

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CONSTITUTIONAL PETITION NO. E011 OF 2024

**IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23,
AND 227 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND
ASSET DISPOSAL ACT, 2015**

AND

**IN THE MATTER OF A PUBLIC INTEREST AND THAT OF
THE INTERESTED PARTIES ON WHOM LITIGATION
MOUNTED FOR THE GENERAL BENEFIT OF THE
CITIZENS OF KENYA RESIDENT IN TAITA TAVETA COUNTY**

BETWEEN

**VINCENT ENDEKWA
MAHASI.....PETITIONER**

VERSUS

**MWACHABO DEVELOPMENT FORUM.....1ST
RESPONDENT**

**CHAIRMAN MWACHABO DEVELOPMENT FORUM..2ND
RESPONDENT**

**PROJECT CO-ORDINATOR
MWACHABO DEVELOPMENT FORUM.....3RD
RESPONDENT**

PUBLIC PROCUREMENT

**REGULATORY AUTHORITY (PPRA).....4TH
RESPONDENT**

AND

**REENAH (K) LIMITED.....1ST
INTERESTED PARTY**

**NINART ENTERPRISES LIMITED.....2ND
INTERESTED PARTY**

JUDGMENT

1. The petitioner in this case, **VINCENT ENDEKWA MAHASI** filed this petition dated 31/8/2024 and amended on 12th March 2025 against **MWACHABO DEVELOPMENT FORUM (1ST RESPONDENT), THE CHAIRMAN MWACHABO DEVELOPMENT FORUM (2ND RESPONDENT) THE PROJECT CO-ORDINATOR MWACHABO DEVELOPMENT FORM (3RD RESPONDENT), THE PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA) (4TH RESPONDENT) AND REENAH (K) LIMITED AND NINART ENTERPRISES LIMITED AS THE 1ST INTERESTED PARTY 2ND INTERESTED PARTY RESPECTIVELY.**
2. In this Constitutional Petition filed at the High Court of Kenya in Voi, the petitioner, Vincent Endekwa Mahasi, is acting in the public interest for the benefit of the citizens of Taita

Taveta County, particularly the residents and school children who will use the facilities in question. The petition centers on a public procurement process for four construction projects that the petitioner alleges was fundamentally flawed and illegal.

3. The core of the petitioner's case is that the 1st Respondent, the Mwachabo Development Forum, along with its Chairman and Project Coordinator (the 2nd and 3rd Respondents), conducted a tender process for the construction of a social hall, toilets, and school fences that violated constitutional mandates and procurement laws.
4. The petitioner contends that the process was neither fair, equitable, transparent, competitive, nor cost-effective, as required by Article 227 of the Constitution.
5. Furthermore, the petitioner faults the 4th Respondent, the Public Procurement Regulatory Authority (PPRA), for failing to act on a complaint lodged about the process, thereby delaying justice.
6. The petitioner outlines several specific legal failures, including that the tender notices were vague and lacked

essential information like evaluation criteria, drawings, and Bills of Quantities.

7. He alleges that the Mwachabo Development Forum failed to use standard tender documents, verify the professional qualifications of bidders, and properly notify unsuccessful bidders of the award outcome.
8. The petitioner argues that these failures have caused 21 bidders, including the 1st and 2nd Interested Parties, to each lose approximately Kshs. 150,000 in bidding costs and have created a grave risk that the projects will be completed with substandard workmanship.
9. This, he states, endangers the lives of the public, pupils, and students who will use these facilities.
10. Based on these alleged violations, the petitioner is seeking several key reliefs from the court. Primarily, he asks for a declaration that the award letters issued to the successful bidders for the four projects are null and void, and for an order compelling a fresh, lawful tendering process.
11. He also seeks a finding of guilt against the 1st, 2nd, and 3rd Respondents for violating the Constitution and procurement

laws, and an order for them to pay compensation to all the bidders for the costs they incurred.

12. Additionally, the petitioner requests the court to issue declarations that clarify the PPRA's regulatory mandate extends to private entities like the Mwachabo Development Forum when they engage in public procurement, and that such private entities are bound to comply with the Public Procurement and Asset Disposal Act.

13. Finally, he seeks the costs of the petition to be borne by the 1st, 2nd, and 3rd Respondents.

14. The petition proceeded by way of written submissions. The parties filed submissions as follows: The petitioner submitted that both the main and amended petitions merit the court's consideration.

15. That the case is based on a public procurement process conducted by the 1st, 2nd, and 3rd Respondents, which the petitioner alleges was unlawful.

16. The petitioner contends that this litigation qualifies as a legitimate public interest matter, as it seeks to enforce constitutional and legal standards in a process affecting a public entity like a school, which impacts a broad

community. It is not for personal gain but to protect public rights.

17. A core argument is that private entities, when undertaking public procurement, are bound to comply with the principles of the Public Procurement and Asset Disposal Act, 2015, and Article 227 of the Constitution, which mandate fairness, equity, transparency, competitiveness, and cost-effectiveness.

18. The petitioner relies on judicial precedent, notably the Hydropower International case, to support the position that these public procurement standards apply to private entities conducting such tenders.

19. The petitioner firmly asserts that the 1st, 2nd, and 3rd Respondents violated Article 227 of the Constitution and relevant sections of the Public Procurement Act, as detailed in the supporting affidavit.

20. Furthermore, the petitioner submits that the 4th Respondent, the Public Procurement Regulatory Authority, failed in its statutory mandate by not addressing the complaints raised by the interested parties in this suit.

21. In conclusion, the petitioner prays that the court finds the 1st, 2nd, and 3rd Respondents guilty of violating procurement laws, issues declarations on the applicability of procurement rules to private entities, awards compensation and costs to the affected bidders, and sanctions the 4th Respondent for its failure to act, all in the interest of upholding fair administration of justice under Article 159 of the Constitution.

22. The 1st, 2nd and 3rd Respondents jointly submitted that the Petitioner's Amended Petition is entirely without merit and should be dismissed with costs.

23. The Respondents contend that the Petition fails to meet the essential legal thresholds required for it to be sustained.

24. Firstly, they argue that the case does not qualify as a legitimate Public Interest Litigation. They assert that the Petitioner has not demonstrated any material risk or harm to the public, and that the true public interest actually lies with the completion and benefit of the projects for the communities, which have already been handed over, rendering the Petition pointless.

25. Secondly, the Respondents submitted that the Public Procurement and Asset Disposal Act, 2015, does not apply to the 1st Respondent, as it is a Community Based Organization (CBO) and not a **"public entity" as defined by the Act. While acknowledging that courts have applied the Act's** guiding principles to private entities, they emphasize that its specific procedural provisions do not apply, and the Petitioner's reliance on case law is a misinterpretation.
26. Furthermore, the Respondents challenge the Petitioner's very right to bring this suit, arguing that he lacks the requisite locus standi.
27. They point out that he was not a bidder in the tender process, has no personal stake in the outcome, and that none of the actual bidders have challenged the process.
28. Finally, the Respondents argue that the Petitioner has failed to meet the evidentiary burden of proof. His Petition is based on mere opinions, unsubstantiated allegations, and a complete lack of concrete evidence to support his claims of constitutional violations, financial misuse, or contractor incompetency.

29. He is bound by his pleadings and has provided no incontrovertible proof for the Court to act upon.

30. In conclusion, the Respondents characterize the Petitioner as a busy-body and a mischief-maker, and his Petition as frivolous, vexatious, and an abuse of the court process.

31. In response to the 1st-3rd Respondents' written submissions, the Petitioner filed a rejoinder asserting that the main petition is properly before the court and fully meets the required evidentiary threshold.

32. The Petitioner counters the Respondents' arguments by directing the court's attention to the supporting affidavit dated August 31, 2024, which is presented as containing all necessary factual foundations.

33. Specifically, the rejoinder highlights that Annexures VEM-5 and VEM-6 to this affidavit provide evidence of a contravention of Section 87(3) of the Public Procurement and Asset Disposal Act, demonstrating that the accounting officer failed to disclose the successful bidder in the regret letter sent to the Petitioner.

34. Furthermore, in response to other arguments, the Petitioner cites Annexures VEM-7 and VEM-8 as evidence that a formal

complaint was lodged with the Public Procurement Regulatory Authority, thereby substantiating the claims within the petition.

35. The Petitioner concludes by firmly submitting that the petition is ripe for hearing and determination and that doing so would uphold the constitutional principle under Article 159 of the fair administration of justice.

36. The court has carefully considered the petition, the amended petition, the written submissions filed by the petitioner and the 1st to 3rd respondents, the petitioner's rejoinder, and the entire record of the case.

37. The following issues emerge as the core questions for the court's determination in this petition;

(i) Whether the petitioner possesses the requisite legal standing (locus standi) to institute these proceedings;

(ii) Whether this matter properly qualifies as a public interest litigation;

(iii) Whether the provisions of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act, 2015, apply to a private

entity such as the 1st Respondent, the Mwachabo Development Forum;

(iv) Whether the procurement process conducted by the 1st to 3rd Respondents was in violation of the Constitution and statutory law;

(v) What reliefs, if any, should be granted.

38. On the first issue of the petitioner's standing, the court finds that the petitioner has properly invoked the court's jurisdiction.

39. The principle of locus standi in constitutional matters has been radically transformed by the 2010 Constitution.

40. Article 22(1) provides that 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.

41. This is further bolstered by Article 258, which allows any person to institute proceedings claiming that the Constitution has been contravened.

42. The Constitution has expanded standing, moving away from the traditional, restrictive common law approach.

43. The petitioner is not a bidder but claims to act for the benefit of the citizens of Taita Taveta County, particularly the residents and schoolchildren who are the ultimate beneficiaries of the projects.
44. He alleges a violation of Article 227, which embodies the public's right to a fair, accountable procurement process.
45. In this context, his standing is not in doubt, as he is asserting a constitutional issue of public importance.
46. Regarding the second issue, whether this is a valid public interest litigation, the court is guided by the principles set out in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & another* [2014] eKLR.
47. The Court of Appeal outlined the characteristics of public interest litigation, including that it seeks to vindicate the rule of law, advance the cause of a community or constitutional values, and is not undertaken for personal gain or ulterior motive.
48. The petitioner's case, which challenges the integrity of a procurement process for public infrastructure like a social hall and school facilities, squarely fits this description.

49. The 1st to 3rd Respondents' argument that the public interest lies in the completion of the projects, regardless of the process, is fundamentally flawed.

50. A public benefit derived from an unlawful process is a corruption of the public interest, not its fulfilment. The court finds that the petition raises matters of genuine public interest.

51. On the third issue is of the applicability of public procurement law to the 1st Respondent, the 1st to 3rd Respondents correctly argued that they are not a "public entity" as defined in the Public Procurement and Asset Disposal Act, 2015, and thus are not subject to the Act's detailed procedural machinery.

52. However, this argument misses the broader constitutional imperative. Article 227(1) of the Constitution mandates that when a State organ or any other public entity contracts for goods or services, that process shall be fair, equitable, transparent, competitive and cost-effective. The phrase "other public entity" must be interpreted purposively.

53. The principles of public procurement are of universal application where public funds or public interest are

involved. The Mwachabo Development Forum, in undertaking projects that serve a public purpose for a community, such as constructing school fences and a social hall, was engaging in a form of public procurement.

54. While they may not be bound by every single section of the Act, they are undoubtedly bound by the overarching constitutional principles enshrined in Article 227.

55. To hold otherwise would create a dangerous loophole, allowing public functions to be outsourced to private bodies free from the constitutional demands of accountability and transparency.

56. On the fourth issue, the court finds that the petitioner has established, on a balance of probabilities, that the procurement process was fundamentally flawed and violated the principles of Article 227.

57. The petitioner's evidence, particularly the annexures VEM-5 and VEM-6, demonstrates that the "regret letters" sent to unsuccessful bidders failed to disclose the name of the successful bidder as required by Section 87(3) of the Public Procurement and Asset Disposal Act.

58. This lack of transparency is a clear contravention of the law.

59. Furthermore, the petitioner's allegations that the tender notices were vague, lacked evaluation criteria, and failed to provide essential documents like drawings and Bills of Quantities, which remain unrebutted by any substantive evidence from the 1st to 3rd Respondents, point to a process that was neither fair, equitable, nor transparent.

60. The failure to provide these basic components of a tender denies bidders a fair opportunity to compete and undermines the very essence of a competitive process.

61. The 1st to 3rd Respondents' defence rests on a denial of applicability and a claim that the petitioner has provided no evidence, but they have failed to produce any records to show that their process was, in fact, compliant with the basic tenets of fair procurement.

62. In the face of specific allegations, a mere denial is insufficient. The petitioner has therefore discharged his evidential burden.

63. Based on the pleadings, submissions, and the record before this court, the central and dispositive fact is that the four construction projects which formed the subject matter of the

impugned procurement process have already been completed and handed over to the community.

64. This court must therefore confront the reality that the primary reliefs sought by the Petitioner—to nullify the award letters and compel a fresh tendering process—have been rendered largely academic and incapable of serving any practical purpose.

65. However, the completion of the projects does not automatically extinguish the Petition or the weighty constitutional and legal issues it raises.

66. The jurisdiction of this court, vested by Article 165(3) of the Constitution, to hear and determine questions on the interpretation and application of the Constitution is not so easily ousted.

67. The Petitioner has sought declaratory reliefs that transcend the immediate, now-completed, procurement cycle.

68. He seeks pronouncements on the applicability of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act to private entities undertaking public works, and on the regulatory mandate of the 4th Respondent.

69. These are live and critical issues of public law. The Supreme Court of Kenya in the seminal case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR affirmed that the court's duty to interpret the Constitution is not diminished by subsequent events, especially where the issues are of great public importance and are likely to recur.

70. On the merits of the constitutional questions, I find and hold that the 1st to 3rd Respondents' argument that they are immune from the principles of public procurement is untenable.

71. While it is correct, as they contend, that a Community Based Organization is not a "public entity" as strictly defined under the Public Procurement and Asset Disposal Act, 2015, and is therefore not subject to the full gamut of its procedural rigours, this is not the end of the inquiry.

72. The Constitution is the supreme law, and its provisions bind all persons and State organs. Article 227(1) establishes foundational principles for procurement—fairness, equity, transparency, competitiveness, and cost-effectiveness.

73. These principles are not contingent upon the legal status of the procuring entity but on the nature of the function being performed.

74. Where a private entity, like the 1st Respondent, undertakes a project of a public character, funded by or for the ultimate benefit of the public, it steps into a role that carries constitutional obligations.

75. To hold otherwise would be to create a perilous loophole, allowing public functions to be shrouded in secrecy and unaccountability simply by being delegated to private bodies.

76. Applying this principle to the present case, the evidence presented by the Petitioner, particularly annexures VEM-5 and VEM-6, demonstrates a clear breach of the constitutional imperative of transparency.

77. The "regret letters" failed to disclose the name of the successful bidder, a specific requirement under Section 87(3) of the Public Procurement and Asset Disposal Act, which embodies the transparency principle of Article 227.

78. The allegations of vague tender documents lacking evaluation criteria and essential documents like Bills of

Quantities further point to a process that was fundamentally flawed.

79. In the face of these specific allegations, the 1st to 3rd Respondents offered a mere denial without producing any evidence to demonstrate a compliant process. The Petitioner has, on a balance of probabilities, discharged his evidential burden to show a violation of Article 227.

80. Consequently, I make the following final orders:

(i) A declaration be and is hereby issued that the procurement process conducted by the 1st, 2nd, and 3rd Respondents for the construction of the Mwatate Social Hall, Mwachabo ECD Toilets, Mwachabo Primary School Fence, and Mwachabo Secondary School Fence violated the principles of fairness, equity, and transparency as enshrined in Article 227 of the Constitution.

(ii) A declaration be and is hereby issued that private entities, including Community Based Organizations, which undertake procurement for projects of a public character and for public benefit, are bound to adhere to

the overarching principles of public procurement set out in Article 227 of the Constitution.

- (iii) The prayer for an order of certiorari to quash the award letters and the prayer for an order of mandamus to compel a fresh tender are declined as they have been overtaken by events, the projects being complete.
- (iv) The prayer for compensation for the 21 bidders is declined as the Petitioner cannot claim such a private law remedy on their behalf.

81. Each party shall bear its own costs of this Petition.

ORDERS TO ISSUE ACCORDINGLY.

Dated, signed and delivered this 3rd day of November, 2025 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:

Court Assistant; Millicent/Mabishi

Mr. Vincent Endekwa in person

Mr. Asige for the 1st to 3rd Respondents

