



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO.6 OF 2012

**IN THE MATTER OF ARTICLE 35(1) AND ARTICLE 73 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF A CONSTITUTIONAL PETITION FOR ACCESS TO INFORMATION
UNDER ARTICLES 20, ARTICLE 23(1) AND ARTICLE 165 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA AND ACT NO. 3 OF 2005 THE PUBLIC PROCUREMENT AND
PROPOSAL ACT, LAWS OF KENYA**

BETWEEN

MICHAEL JUMA OTIENO

**(REPRESENTATIVE FOR CENTRE FOR PEACE AND DEMOCRACY (CEPAD) BOARD OF
DIRECTORS).....PETITIONER**

AND

THE EXECUTIVE DIRECTOR,

NON.GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARDRESPONDENT

J U D G M E N T

There is at Kisumu High Court Miscellaneous Application No.7 of 2011 in which the Centre for Peace and Democracy (CEPAD) Board of Directors (the *ex-parte* applicant therein) sought judicial review order of *Mandamus* to compel Non-Governmental Organisations Co-ordination Board (who is respondent herein) to register new CEPAD officials elected during the special annual general meeting held at Bondo on 29/10/10. The application named Martin Luther Omondi, Christine Awuor Otiri and Busabaliawo Abila Odongo as interested parties. When the respondent and interested parties were served, they entered appearance and indicated that they were being represented by the firm of M/S Otieno, Yogo and Company Advocates. The petitioner Michael Juma Otieno was the representative of the *ex-parte* applicant who filed the application. In the instant petition he has sued the respondent complaining that there was no due process followed in the procurement of the services of the legal firm to represent them in the application. Secondly, that the decision to instruct the firm to represent both the respondent and the interested parties would lead to conflict of interest.

This petition was filed under Articles 20, 23(1), 35(1), 73, 165 and 227 of the Constitution of Kenya

2010 and under the provisions of the Public Procurement and Disposal Act No.3 of 2005. It complained that the petitioner had written to the respondent seeking documentary proof that it had legally and procedurally procured the services of the legal firm. It sought documentary evidence to show that the firm's services had been procured by way of any of the various methods allowed by law and, lastly, that the procurement method was open, fair, transparent, competitive and cost effective. The respondent had not responded to the written request for information. The petition was consequently filed to seek the declarations that the petitioner has a Constitutional right to be provided with information relating to the procurement; and the respondents have a constitutional duty to provide the information to the petitioner.

The petitioner sought an order to be supplied with the information and a declaration that the appearance of the firm in the application above was null and void if the procurement information was not supplied. Lastly, a declaration was sought that the sharing of counsel between the respondents and the interested parties in the application presented a conflict of interest.

The application above is pending, and this petition was not opposed. Mr. Amondi appeared and submitted for the petitioner.

The respondent's Board has been set up by the Government to facilitate and coordinate the work of all national and international non-governmental organisations operating in Kenya. Its operations are subject to direction by the minister responsible for matters relating to non-governmental organisations and treasury, and its accounts are audited by the Auditor General (Corporations). The respondent is therefore a government corporation, a public entity.

Under Article 227 (1) of the Constitution, 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. Under section 27(1) of the Public Procurement and Disposal Act, a public entity shall ensure that the Act, and the regulations and directions made thereunder are complied with in regard to each of its procurements. The Act is what is contemplated by Article 227 (2) to make sure that the provisions of Article 227 (1) are adhered to.

Under Article 260 of the Constitution, the respondent is a state organ which, under Article 35(1), is supposed to provide the petitioner with the information relating to the procurement of the firm of Otieno, Yogo, Ojuro and Company Advocates to act for it in the application which is pending before the High Court. The petitioner seeks that information to test whether the procurement complied with Article 227 and the provisions of the Public Procurement and Disposal Act. To the extent that the petitioner wrote to the respondent seeking the information and found no response, I declare that the petitioner's right to information under Article 35(1) was violated.

The petitioner asked that the procurement be declared null and void if it turns out that the same did not obey the provisions of the Constitution and the Act. It is, at this time, speculative to say that the legal firm was not properly procured. Whether the appearance of the legal firm for both the respondent and the interested parties presents a case of conflict of interest should be left to the court trying the judicial review application. Parties can urge the issue by a preliminary point in the matter.

In view of the above, I declare that the respondent is a public entity which holds the information regarding the procurement of the legal firm in the application. It is holding that information on behalf of the people of Kenya and therefore has a constitutional duty to provide that information to the petitioner. It is by the provision of that information that the procurement process can be tested against the Constitution and Act. This is done to ensure that there is integrity in the above. I direct that, within 30 days from today, the respondent does provide all the documentary information leading to the procurement of the legal firm.

Costs of the petition shall be borne by the respondent.

Dated, signed and delivered this 10th March, 2014

A. O. MUCHELULE

J U D G E