning on delegation.

14. Learned counsel argues therefore, that instructing a private law firm is delegation which is prohibited by the constitution and the law. He contends that public resources must be used prudently and in his view, it is a misuse of public resources to pay a private law firm to act for the Attorney General.

1st respondent's submissions

15. *Mr. Karori*, learned counsel for the first respondent submits, also relying on their written submission dated 7th July 2018 and authorities of the same date, that neither the Constitution nor the law bars the Attorney General from appointing counsel from the private sector on his behalf. He contends that where there is no such a bar, the Court cannot introduce one by way of judgement. In learned counsel's view, the petitioner has misunderstood the constitution with regard to delegation. He argues that the power to delegate is contained in section 6 of the Office of the Attorney General Act and refers to Part III of the Act on the performance of functions of that office. Learned counsel contends, therefore, that there is a distinction between powers and functions of the Attorney General.

16. *Mr. Karori* further argues that article 156(7) has no relevance on whether or not the Attorney General can appoint a private law firm to represent him in civil litigation. He contends that section 14 of the Act deals with powers while section 17 deals with functions of the Attorney General including the power to allow Ministries or Agencies of government appoint counsel to act for them. Drawing parallels from those provisions, learned counsel contends that under the Act, the Attorney General has power to appoint a private law firm to act on his behalf.

17. Counsel relies on the case of *Olga Garau v Department of Industrial Relations et al* CA 2/2 B257958 (Cal. Ct. App. 2015) for the submission that the rule designating the Attorney General as counsel for the state and state agencies is a default rule and that the Attorney General may let others represent the state and state agencies in his stead and that the section expressly empowering the Attorney General to give written consent to enable a state agency to employ counsel other than the Attorney General, applies in equal force where the state itself is a defendant.

18. On the same point learned counsel relies on the case of *State of West Virginia ex rel. Discover Finacial Services, Inc. v Hon. David Nibert* No. 13-9986 WL 246023 (W. Va S. Ct. Appeal1013) for the submission that the Office of the Attorney General retains inherent common law powers when not expressly restricted or limited by statute and the extent of those powers is to be determined on a case by case basis. He also relies on *P.B. v Nova Scotia (Minister of Community Services et al* 2014 NSCA 83 for the submission that at common law, the Attorney General (Of Ontario) has all the powers as those of the Attorney General and Solicitor General (of England) by usage, and in conducting litigation, the Attorney General is assisted by lawyers from the legal department, and that even where lawyers are from outside the department, the Attorney General controls that litigation and the lawyer answers to the Attorney General where the litigation involves the Crown(government).

19. *Mr. Karori* further submits that under Article 156(4) of the Constitution, the Attorney General is the principal legal advisor to the national government and his powers and functions are set out in Part III of the Act. Learned counsel contends that section 3 of Interpretation and General Provisions Act deals with delegation of powers as opposed to delegation of functions. According to counsel, Section 44 of the same Act is clear that the Attorney General may appoint a person to perform the functions of the office. He therefore argues that only power can be delegated but not functions. In *Mr. Karori's* view, section 38 deals with delegation of powers and contends that the Attorney General has only delegated functions but not powers.

20. According to *Mr. Karori*, Section 25 of the Office of the Attorney General Act gives the Attorney General power to employ staff and to procure services of other persons to help him discharge his functions. He submits that the Attorney General may at an appropriate stage procure a person to discharge his functions and, therefore, given the proliferation of litigation, some complex, the Attorney General has a right to appoint a private law firm to represent the government, thus avoid injustice.

Determination

21. We have carefully considered the preliminary objection raised herein, the response thereto; submissions by counsel for the parties as well as the authorities relied on. The petitioner's objection is primarily that the Attorney General could not appoint the firm of *Iseme, Kamau and Maema Advocates*, a private law firm, to represent him in this petition or any other civil litigation where the Attorney General or the national government is a party. In the petitioner's view, a private law firm is not contemplated in the constitution and the law as one to represent the Attorney General on behalf of the national government. It is the petitioner's case that the Attorney General can only constitutionally and legally delegate his functions to public officers and not private law firm(s) which would be a violation of both the Constitution and the law.

22. It has been contended on behalf of the 1st respondent, the Attorney General, that he has power to appoint a private law firm to represent the government in matters he deems fit in order to avoid injustice being occasioned to the public. Doing so, it is contended, is acting in the best interest of the public as he is required to do by both the constitution and the law.

23. The central issue before us is whether the Attorney General can properly appoint a private law firm to represent the national government in civil litigation, a function which, according to the petitioner, is constitutionally reserved for him. The office of the Attorney General is a constitutional office established under Article 156(1) of the constitution. The Article further provides for the functions of that office so that the Attorney General is the principal legal advisor to the national government; should represent the national government in court or in any other legal proceedings in which the national government is a party, other than criminal proceedings and he should perform any other conferred on the office by an Act of Parliament or the President.

24. Article 156(6) further requires the Attorney General to promote, protect and uphold the rule of law as well as defend public interest, while under Sub-Article 7, he may exercise his powers in person or by subordinate officers, acting in accordance with general or special instructions. From the constitutional text, the Attorney General can exercise his powers personally or through his subordinates who have either special or general instructions to exercise those powers.

25. In our view, the word "**subordinate**" must be read to mean a person who is employed and works in the Office of the Attorney General or a public officer who has express authority from the Attorney General to exercise those powers on his behalf. This is also clear from section 2 of the Office of the Attorney General Act which defines the word "**subordinate office**" to mean a **state counsel or any other member of staff employed by the Public Service Commission under this Act and discharging his or her duties in the Office**. The Attorney General's power can, therefore, be exercised personally or by delegation in civil proceedings against the National Government.

26. In that regard, the question raised in the preliminary objection as we understand it, is not whether a private law firm can discharge duties of the Attorney General through delegation but rather whether the Attorney General can constitutionally and legally appoint a private law firm to represent him in civil proceedings on behalf of the National Government. This is because section 14 which deals with delegation, provides that the Attorney-General may, either generally or otherwise as provided by the instrument of delegation, by writing under his hand, delegate to the Solicitor - General or **any State Counsel** all or any of his powers and functions under any written law, except this power of delegation. The section is therefore clear that a power or function so delegated may only be exercised or performed by the Solicitor-General or state counsel in accordance with the instrument of delegation. A delegation under this section may be revoked at will and does not prevent the excise of a power of performance of a function by the Attorney General.

27. Our reading of the law is that delegation can only be the Solicitor General, **subordinates** in the office of the Attorney General or other public officers but not to those from the private sector. This, in our view, is also in line with Article 156 (7) of the constitution which provides that the **powers of the Attorney General may be exercised in person or by subordinate officers acting in accordance with general or special instructions**. In that respect, therefore, delegation can only be to public officers and not to persons from the private sector.

28. *Mr. Karori* submits quite rightly, that the firm of *Iseme, Kamau and Maema Advocates* is not acting under delegated authority but has been appointed to represent the Attorney General on behalf of the National Government. According to counsel, the Attorney General has exercised his right like any other party to appoint counsel of his choice to represent him on behalf of the government. Learned counsel relies on section 25 of the Office of the Attorney General Act to support his position.

29. Section 25 gives the Attorney general power to appoint staff and he may at appropriate stage procure services of a person to discharge his functions. For avoidance of doubt, the section provides that; ***(1) There shall be such officers and other members of staff of the office as the Attorney-General considers necessary for the proper and efficient discharge of the functions of the office; and (2) the Attorney-General “may procure the services of such other persons” as may be reasonably necessary for the purposes of assisting the Attorney general in the performance of the functions of the Attorney-General.***

30. Our understanding of the import of section 25(2), is that the Attorney General can “***procure other persons***” to assist him in the performance of his functions. In that regard, according to Black’s Law Dictionary, 9th edition, the word “***procurement***” means ***getting or obtaining something or bringing something about.*** Concise Oxford English Dictionary, Twelfth edition, defines the word “***procure***” to mean, “***Obtain, persuade or cause to do something***”. Construing the words the Attorney General “***may procure the services of such other persons***” as used in section 25(2) of the Act in their plain and ordinary meaning, they must mean that the Attorney General may get persons other than the Solicitor General or subordinate staff (state counsel) to perform his duties and, in that regard, he may appoint counsel from the private sector to represent the National Government in civil litigation.

31. This, in our view, is in accord with the principle of statutory construction which requires that words in a statutory provision, as much as possible, be given their plain and ordinary meaning unless there is ambiguity; and that a statutory provision should where possible be read in a manner that makes it consistent with the constitution, unless there is irreconcilable inconsistency or tension between the two. In this regard, the Constitutional Court of South Africa stated in ***Re Hyundai Motor Distributors (Pty) Ltd v Smit No [2000] ZALC12:2001(1) SA545 (CC), 200(10) BCL1079 CC ZALC12:2001(1)***, that it is the duty of a judicial officer to interpret legislation to be in conformity with the constitution so far as this is reasonably possible and that the legislature is also under a duty to enact legislation that is also reasonably clear.

32. It is also cannon of statutory construction that a statute be given a holistic interpretation looking at the statute as a whole in order to ascertain the true intention of the legislature. In this respect the Court of Appeal states in ***The Engineers Board of Kenya v Jesse Waweru & others*** civil Appeal No. 240 of 2013 that:

“One of the canons of statutory interpretation is a holistic approach.... no provision of any legislation should be treated as “stand-alone” An Act of Parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”

33. A statute should also be read both textually and contextually because both are necessary in ascertaining the intention of the law giver. In the case of ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.,*** (1987) SCR (2) 1, the Supreme Court of India rendered itself thus;

“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important...interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted”.

34. The Supreme Court of India again stated in ***Commercial Tax Officer, Rajasthan v. M/S Binan Cement Ltd*** (2014) SCR that the ***Court should be mindful of the principle that it should examine every word of a statute in its context and must use context in its widest sense.***

35. Applying the above principle and reading the provisions of the Office of the Attorney General Act holistically, we take an interpretive approach to section 25(2) that it allows the Attorney General to procure services of a counsel from the private sector to represent him in a civil litigation against the National Government. However, in doing so, the Attorney General must bear in mind the constitutional values and principles and act only in accordance with the dictates of the constitution and the law.

36. This is because Article 201 of the constitution lays down principles of public finance stating that ***there should be openness and accountability including public participation in financial matters.*** Public participation is one of the core values of our constitution under Article 10. It is also a requirement that public money be used in a prudent and responsible manner. In that regard, Article 227 of the constitution is clear on procurement of public goods and services. It states that “***where a state organ or any other public entity contracts for goods and services, it should do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective”.***

37. The constitution empowered Parliament to enact a legislation to formulate policies relating to procurement of goods and services by state organs and public bodies. This was done through the enactment of the ***Public Procurement and Asset Disposal Act*** (PPAD) which governs procurement of goods and services by use of public resources. Section 3 of the Act echoes the constitutional principles of fair, equitable, transparent, competitive and cost effective processes in procurement of public goods and services by state organs and public entities. It states that Public Procurement and asset disposal by state organs and public entities should be guided by the values and principles of the Constitution in Article 10. These values and principles included transparency, accountability and Public participation.

38. According to the Act, “***procurement***” means acquisition by purchase, rental, lease or other contractual means, of any type of works, assets, ***services*** or goods. Appointing counsel from the private sector to offer legal services to a public entity is procurement of legal services and, therefore, is within the scope of the Act. In that case, the office of the Attorney General is a public entity and is bound by the provisions of the Constitution and the PPAD Act in so far as procurement of goods and services is concerned. This is so because procuring goods and services is a constitutional and legal requirement and must therefore be done in accordance with the guidelines contained in the PPAD Act as a way of ensuring not only public participation, transparent and accountability but also prudence in the use of public resources.

39. Section 53(1) of the PPAD Act is to the effect that ***all procurement by state organs and public entities are subject to the rules and principles of that Act,*** while subsection (8) thereof states that ***accounting officer shall not commence procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.***

40. Further still, section 5 states that the PPAD Act shall prevail in case of inconsistency between it and any other legislation or government

notices or circulars in matters relating to procurement and asset disposal, except in cases where procurement of professional services is governed by an Act of Parliament applicable to such services. This implies that except where there is another law providing to the contrary, professional services should be procured in accordance with the PPAD Act which is the applicable legal framework.

41. It is therefore clear to us that procurement of goods and services by public entities has to be done in accordance with PPAD Act unless otherwise provided by clear words of another statute. The Court of Appeal appreciated the constitutional values and principles with regard to procurement of goods and services by public entities when in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others** (2017) ECLR that;

“[150] ... Article 227 (1) of the constitution provides that;

“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.

151]. The Preamble to the Public Procurement and Asset Disposal Act, 2015 stipulates that it is an Act of Parliament to give effect to Article 227 of the Constitution and to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. From this preamble, it is manifest that the provisions of the public procurement and Asset disposal Act, 2015 are normative derivatives from Article 227 of the constitution. Any and all provisions of the Act must be read as stemming their legality from the constitution. Of significance is the provision in Article 227 (2) (a) which stipulates that the Act of Parliament may provide for categories of preference in the allocation of contracts. This provision constitutionalizes the methods of procurement identified in Part VII and XII of the Public Procurement and Asset Disposal Act, 2015.

42. Part VII of the PPAD Act is on basic procurement rules while part XII is on preferential procurement. Part VIII- section 90(1) of the Act, provides for classified procurement, and states that the provisions of the Act shall apply to all state organs and public entities including the national security organs. Part IX which provides for methods of procurement of goods and services states in section 91 that (1) open tendering shall be the preferred procurement method for procurement of goods, works and services and (2) that the procuring entity may use an alternative procurement procedure **only if that procedure is allowed and satisfies the conditions under this Act for use of that method.** Section 103 states that direct procurement may be used as long as the purpose is not to avoid competition and if the goods or services to be procured are available only from that particular supplier.

43. In light of what we have stated above, the decision to appoint the law firm of ***Iseme, Kamau and Maema Advocates*** would mount to procuring professional legal services which would have to be done through an open competitive and transparent process in compliance with Article 227 of the constitution and relevant public procurement laws and rules.

44. The petitioner has not argued that the appointment of the impugned law firm was not done in accordance with the constitution and procurement laws through a system of public procurement process that implies is fair, equitable, transparent, competitive and cost-effective. The concern was that the Attorney General could not delegate functions to a private firm to represent the national government in civil proceedings, contending that the appointment violated the constitution and the law.

45. Having ourselves evaluated the provisions of the constitution and the office of the Attorney General Act, we found and hold that the Attorney General may procure services of a private firm to act on behalf of the National Government in civil proceedings in which the national government is a party and that such an appointment is not a delegation. We find it difficult to accept the petitioner’s argument that the appointment of the private law firm is impermissible in the face of clear provisions of the law.

46. Both counsel relied on a number of foreign decisions to either submit that the Attorney has or has no authority to appoint a private law firm to act on his behalf or that he has inherent authority to engage one. We appreciate their industry and able submissions as well as the persuasive value of the authorities they cited before us. We must however, point out that although those foreign decisions may be relevant to the issues at hand, they have to be looked at in context. First, they are from foreign jurisdictions and therefore, only of persuasive value and, second, no effort was made to show that those jurisdictions have constitutional and laws similar to our own. No submissions were also made to show that constitutional principles in those jurisdictions are similar to what we have.

47. In that context, the relevance and persuasiveness of those decisions notwithstanding, we must always bear in mind the unique circumstances of our country and the nature of the suit before us. In this respect, we are alive to the words of the Court of Appeal in **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 others** [2016] eCLR , (par 124), that ***“whereas citation and reliance on persuasive foreign jurisprudence is valuable foreign experiences, values and aspirations of other countries should rarely be invoked in interpreting the Kenyan Constitution. The progressive needs of the Kenyan Constitution are different from those of other countries”.***

48. The Supreme Court sounded a similar caution in **Jasbir Singh Rai & 3 others –v- Estates of Tarlochan Singh Rai and 4 other** [2013] eCLR stating that it will not be appropriate to pick a precedent from one jurisdiction or another just because they seem to suit the immediate occasion but that each of those precedents has its place in the jurisprudence of its own country.

49. In the end, having considered the objection, submissions on behalf of the parties, the constitution and the law, it is our conclusion that the objection is unsustainable. The law allows the Attorney General procure services of a private law firm to represent him on behalf of the National Government but should do so in compliance with the constitution and the Public Procurement and Disposal Act.

50. For the above reasons, we over rule the preliminary objection dated 26th June 2018. This being public interest litigation, we make no order with regard to costs.

Dated and signed at Nairobi this 2nd Day of November 2018

J W LESIT

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JUDGE

E C MWITA

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JUDGE

L M NJUGUNA

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JUDGE

Dated and Delivered at Nairobi this 2nd Day of November 2018

E C MWITA

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JUDGE