



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**PETITION NO. 1 'A' OF 2014**

**ERICK OKEYO.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT**

**JOSEPH OMULO OKAL.....2ND RESPONDENT**

**MADAM R. ENTERPRISES.....3RD RESPONDENT**

**J U D G M E N T**

1). The 2nd respondent is the executive committee member for Treasury for the 1st respondent. On 13-9-2013 he wrote a letter of notification of award of contract for solid waste management (“EO1”) in the following terms:

“We wish to advise that after careful evaluation of your bid alongside others, we found your bid to be substantially responsive to our needs and requirements.

Further, the financial and technical evaluations revealed that you have the capacity, machinery and financial capabilities to carry out the above mentioned job.

On behalf of County Government of Kisumu, I am pleased to inform you that your bid has been accepted. Consequently you are required to sign the contract award agreement form on it before 20th October, 2013.

The contract is envisaged to run for 15 years that is from 2013 – 2028 for a sum total of Kshs. 1,200,000,000/= per year.”

The award was being made to the 3rd respondent. The firm was being given the exclusive responsibility to collect garbage and manage all solid waste for 15 years for the value indicated.

2). On 20-2-2014 the petitioner came to court to challenge this award. He did this after he had tried, in vain, to obtain from the respondents evidence that a tender had been floated, there was invitation to the tender advertised and there was evaluation of bids before the award. The petitioner is a resident of Kisumu and a tax payer and states that no such tender was floated or bids invited. He made reference to Article 227 (1) of the Constitution of Kenya 2010 which commands that:

“227 (1). Where 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.”

His case was that the process used to award the tender to the 3rd respondent was not fair, equitable, transparent, competitive or cost effective.

3). The second complaint by the petitioner was that the 3rd respondent is actually a business name (“EO2”) whose owner is Renish Achieng Omullo who does not have the necessary qualifications, capability, experience, resources, equipment and facilities to perform the contract on waste management worth Kshs. 1.2 billion per year. Related to this was the allegation that the respondent was given the tender because she is related to the 2nd respondent. He made reference to Article 75 which asks a state officer to conduct himself in a manner that avoids any conflict between personal interests and public or official duties.

4). Thirdly, the tender was questioned because the question of refuse removal, refuse dump and solid waste management was an environmentally sensitive one that required, not only the involvement of the National Environmental Management Authority (under the Environmental Management and Co-ordination Act No. 8 of 1999) but also public participation as envisaged under Article 201, now that public resources were involved. A policy needed to be developed following public participation before any tender could be floated. The petitioner pleaded that the 3rd respondent was going to levy charges from the public from whom such garbage or waste was collected. He found a problem with that levy in view of lack of legislation (Article 210) to allow such imposition.

5). Fourthly, he complained about the respondents refusal to provide information regarding the tender. His case was that that was public information to which he was entitled, and which he had been denied, under Article 35.

6). Lastly, he complained that his right to a clean and healthy environment under Article 42 was threatened as were his consumer rights under Article 46.

7). The 3rd respondent filed a replying affidavit through its commercial manager Fredrick Agoro in which he stated that, by the award the firm was going to collect solid waste

“and use it as raw material for generation of electricity and making of fertilizer at its biogas plant all at its own expense.”

In so doing, the public was going to benefit as:

“the garbage will be removed and the environment made cleaner without the 1st respondent using tax payers money or levying charges on the public.”

He stated that the 3rd respondent was going to collect garbage and solid waste for free without levying any tax or charge to the public. The 3rd respondent, he stated, was not going to get any payment from the 1st respondent. The 3rd respondent's case was that the petitioner used to provide security services to it, that the services were terminated which led to the petitioner suing it. This petition, therefore, is intended to intimidate the respondent into settling that personal dispute.

8). The 2nd respondent filed grounds of opposition in which he denied that the petitioner had any legitimate complaint. He denied that his human or fundamental rights and freedoms had been violated or were threatened with violation. He stated that no contract had so far not been signed, and that in any case

“9. The intended contract and the attendant Public Private Partnerships envisaged is in the interest of the public, as it will eliminate the solid waste management in the County at no cost to the public.”

His case was that, now that no public funds were to be expended the provisions of Article 227 (1) and those of the Public Procurement and Disposal Act and the Regulations thereunder did not apply.

9). The 1st respondent filed grounds of opposition to say that no right or freedom of the petitioner has

been infringed, or is threatened to be infringed. It was contended that if the petitioner had any grievance with the award he should have sought remedy under the Public Procurement and Disposal Act, and that, in any case, he had complained to the Ethics and Anti-Corruption Commission who were investigating the matter. The respondent stated that:

“7. There was no evidence that the contract if entered into and performed by the 3rd respondent will not be beneficial or that it will be detrimental to the members of the public resident in Kisumu County.”

**10).** Priscah Auma Misachi, Yonah Maina Koko, Jane Omolo, Mohamed Aslam Khan, Philip Anayo and Malin Olero are members of Kisumu County Assembly. They successfully applied to be joined in the petition as interested parties. They supported the award to the 3rd respondent. In the affidavit sworn by Priscah Auma Misachi, they stated that:

“9. The 1st respondent does not have capacity to manage the same and therefore it would be unfair for this court to be used to deny a philanthropist an opportunity to help alleviate this obvious problem.”

They stated that the 2nd respondent had access to international funds which they intend to use to establish a solid waste management plant, and

“to establish necessary infrastructure towards that purpose and they should be allowed to use waste.”

**11).** The court also allowed Kisumu Waste Management Association (KIWAMA) to join in the petition as an interested party. This is a duly registered society that has a membership of 54 community organizations that deal in waste management. They have a letter of no objection from the National Environmental Management Authority (NEMA) as having complied with all the legal provisions of Environmental Management and Co-ordination (Waste Management) Regulations of 2006. They are based in Kisumu. They state that, until this petition was filed they were unaware that the 1st respondent had awarded a tender to the 3rd respondent to handle garbage collection and waste management. They say that they were unaware of any procurement process leading to the award. They were not invited to bid. Their contention is that the award offended Article 227 (1) of the Constitution. They are tax payers who were denied the right to participate in the tender. They took issue with the fact that the 3rd respondent had been issued an award whose value was Kshs. 1.2 billion per year for 15 years

“which money is to be paid from the tax payers money hence the public members of Kisumu County stand to suffer economic loss by virtue of a contract which has been procured illegally.”

They stated that they were aware that the proposition of the 3rd respondent was relative of the 2nd respondent who signed away the award.

**12).** Honourable Fredrick Outa, Honourable J. Olago Aluoch and Honourable Aduma Owuor are members of the National Assembly representing constituencies in the County. They successfully sought to be joined in the petition as interested parties to oppose the petition which they stated that it was:

“frivolous, vexations and constitutes an abuse of the process of the court.”

Their contention was that the failure to follow the procurement law, if at all, did not amount to an infringement of the petitioner's fundamental rights and freedoms; that no public funds are to be used and therefore the provisions of the Public Procurement and Disposal Act did not apply to the situation. Lastly, they stated:

“9. That the intended contract and the attendant Public Private Partnerships envisaged is in the interest of public, as it will eliminate the solid waste menace in the County as no cost to the public.”

**13).** The petitioner sought the following declarations:

- a. that the contracting of the 1st respondent's obligations as set out in Schedule 4 of the Constitution was a major policy decision requiring public participation as provided for in the Constitution more so in Articles 201 and 232;
- b. that the 1st respondent was bound by Article 227 (1) of the Constitution;
- c. that the awarding of the contract contravened Article 227 as read with Articles 201 and 75 and ought to be set aside;
- d. that the award threatens the right of the petitioner under Articles 42 and 46;
- e. that, in so far as the award did not follow the provisions of the Public Procurement and Disposal Act and Article 227 of the Constitution, it was null and void;
- f. that the levying of fees or licences by the 3rd respondent was illegal and contravened Article 210 of the Constitution.

The petitioner sought an order compelling the 1st respondent to commence a fresh procurement process that is competitive, transparent, fair and has public participation. He also asked for costs.

**14).** The respondents, the members of the County Assembly and the members of National Assembly sought that the petition be dismissed with costs.

**15).** Mr. Njuguna represented the petitioner; Mr. Yogo represented the 3rd respondent and the members of the National Assembly; Mr. M/S Aron represented the 2nd respondent; Mr. Lore represented the 1st respondent; Mr. Okongo represented the Members of the County Assembly; and Mr. Ogonda represented KIWAMA. Submissions were filed on behalf of the petitioner, the 1st respondent and the 3rd respondent. I have considered them and considered the authorities cited.

**16).** There is no dispute that the 2nd respondent is the 1st respondent's County Executive Committee Member for Treasury. He did not swear any affidavit to deny that on 13-9-2013 he wrote ("EO 1") to notify the 3rd respondent that its bid to manage solid waste had been accepted by the 1st respondent, and that a contract in that regard would be signed on 20-10-2013. This letter of offer indicated that the contract was envisaged to run for 15 years (from 2013 to 2028) for a sum of Kshs. 1.2 billion per year. The replying affidavit sworn on behalf of the 3rd respondent admitted that it had received the letter of award, but denied that any funds would be used in the project. The members of the National Assembly and the Members of the County Assembly who joined the petition took the position that the project was going to be beneficial to the County, and that no public funds would be spent. The 1st respondent did not get any of its officers to swear an affidavit to deny the letter, or its contents. I find that indeed the 1st and 2nd respondents issued the letter of award.

**17).** The petitioner's case was that the 1st and 2nd respondent were under a duty to subject this procurement to due process as is required under Article 227 (1) and the provisions of the Public Procurement and Disposal Act and the Regulations thereunder. There is no dispute that under sections 3 (1) (k), 3 (2) and 4 of the Act and regulation 5 of the Public Procurement and Disposal (County Government) Regulations 2013 Kisumu County is a public entity. Any procurement by it was to follow the Constitution and the Act. It had to be fair, equitable, transparent, competitive and cost effective. The petitioner says that the procurement was not any of these. He was not able to trace any document to show that the tender was advertised or processed as is required by law. KIWAMA is a body of registered associations in the County that deal in waste management. They only learnt of the award after the petition was filed. The 1st, 2nd and 3rd respondents took the position that, now that no public funds were being spent the provisions of the Constitution and the Act in relation to procurement did not apply. In the same breath, they contended that if the petitioner had any grievance he should have gone to the complaint mechanism under the Act. If the Act did not apply, how was the petitioner going to seek redress under it? The respondents' contention cannot make legal sense. The letter of award indicated that the solid waste economy was worth Kshs. 1.2 billion annually. This is the economy that the 3rd respondent was going to manage. The respondent was exclusively being given to manage this public resource for 15 years. What he was going to manage was going to be worth Kshs. 18 billion at the end of the period. The respondents indicate that the 3rd respondent was going to erect a plant using the solid waste as raw material to be able

to generate electricity and manufacture fertilizer. The letter of award was not saying that the electricity and the fertilizer would be handed over the County Government. The 3rd respondent, it follows, was going to exclusively sell, and benefit from, the electricity and fertilizer.

**18).** Whichever way one looks at this project, the 1st respondent has, on behalf of the residents of the County, a raw material in terms of garbage and solid waste. How that raw material was going to be collected and managed was under the Constitution the responsibility of the 1st respondent, again on behalf of the residents. That responsibility was to be exercised to benefit the residents. To give away this large economy was a major decision that required public participation under the Constitution. Who was going to be handed over to manage this economy required a procurement process to be undertaken, under the Constitution and the Act. It was only an open and competitive procurement that was going to ensure value for money. It is only by the procurement as outlined in the law that would ensure a technical evaluation process that could give the best outcome. The 3rd respondent may very well have the technical and financial abilities to manage waste, but this had to be tested against other pre-qualified bids.

**19).** The 1st respondent's submission was that it could not provide information that it did not process. However, its own letter stated that the 3rd respondent's bid had been evaluated "alongside others", and that a technical and financial evaluation had revealed it to be able to perform the job. Now that the petitioner is saying that, as it were, the 3rd respondent was single-sourced, the 1st and 2nd respondents should have sworn affidavits showing the tender advertisement, the bids received and the evaluation done to decide on the 3rd respondent. No affidavit was sworn. The petitioner, I find, is a tax payer and resident of the County who was entitled to all the information regarding the award. His right was violated when no such information was forthcoming.

**20).** The petitioner stated, and was supported by KIWAMA, that the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent were related. There was no affidavit sworn to deny this. The petitioner's contention was that the award was influenced by this relationship. He cited Article 75 which requires that a public officer be objective and impartial in decision – making. A decision by a public servant should not be influenced by nepotism, favouritism or improper motives. Under section 43 of the Act the 2nd respondent was under a duty to declare his relationship with the 3rd respondent. The award was voidable given this undisclosed conflict of interest. The award offended the Constitution in so far as it was signed off by the 3rd respondent's relative (2<sup>nd</sup> respondent).

**21).** Lastly, the Constitution and the County Governments Act (No 17 of 2012) provide for citizen participation in elections and appointments; legislation; policy formulation, planning and development; effective resources mobilization and use for sustainable development; project identification, prioritisation, planning and implementation; and the alignment of county financial and institutional resources to agreed policy objectives and programmes. Further, the Act requires each County to provide continual and systematic civic education to its residents. This is out of the realization that it is only when citizens are enlightened that they can effectively participate in governance matters affecting them. There was no evidence to show how this solid waste management project was conceived. There was no evidence that the project was as a result of any policy decision and objective in which the residents of the County were engaged. This project is therefore Constitutionally and legally indefensible.

**22).** I hope I have said enough to show that allowing the respondents to proceed with this project in this illegal manner would lead to imprudent and irresponsible use of a precious resource without assuring the public that there is value for money. It is for the foregoing reasons that I allow the petition. I declare that:

(a) the decision to enter into a public private partnership in relation to solid waster management was a major policy decision that required public participation;

(b) the decision as to which private entity would help the 1<sup>st</sup> respondent in managing solid waste required public procurement under Article 227 (1) of the Constitution and under sections 2,3, and 4 of the Public Procurement and Disposal Act; and

(c) in so far as the 3<sup>rd</sup> respondent was not so procured the 1<sup>st</sup> and 2<sup>nd</sup> respondents breached the Constitution and the Act and, to that extent the award was null and void.

On the issue of costs, I consider that the 1<sup>st</sup> to 3<sup>rd</sup> respondents were engaged in a blatant illegal enterprise that was going to deny the County and its residents enormous resources. It is for this reason that I order that they jointly and severally pay the costs of the petitioner who has brought this matter to the attention of the public.

**Dated, signed and delivered at Kisumu this 7th day of May, 2014.**

**A. O. MUCHELULE**

**JUDGE**