



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 43 OF 2012

BETWEEN

FAMY CARE LIMITED.....PETITIONER

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AGENCY.....2ND RESPONDENT

AND

PHARMACY & POISONS BOARD.....1ST INTERESTED PARTY

ANGELICA MEDICAL SUPPLIES LTD.....2ND INTERESTED PARTY

PFIZER LABORATORIES LIMITED.....3RD INTERESTED PARTY

PFIZER INC.....4TH INTERESTED PARTY

RULING

Introduction

1. The matter before the court concerns an open international tender for procurement of various family planning commodities funded by the Government of Kenya through the Kenya Medical Supplies Agencies (“KEMSA”). The petitioner is aggrieved by the tendering process and has brought this petition not only to challenge the procurement process but also enforce certain fundamental rights and freedoms it claims have been breached by the supply of the contraceptive commonly known as “Depo Provera” into the Kenyan market.

The applications

2. This ruling concerns two applications lodged by the petitioner. The first one a chamber summons dated 17th February 2012 brought to enforce the provisions of **Article 35** which seeks the following relief from the 1st interested party, the Kenya Pharmacy and Poisons Board (“KPPB”) as follows;

[2] The principal officer ofthe Pharmacy and Poisons Board, do disclose on oath the complete record of correspondence between the 1st interested party and any other party concerning any and all matter touching on registration of the drug “Depo-Provera” under registration certificate No. 0782 in the context of Tender No. KEMSA/O1T60/2011-2013”

3. The application is purported by the affidavit of Mr Muriuki Mugambi sworn on 17th February 2012 where he depones he is advocate of the High Court of Kenya and that “[He] is a Kenyan Citizen and [has] the conduct of the above matter on behalf of the petitioner and conversant with the facts relating to the above matter which the petitioner seeks orders for the protection of fundamental rights and freedoms on its own behalf and in the public interest.”

4. The second application is a chamber summons dated 23rd February 2012 brought to enforce the provisions of **Article 35** and it seeks the following relief against the 2nd respondent, KEMSA, as follows;

[2] the Principle Officer of the 2nd respondent herein, Kenya Medical Supplies Agency do disclose on oath true and certified copies of (i) the Technical Committee minutes and evaluation reports; and (2) the Tender Committee minutes relating to Tender No. KEMSA/O1T60/2011-2013”

5. The application is also supported by the affidavit of Mr Muriuki Mugambi sworn on 23rd February 2012 where he depones that he is an advocate of the High Court of Kenya and that, “[He] is a Kenyan Citizen and [has] the conduct of the above matter on behalf of the petitionerin which the petitioner seeks order for the protection of fundamental rights and freedoms on its own behalf and in the public interest.”

The Preliminary Objection

6. When the matter came up for hearing and directions on 24th February 2012, Mr Kipkorir, advocate for KEMSA, raised a preliminary objection on the ground that the petitioner, Famy Care Limited, is a limited liability company incorporated in India. As a foreign citizen it is not a citizen for purposes of **Article 35** which enshrines the right of access to information. The right guaranteed under **Article 35** can only be enjoyed by Kenyan Citizens.

7. Mr Kipkorir contended that the fact that the affidavits in support of the application were sworn by Mr. Mugambi, a Kenyan Citizen and an advocate, does not assist the petitioner as the information sought is for the benefit of the petitioner, a non citizen. He further argued Mr Mugambi has no interest in the matter other than being counsel on record and none is disclosed in the pleadings and depositions.

8. Mr Ogamba, counsel for the 2nd interested party supported the preliminary objection. He further asked the court to strike out the supporting affidavits as they offend **Order 19** of the **Civil Procedure Rules**. He contended that it is improper for an advocate to descend into the arena of the dispute as the petitioner’s advocate has done.

9. Ms Kasim supported the objection. She added that her client had no issue producing the documents to the court. Mr Munyu for the 3rd and 4th interested party emphasised that the citizenship was in relation to the petitioner and not any other party.

Petitioner’s Submissions

10. In opposition to the preliminary objection Mr Mugambi submitted the petition is brought under **Article 22** to enforce fundamental rights and freedoms and these fundamental rights and freedoms relate to the petitioner who is also acting in public interest as provided in **Article 22(2)(c)**. Counsel contended that being a suit in the public interest every member of the public affected is entitled to the full protection of **Article 35** therefore the petitioner must be included in the definition of citizen.

11. Mr Mugambi argued that the genesis of the proceedings was an international tender inviting non

citizens to participate and they too, are entitled to the protection of our Constitution. He maintained that the argument raised by the respondents is very narrow and the court must give effect to broad principles and if the information is relevant to adjudication of a dispute then the information must be provided.

12. As regard his position as an advocate, Mr Mugambi submitted that there was no real issue has been brought as to why there is a conflict on his part. He contended that as a citizen and an advocate, he was entitled to all the necessary information to an officer of the court.

13. Finally, counsel submitted that while KPPB has no objection to providing information to the court, KEMSA has an obligation to provide documents. As KPPB has already given information with the knowledge that the petitioner is not a citizen the preliminary objection must be dismissed.

Article 35 of the Constitution

14. The main issue for consideration is whether a company incorporated outside Kenya is a citizen for the purpose of **Article 35(1)** of the Constitution.

15. **Article 35** of the Constitution provides as follows;-

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.[Emphasis mine]

16. The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in **Article 10** of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and **Article 10** cannot be achieved unless the citizen has access to information.

17. The right of access to information is also recognised in international instruments to which Kenya is party. **The Declaration of Principles on Freedom of Expression in Africa** adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 - 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of **Article 9** of the **African Charter on Human and Peoples' Rights** which provides, "**Every individual shall have the right to receive information.**" The Commission noted that right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.

18. The right of access to information protected under **Article 35(1)** has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to '**every person**' or '**a person**' or '**all persons**' this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term '**person**' and '**citizen**' as applied in **Article 35**.

19. I am aware that Constitution must be given a broad and purposive interpretation. This is the obligation cast on the court by **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to

good governance.

20. The Constitution must also be construed as a whole and when construing the meaning of a given word, the court should strive to give a consistent meaning throughout the Constitution as the context permits. In the Ugandan case of *Tinyefuza v The Attorney General of Uganda Constitutional Appeal No. 1 of 1997*, the Supreme Court stated that, “*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.*”

21. Fortunately, **Article 260** states that a person, “***includes a company association or other body of persons whether incorporated or unincorporated.***” Thus the rights which accrue to a person are also exercised by the juridical persons to the extent that the right or fundamental freedom itself permits.

22. Though the term “***citizen***” is not defined in **Article 260**, citizenship is dealt with under **Chapter Three** of the Constitution, **Articles 12 to 18**. The purport and effect of these provisions is that citizenship is in reference to natural persons. For example, **Articles 13 and 14** provide as follow;

13. (1) *Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.*

(2) Citizenship may be acquired by birth or registration.

(3) Citizenship is not lost through marriage or the dissolution of marriage.

14. (1) *A person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.*

(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendents of Kenyan citizens who are born outside Kenya.

(4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

(5) A person who is a Kenyan citizen by birth and who, on the effective date, has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

A juridical person is neither born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in **Articles 15 and 16** of the Constitution negative an intention to define a citizen as including a juridical person.

23. The clear intent manifested is that the right of access to information under **Article 35(1)** is limited by reference to citizen and is not intended to be exercised by juridical persons. This intention is even clearer when one considers that the right of access to information under **Article 35(1)** is in respect of citizens and while **Article 35(2)** entitles every person to correction or deletion of untrue and misleading information.

24. The only other right which is limited by reference to citizen is to be found at **Article 38**. **Article 38** protects political rights of citizens. **Article 38(1)** provides, in part, “***every citizen is free to make political choices....***” **Article 38(2)** states, “***Every citizen has the right to a free, fair and regular election based on universal suffrage***” It is clear that **Article 38** also negatives any intention by the people of Kenya to give juridical persons political rights. A corporation is not a real thing, it is a legal fiction, an

abstraction and a vehicle through which natural persons can engage as a collective to realise certain objectives set out in the founding instrument. A juridical person cannot vote or make political choices or exercise the political rights protected by **Article 38**.

25. The rights protected under **Article 35(1)** and **38** are essential for the purpose of organising a democratic state. The exercise of these rights excludes juridical persons as they are not “*the people*” referred to in the Preamble to the Constitution. A reading of the Constitution and an examination of words “*person*” and “*citizen*” within the Constitution can only lead to one conclusion; That the definition of a citizen in **Articles 35(1)** and **38** must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution.

26. I therefore conclude that for purposes of **Article 35(1)**, a citizen is a natural person who is a citizen of Kenya as defined by Chapter Three of the Constitution. It is common ground that the petitioner is a body corporate duly incorporated in India. It is therefore excluded from the enjoyment of the right to access to information protected by **Article 35(1)**.

Whether the Advocate can claim the right on behalf of his client

27. Mr Mugambi argues that as a citizen, he is entitled to information under **Article 35(1)**. As a citizen, Mr Mugambi is no doubt entitled to exercise and enforce his constitutionally guaranteed rights. However, in this matter, Mr Mugambi is not the petitioner but the advocate for the petitioner. The argument he advances is at once startling and if accepted, would revolutionise the practice of law and compromise the independence of an advocate. An advocate remains an agent for his client for purposes of prosecuting the case. He is not to substitute himself for his client or give his client certain benefits due to him as an advocate *qua* advocate or as a citizen by actively and deliberately circumventing constitutional or other legal provisions by using his privileged position in the course of proceedings.

28. Mr Mugambi is not the petitioner and there is nothing in the pleadings that entitles him to act as such. He cannot circumvent the provisions of **Article 35(1)** by constituting himself as a petitioner and citizen to benefit the petitioner who is not a citizen. The contents of Mr Mugambi’s affidavits, which I have quoted at paragraphs 3 and 5 above, clearly show that he is acting on the petitioner’s behalf.

Public interest

29. The petitioner has also argued that the petition before this court is brought in public interest and that being a suit brought in public interest then **Article 35(1)** must be read broadly as affording the petitioner the right to obtain information.

30. It is possible that, in fact, the petition raises matters of public interest or is brought in public interest but that alone cannot circumvent the clear limitation at **Article 35(1)**. There is nothing in that Article that allows the limitation of citizenship to be overwritten in the public interest and I am not prepared to imply public interest where the provisions are so clear.

Disposition

31. The other disclosures shall be dealt with in the context of the provisions of the **Public Procurement and Disposal Act, 2005** and as no affidavit has been filed on behalf of the Public Procurement Administrative Review Board, I shall not comment on the issue at this stage.

32. As the right under **Article 35(1)** is available only to citizens, it follows that the petitioner’s applications dated 17th February 2012 and 23rd February 2012 are struck out. The costs shall abide by the petition.

DATED and DELIVERED at NAIROBI this 2nd day of March 2012.

D.S. MAJANJA

JUDGE

Mr M. Mugambi instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates for the petitioner.

Ms Barasa, Litigation Counsel, instructed by the State Law Officer for the 1st respondent

Mr D. Kipkorir instructed by KTK Advocates for the 2nd respondent

Ms Kasim instructed by Naikuni, Ngaah and Miencha Advocates for the 1st interested party

Mr M. Ogamba instructed by Migos Ogamba and Company Advocates for the 2nd interested party

Mr M. Munyu instructed by Iseme, Kamau & Maema Advocates for the 3rd and 4th interested party