



Commissioner General Kenya Revenue Authority v Okoiti & 2 others (Civil Appeal 100 of 2018) [2023] KECA 1278 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1278 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 100 OF 2018
HA OMONDI, DK MUSINGA & GWN MACHARIA, JJA
OCTOBER 27, 2023**

BETWEEN

COMMISSIONER GENERAL KENYA REVENUE AUTHORITY ... APPELLANT

AND

OKIYA OMTATAH OKOITI 1ST RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT

SICPA SECURITIES SOL. SA 3RD RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Mativo, J.) dated 12th March 2018 in Petition No. 532 of 2017 Consolidated with HCCA No. 125 of 2018)

Validity of the Excisable Goods Management System (EGMS) Regulations

The case concerned the implementation of the Excisable Goods Management System (EGMS) in Kenya, which was intended to affix excise stamps to excisable goods to curb counterfeit products and increase tax revenue. The High Court had invalidated certain regulations due to a lack of sufficient public participation. KRA appealed the decision to the Court of Appeal, which allowed the appeal, holding that the representation of key stakeholders during consultations was sufficient to meet the requirement for public participation, and that the procurement process was lawful.

Reported by John Ribia

Constitutional Law – national values and principles of governance – public participation – public participation in the passing subsidiary legislation - Excise Duty (Excisable Goods Management System) Regulations (Legal Notice 53 of 2017) – effect of representation by a representative body in a public participation meeting - whether sufficient public participation occurred before implementing the Excisable Goods Management System in Kenya - whether the representation of key stakeholder organizations in meetings on the implementation of the Excisable Goods Management System (EGMS) was sufficient to satisfy the constitutional requirement for public participation, given that the stakeholders represented the views of their members – Constitution of Kenya, 2010 article 10, 43(1)(a),(c) & (d), 226(3), and 229(7) & (8).



Procurement Law – tender award - whether the tender awarded to SICPA to implement the Excisable Goods Management System in Kenya was lawful and in compliance with the Public Procurement and Asset Disposal Act (PPAD).

Brief facts

In October 2017, the Cabinet Secretary for National Treasury issued a public notice mandating that bottled water, juices, soda, non-alcoholic beverages, and cosmetics manufactured or imported into Kenya be affixed with excise stamps. That was part of the Excisable Goods Management System (EGMS), which was intended to increase revenue and combat counterfeit products. KRA awarded the tender to a Swiss company, SICPA Securities Sol. SA, to implement the system.

The 1st respondent challenged the legality of the implementation, arguing that there was insufficient public participation, and that the direct procurement of the tender violated the law. The High Court invalidated the regulations, prompting KRA and other respondents to appeal.

Issues

- i. Whether sufficient public participation occurred before passing the legislation - Excise Duty (Excisable Goods Management System) Regulations and implementing the Excisable Goods Management System in Kenya.
- ii. Whether the representation of key stakeholder organizations in meetings on the implementation of the Excisable Goods Management System (EGMS) was sufficient to satisfy the constitutional requirement for public participation, given that the stakeholders represented the views of their members.
- iii. Whether the tender awarded to SICPA to implement the Excisable Goods Management System in Kenya was lawful and in compliance with the Public Procurement and Asset Disposal Act (PPAD).

Held

1. Being a first appeal, the court's primary duty to reevaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31 of the Court of Appeal Rules, 2022.
2. Public participation played a central role in both legislative and policy functions of government, whether at national or county level, and applied to the procedure of legislative enactment. Lack of public participation was fatal, and if any action that required public participation was commenced without it, the same was invalid as it offended an express constitutional stipulation.
3. The Kenya Association of Manufacturers, a large body, with representation in the whole country gave their considered view. The fact that there was representation of the membership of the key stakeholder in the meetings was sufficient as the representation of the membership of the stakeholder had the members view on the implementation of EGMS. A consultative meeting in every county was not necessary so that the EGMS could pass the public participation test.
4. The rule of thumb was that a reasonable and real opportunity was given to the public and all interested parties, with timely access to information. Public participation was carried out, it passed the test of effectiveness. The requirement for public participation was met.
5. The trial court applied the law retrospectively. If the more recent legislation, Public Procurement and Asset Disposal Act (PPAD) 2015 came into force on January 7, 2016, and the tender in question was awarded on July 17, 2015. The applicable law was the PPDA 2005.
6. There was some variation that rendered the scope of the original contract incapable of being carried out; and that the 25% threshold would be exceeded under Legal Notice No. 110 of June 18, 2018, as set out in the Auditor General's report. Since there was already an existing contract, and the platform was already in existence, then the easiest thing was to re-issue the tender and award it directly to the 3rd respondent, who was already laying the works in the pipeline. As per the Auditor General's report, it would have cost the consumer much if a parallel system was to be put in place. The tender was not awarded irregularly. The appellant acted in accordance with section 103(1) of the PPDA Act.



7. Orders: The appeal was dismissed, and each party was ordered to bear its own costs, acknowledging the public interest nature of the litigation.

Appeal allowed.

Orders

Each party was to bear its own costs.

Citations

Cases

Kenya

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Mentioned)
2. *British American Tobacco Ltd v Cabinet Secretary of Health & 5 others* Civil Appeal 112 of 2016; [2017] KECA 763 (KLR) - (Explained)
3. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Applied)
4. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Applied)
5. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Mentioned)
6. *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Applied)
7. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR); [2014] KLR-SCK; [2014] 3 KLR 36 - (Mentioned)

South Africa

1. *Doctors for Life International v Speaker of National Assembly and Others* [2006] ZACC 11; 2006(12) BCLR1399; 2006 (6) SA 416 - (Applied)
2. *Minister of Health v New Click South Africa (PTY) Ltd (CCT 59/2004)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 43(1)(a)(c)(d); 226(3); 229(7)(8) - (Interpreted)
2. Court of Appeal Rules (cap 9 Sub Leg) rule 31- (Interpreted)
3. Customs and Excise Act (Excisable Goods Management System) Regulations In general - (Cited)
4. Customs and Excise Act (Repealed) (cap 472) section 116B- (Interpreted)
5. Excise Duty (Excisable Goods Management System) Regulations In general- (Cited)
6. Excise Duty Act (cap 472) section 28 - (Interpreted)
7. Public Audit Act (cap 412B) sections 32(4); 53(a) - (Interpreted)
8. Public Procurement Amendment Regulations section 9 - (Interpreted)
9. Public Procurement and Asset Disposal Act (cap 41C) sections 74,102(1)(2); 103(2)(d); 165(1)(2); Schedule 3 paragraph 1(1) - (Interpreted)
10. Public Procurement and Disposal Act (Repealed) (Act No 3 of 2005) In general- (Cited)
11. Statutory Instruments Act (cap 2A) sections 5, 11(1-4)- (Interpreted)

Texts

1. Mackay, JPM., (Lord of Clashfern) *et al* (Eds) (2001) *Halsbury's Law of England* London: LexisNexis Butterworths 4th Edn p 570

Advocates

None mentioned



JUDGMENT

Judgment of Omondi, J.A.

1. When this matter came up for hearing, it became apparent that the appeal in Nairobi Civil Appeal No 100 of 2018 arises from the same decision that is challenged in Nairobi Civil Appeal No 125 of 2018, and involves the same parties; and the same issues. The parties therefore agreed to have the matters consolidated and heard together, with Civil Appeal No. 100 of 2018 being the lead file for purposes of hearing this appeal with ease.
2. The genesis of this appeal was triggered by the contents carried in the local media on October 3, 2017, where the 2nd respondent published a public notice announcing that with effect from November 1, 2017, bottled water, juices, soda and other non-alcoholic beverages and cosmetics, manufactured or imported into Kenya, shall be affixed with the new generation excise stamps, in accordance with [Legal Notice No. 110](#) of June 18, 2013. The regulations issued by the Cabinet Secretary (CS), in the Legal Notice, were said to have the effect of expanding the scope of items to be covered by Excisable Goods Management Systems (EGMS) to include the listed goods. According to the 1st respondent, the Kenya Revenue Authority (KRA), had awarded the tender worth between Kshs 15 -17 million, to a Swiss based international company known as SICPA Securities SOL SA (SICPA), to implement the EGMS system, which was to ensure the traceability of products, secure excise duty, and ultimately increase revenue to KRA.
3. The justification given for implementation of this system, was that it was intended to seal the loopholes that had been suffered under the manual system; and curb illicit trade in counterfeit goods which were contributing to loss of revenue; that the previous manual method of affixing Excise and Revenue Stamps on excisable goods which was only limited to tobacco, wines, spirits and beers; had experienced alleged rampant counterfeiting of stamps, resulting in manufacturers under-declaring the volumes of their products; and in turn, leading to under-collection of excise taxes. In a nutshell, the subsidiary legislations sought to implement the EGMS for which the 3rd respondent had been awarded the tender.
4. The 1st respondent, Okiya Omtatah Okoiti (Okiya), challenged the legal instruments, and filed a suit *vide* an amended petition filed on December 1, 2017 against the appellant, Commissioner General of the Kenya Revenue Authority (KRA), the 2nd respondent, the Cabinet Secretary, National Treasury (CS), the 3rd respondent, and SICPA Securities SOL SA (SCPA) alleging: violations of various constitutional and statutory provisions; that there had been no public participation or consultations, before the introduction of the EGMS; the appellant's disregard for public interest to achieve an undisclosed collateral purpose, and irregularly issuing Gazette Notice No 12856 of 5th September 2013 prescribing the price of an excise stamp to be Kshs 1.50, seeking to enforce void laws; and undermining the authority of Parliament's Public Investment Committee (PIC) by disregarding PIC's directive suspending the implementation of Excisable Goods Management System (EGMS) to allow PIC to finalize investigations into alleged irregularities in award of KRA tender No. KAR/HQS/DP-423/2014-2015.
5. The 2nd respondent was accused of irregularly issuing [Legal Notice No 110](#) of June 18, 2013 to achieve an undisclosed collateral purpose, by expanding the scope of items to be covered under EGMS, to include all excisable goods except cars manufactured or imported into Kenya; and for irregularly issuing [Legal Notice No 53](#) of March 30, 2017.



6. The 1st respondent lamented that the Excise Tax was selectively imposed on the use or sale of specific goods and services which pose harm to the consumer such as gambling, alcohol, and tobacco; therefore charging excise duty on bottled water, fruit and vegetable juice was a deliberate violation of article 43(1)(a)(c) & (d) of the *Constitution*; and its imposition without public participation was a burden to manufacturers and consumers and punitive, particularly to a majority of small businesses which were making narrow profit margins.
7. The 1st respondent claimed that the 3rd respondent was the beneficiary of the appellant's and Treasury's 5 year contract for supply of EGMS at a minimum sum of Kshs 15,909,293,482 and maximum of Kshs 17,15,333,818; that the 1st respondent required that excisable goods and services be affixed with stamps bought from the 3rd respondent, who according to the petitioner was a foreign company corruptly procured; and that the EGMS duplicates the work of other government agencies like the Kenya Bureau of Standards and the Anti-Counterfeit Agency, and as such the decision to pursue counterfeits is ultra vires its mandate.
8. It was the 1st respondent's contention that industry players under the auspices of Kenya Private Sector Alliance (KEPSA), had sought to get the National Assembly's Public Investment Committee (PIC) to annul the EGMS implementation on grounds that there was insufficient consultation; failure to cater for the needs of manufacturers; the inappropriate system for low priced excise products, which would end up being passed on to the consumers by way of price increase of consumer goods and lack of justification for collecting the imposed Stamp Duty.
9. The 1st respondent also lamented that PIC had requested the appellant not to implement EGMS until a suitable pricing model was agreed on after consulting stakeholders, but the 2nd respondent nonetheless proceeded with implementation without consultation, issued tender number KRA/HQS/06/1CB-037.2011-2012(EGMS 11) wherein the 3rd respondent was awarded the tender for supply of printed revenue stamps, track and trace software and integrated production accounting system at Kshs 4, 808,134,887.
10. That the 2nd respondent then issued *Legal Notice No 110* of June 18, 2013 expanding the scope of items to be covered under EGMS to include all excisable goods except cars manufactured in Kenya; that on May 15, 2015 the appellant's Tender Committee terminated the contract on the ground that it could not cover the extended scope of excisable goods and also the variation of the Legal Notice would exceed the 25% threshold allowed under section 9 of the *Public Procurement Amendment Regulations* 2013. As a result, the 1st respondent initiated tender number KRA/HQS/DP-423/2014- 2015 (EGMS 111), a direct procurement involving negotiation with the 3rd respondent which expanded the scope of the cancelled contract to accord with Legal Notice 110 of June 10, 2013.
11. That contrary to section 5 of the *Statutory Instruments Act*, the appellant and 2nd respondent did not conduct public participation prior to issuing *Legal Notice No 110* of June 18, 2013 and Gazette Notice No 12856 of September 5, 2013 nor were the legal notices presented to parliament for scrutiny as per section 11 (1-4) of the *Statutory Instruments Act*, as per the findings of the Auditor General.
12. On the other hand, the appellant maintained that Excise Tax is not only charged on goods that pose harm to the consumer, but also on products that can raise significant revenue, hence the introduction to the goods in question; that prior to the enactment of *Excise Duty Act*, water was excisable, and the implementation of EGMS on non- alcoholic beverages started in 2015; that public participation had been carried out with the relevant stake holders through consultations with representative organisations such as the Kenya Association of Manufacturers (KAM), Alcoholic Beverages Association of Kenya and Tobacco Manufacturers, where all the issues of concern were



addressed, and the schedule agreed on was that implementation was to be conducted in two phases- with phase one being implemented in the year 2013 to cover wines, sprits, beers and cigarettes; whilst phase 2 was to start from November 1, 2017 and would cover the goods mentioned in these proceedings; and the implementation of phase 1 had seen the rise in excise duty collection from 10% to 43% in 2015/2016.

13. The appellant added that the issue of cost of stamps had been raised in the public participation and the 2nd respondent addressed the same in Legal Notice No 53 of 2017 in accordance with recommendation of stakeholders; the increase of Kshs 0.5 litre was arrived at after consultation; and that the 1st respondent had not demonstrated that the cost would affect access to water; that EGMS was expected to combat illicit trade in excisable goods and arrest declining tax revenue on items in question to improve payment of duty, account for production/importation and enhance tax compliance.
14. The appellant also explained that EGMS was introduced by section 116B of *Customs and Excise Act* (repealed) and [Legal Notice No 110 of 2013](#), and that section 28 of [Excise Duty Act](#) 2015 maintained the requirements of section 116B and that the effect of [Legal Notice 53 of 2015](#) was to continue implementation of EGMS in place of [Legal Notice 110 of 2013](#); that a public body could under justifiable reasons opt for direct procurement; that the 1st respondent did not violate any law in awarding the tender to the 3rd respondent; and that the court had no jurisdiction to hear public procurement matters which fell under the Procurement Administrative Review Board. In addition, that [Legal Notice No 53 of 2017](#) was properly tabled before the National Assembly as per provisions of the [Statutory Instruments Act](#).
15. The 2nd respondent also stated that the 1st respondent had not demonstrated violation of the [Constitution](#) and the [Statutory Instruments Act](#), as the legislative proposals were properly tabled before the National Assembly; the regulations did not fall under the mandate of PIC; and in any event the National Assembly Delegated Legislation Committee did not make any adverse report on the regulations complained of.
16. The 3rd respondent defended its position that it participated in the tender process which was not tainted with any irregularities, and upon meeting the conditions of both tenders, won and was duly awarded the tender.
17. The 1st respondent sought orders of declaration that:
 - a. Public participation must apply to enactment of all subsidiary legislations and policy decisions, though the degree and form of such participation will depend on the peculiar circumstances of the case.
 - b. Subsidiary legislation must conform to the [Constitution](#), the parent Act and [Statutory Instruments Act](#) in terms of both its content and the manner in which it is adopted, and failure to comply renders the legislation invalid.
 - c. The repealed [Legal Notice No.110](#) of June 18, 2013, and Gazette Notice No 110 of 18th June 2013, and Gazette Notice No 12856 of 5th September were enacted in a manner inconsistent with the provisions of the [Constitution](#) and the [Statutory Instruments Act](#), hence they were null and void for all purposes.
 - d. Legal Notice No 53 of March 2017 was enacted in a manner inconsistent with the [Constitution](#) and the [Statutory Instruments Act](#) in that there was no adequate public participation prior to its enactment, hence the same was null and void.



- e. The appellant was obligated to craft and implement a meaningful programme of public participation and stake holder engagement in the process of tendering Tender Notice No KRA/HQ/DP -423/2014-2015, and/ or to ensure that the direct procurement met the strict statutory requirements of section 103(2)(a) – (e).
- f. An order of *certiorari* be issued quashing Legal Notice No 53 of 30th March 2017 to the extent that it sought to impose or introduce excise duty on bottled water, juices, soda, and other non-alcoholic beverages and cosmetics; and quashing the award of tender made to the 3rd respondent.
18. *Vide* a judgment dated March 12, 2018, the trial court having carefully considered the parties pleadings, testimony, and evidence on record allowed the petition in its entirety, making a finding that the 1st respondent herein did not fall under the category of persons who may seek administrative review under section 165(1) & (2) of the *Public Procurement and Disposals Act* (PPAD Act), which was only available to a candidate or tenderer claiming to have suffered, or risked suffering loss or damage due to the breach of a duty imposed on a procuring entity by the *Act* or the regulations; as such, the 1st respondent could not seek administrative review before the board; consequently the alternative remedy of making request for review was unavailable to the 1st respondent.
19. On the question of public participation, the trial court held that there was no evidence that *Legal Notice No 53 of 2017* and Gazette Notice No. 12586 were subjected to public participation. The court noted that only two meetings were held with a few attendees; that the said meetings were only held in Nairobi, whereas the whole country would be affected. Consequently, the said regulations were not enacted in a manner consistent with the *Constitution* and, as such, were not valid, and any decisions taken pursuant to the said regulations were invalid.
20. As regards the issue of whether the 1st respondent violated the law governing direct procurement in awarding the tender to the 3rd respondent the court was not convinced that the direct procurement was an extension of the previous terminated contracts, as no contract document was produced by any of the respondents to justify their allegation that the contract was an extension of the previous contract to meet the requirements of section 103 (2)(d) of the *PPAD Act*, and that the absence of such contract gave weight to the petitioner’s case that the direct procurement was undertaken in violation of the law and that there was no evidence that the guidelines set out in section 102(1) & (2) of the *Act* were satisfied.
21. On the issue of the legality of the statutory instruments under challenge the court noted that it was a constitutional and statutory imperative that sufficient public participation be undertaken prior to enacting *Legal Notice No 53 of 2017* and prior to implementation of the system. Having noted earlier that public participation was not conducted to the required standard, the court went on to hold that *Legal Notice No 53 of 2017* was adopted in a manner inconsistent with the constitutional and statutory requirements that prescribe public participation.
22. As to whether the imposition of the impugned tax created an unfair tax burden and whether it offended article 43(1)(a),(c) & (d) of the *Constitution*, the court went on to hold that article 43 rights should not be hindered by a tax burden created by a Legal Notice promulgated without strict adherence to constitutional and statutory principles and values, and that for such rights to be limited the respondents ought to have satisfied the article 24 analysis test which was not done.
23. Being aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment of the trial court on 20 grounds of appeal which can be clustered and condensed into thematic areas as follows:



i. The appellant contends that the benefits derived from introduction of excise stamps had Grounddecreased and upon investigation it came to light that fraudsters had established the weakness 1, 2, of the stamp, and had made ways to use counterfeit stamps, with the result that there was a great 3, 4, 9decline in revenue on wines, spirits, tobacco, bottled water, soda and non-alcoholic beverages. & 15–Consequently, EGMS was identified as a solution; and was introduced *vide* section 116B of the whetherCustom and Excise Act (repealed) and [Legal Notice No.110 of 2013](#) requiring all excisable goods the to be managed under EGMS and affixed with excise stamps. The appellant further contended learned that the [Excise Duty Act](#) was replaced with the *Customs and Excise Act*, and that section 28 of judge this [Act](#) still maintained the provisions of section 116B of the repealed Act.

appreciated
the The appellant further contended that pursuant to section 28 of the [Excise Act](#) 2015, [Legal Notice No. 53 of 2017](#) was passed, whose intent was to continue the implementation of EGMS facts of in place of [Legal Notice 110 of 2013](#).
the case

in theGrounds 5, 6, 7, 8, 10, 12 & 20– whether the learned Judge misapplied and misapprehended effect ofthe concept of public participation as envisaged in the [Constitution](#).

the The appellant argued that the trial court placed an unnecessarily high threshold on public Legal participation by focusing on the geographical reach rather than relevant stake holders Notices participation; that the legal threshold for public participation has been dealt with in a number in the of decisions such as [Legal Advice Centre and 2 others v County Government of Mombasa and present 4 others](#) [2018] eKLR, which recognized meetings, press conferences, briefings of members of case. public, and even structured questionnaires as mechanisms that can be used to facilitate public participation; and stated that a body or party has the discretion to choose the medium it deems fit, as long as it ensures the widest reach to the members of public and/or the interested party.

The appellant reiterated its position that it invited members of the public for consultation held on 19th and October 27, 2017; and in attendance were stakeholders as well as representation of the stakeholders’ membership, who made representations that were escalated to the cabinet secretary to reduce the cost per stamp, which were eventually reduced; that these meetings were evidenced by attendance sheets that were produced as annexures in the appellants response in the High Court.

iii. Grounds 11, 13 & 14 – whether the learned Judge misapplied the Special Audit Report of the Auditor General in the tender process.

The appellant submitted that the trial court erred in law and in fact by ignoring the findings of the Special Audit Report of the Auditor General on EGMS of June, 2017. The said report stated that the implementation of EGMS did not result in any increased costs to the consumer, and in its conclusion the report stated that procuring an alternative supplier would mean compelling manufacturing business to install parallel software which would not be cost effective for manufacturers, translating into high costs for consumers.

The appellant further argued that the trial court placed undue reliance on the Audit General’s report even though the said report had not been adopted by the National Assembly thus acting contrary to article 229(7) & (8). The appellant further submitted that section 53(a) of the [Public Audit Act](#) No 34 of 2015 provides that the relevant accounting officer of a state organ or public entity shall within 3 months after parliament has considered and made recommendations on the report, take relevant steps to implement the recommendations of parliament on said report.



The appellant further submitted that the trial court relied on an incomplete report by the Auditor General, which report had not even been considered and adopted by parliament, and further that from the said report no finding was made to the effect that the tender process was flawed in any way, or that the procuring entity breached any procurement laws.

- iv. Ground 16 – whether the learned Judge erred in law and fact in paragraph 78 of the judgement by shifting the burden of proving the petitioner’s case on the respondents

Drawing from the Supreme Court of Kenya’s decision in the case of *Gatirau Peter Munya v Dickson Mwende Kithinji and 3 others* [2014] eKLR, the appellant contended that he who alleges must prove; and the learned Judge in holding that the respondents did not avail the terminated contract documents and that the contract did not conform with the provisions of section 103 (2) (d) of *PPAD*, essentially shifted the burden of proof to the appellant.

- v. Grounds 17, 18 & 19 – Whether the learned Judge was justified to apply PPAD to nullify the tender awarded on July 17, 2015

The appellant submitted that the Third Schedule paragraph 1(1) of the *PPAD* 2015 stipulates that procurement proceedings that commenced before the *Act* shall be continued in accordance with the law applicable before the commencement of the *Act*, that is, January 7, 2016.

The appellant therefore submitted that the trial court relied on the provisions of the new Act without taking into account when the procurement proceedings commenced, and also failed to mention the provisions of the *3 of 2005.pdf PPAD* 2005, the applicable law then, in declaring the tender issued on 17th July 2015 invalid. In support of this proposition, the appellant relied on the decision in *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others* [2012] eKLR where the Supreme Court drawing from *Halsbury’s Laws of England, 4th Edition Vol 44 pg 570* stated that:

“... for non-criminal legislation, the general rule is that all statutes, other than those that are merely declaratory or which relate only to matters of procedure or evidence, are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature”

24. The 3rd respondent associated itself with the position taken by the appellant, reiterating that the learned Judge misdirected himself in holding that there was inadequate public participation; and improperly relied on the Special Audit Report relating to the tender No KRA/HQ/060/2010-2011 which bore no relation to the proceedings before him, as it had been terminated at the time the matter was filed in court; and that in referring to the Public Procurement and Disposal Act, 2015, the learned Judge cited the wrong provisions of the law, and improperly imposed the burden of proof on the appellant.
25. In opposing the appeal, the 1st respondent submitted that the appellant has not demonstrated how the learned Judge failed to appreciate facts of the case and the effect of the legal notices to the dispute at hand; the poster mock stakeholder consultations could not be equated to public participation, as the general public was not given a chance to have their say, yet the consumers (being the general public), as purchasers of the products, were the key stake holders; which should not be confused with the statement that their views were considered, and the appellant has not demonstrated how the threshold for meaningful public participation was realized, this being compounded by the fact that no minutes of meetings with the so-called stakeholders were presented to the trial court.



26. Drawing from the provisions of article 299 of the *Constitution*, as read with article 226 (3); and section 32(4) of the *Public Audit Act* No 34 of 2015, the 1st respondent was categorical that the learned trial Judge did not misapply the Special Audit Report, which in his view is not an opinion to be validated by Parliament before it becomes effective, rather it has the force of law, and must be acted upon.
27. The 1st appellant poked holes at the justification given by the appellant that it opted for direct procurement because of the existence of proprietary software which had been acquired by the 3rd respondent under the EGMS II as the contract had been cancelled. It was the 1st respondent's contention that it matters not whether the trial court made reference to the *Public Procurement and Assets Disposal Act* No 33 of 2015; or to the *Public Procurement and Disposal Act* of 2005 in finding that the finding that the legislative provision offered no refuge to the appellant, because either way, the EGMS procurement did not pass the test for direct procurement; and in any event, no conditions existed in law to justify the direct procurement for EGMS III. In this regard, we were urged to take into consideration the allowable conditions as provided under section 74 of the [3of2005.pdf Public Procurement and Assets Disposal Act](#) of 2005 (now repealed). The direct awarding of the tender to the 3rd respondent was faulted as irregular and unlawful because it locked out other foreign companies that would have participated, had an open international tender been issued.
28. The 1st respondent pleaded that in the event that the appeal is successful, he should not be ordered to bear the costs thereof, as this is a public interest litigation, filed against a public body which is acting ultra vires, and condemning him to costs would send discouraging signals to those who are keen on protecting the public.
- On the other hand, he proposed that if the appeal is not allowed, then he ought to be awarded costs as he has expended his own resources to prosecute the matter. In this regard, we were referred to the case of *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR; and an academic paper: 'Costs in Public Litigation' by Christopher Tollefson to the effect that a public interest litigant should recover costs if successful, but not held liable in costs in the event of adverse outcomes.
29. This being a first appeal, and as has been reiterated in several decisions of this court, it is this court's primary duty to reevaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31 of the *Court of Appeal Rules*, 2022. This duty has been reiterated in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
30. In our view, the main issues for our determination are:

i. Was there public participation before the implementation of the EGMS?

The appellant contends that there was indeed public participation whereas the respondents agree with the trial court that the public participation carried out was not to the required standard. It cannot be gainsaid that public participation plays a central role in both legislative and policy functions of government, whether at national or county level, and applies to the procedure of legislative enactment. Lack of public participation is fatal, and if any action that requires public participation is commenced without it, the same is invalid as it offends an express constitutional stipulation. In the case of *Doctors for life International v Speaker of National Assembly and others* (CC12/05)[2006]ZACC 11;2006(12) BCLR1399 (CC);2006 (6)SA 416(CC), it was held that:

“ the right to political participation is a fundamental human right set out in a number of international instruments. In most of these instruments the right consists of at least 2



elements, a general right to take part in the conduct of public affairs and a more specific right to vote and/or be elected...significantly the ICCPR guarantees not only the right but the opportunity to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.”

31. We have no doubt that it was necessary for the public to be involved in the process of implementing EGMS; indeed, public participation ought to be real, not illusionary and ought not to be treated as a mere formality for purposes of fulfilment of constitutional dictates. What then constitutes proper and/or reasonable public participation as envisioned in the *Constitution*? Lenaola, J. (as he then was) agreeing with the sentiments of Sachs, J, in the case of *Minister of Health v New Click South Africa (PTY) Ltd* was of the opinion that it does not matter how public participation was effected. What is needed is that the public be accorded some reasonable level of participation. This same case further held at para 155:

“it cannot be expected of the law maker that a personal hearing will be given to every individual ...what is necessary is that the nature of the concerns ought to be communicated to the law maker and taken into account in formulating legislation.”

32. In the case of *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 others* [2015] eKLR, the court observed that public participation did not mean that everyone must give their views, which is impracticable. Rather there ought to be evidence of intentional inclusivity in the participation program. The court further stated that public participation calls for innovation and malleability, depending on the nature of the subject matter. In other words, no single regime or program of public participation can be prescribed, and the court will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness.
33. This has court emphasized the importance of public participation in the case of *Legal Advice Center & 2 others v County Government of Mombasa & 4 others* [2018] eKLR holding that the purpose of permitting public participation is to ‘afford the public the opportunity to influence the decision of the law makers ...were it to be otherwise the duty to facilitate public participation would have no meaning’.
34. We thus pose the question:- was this done? Was an opportunity afforded to the public to air their views on the implementation of EGMS? The trial court was not convinced that public participation was properly and reasonably carried out, the reasoning being that only two consultative meetings were carried out and that these meetings were only carried out in Nairobi, whereas the implementation of the EGMS would affect the entire country.

This begs the question, whether the learned Judge expected the consultative meetings to be in all the 47 counties in the country; and whether this would have been reasonable and/or feasible?

In the case of *British American Tobacco Ltd v Cabinet Secretary of Health & 5 others* [2017] eKLR, this Court stated:

“... public participation is a mandatory requirement in the process of making legislation, including subsidiary legislation. The threshold of such participation is dependent on the particular legislation, and the circumstances surrounding that legislation. Suffice to note that the concerned State agency or officer should provide reasonable opportunity for public participation, and any person affected by the legislation should be given an opportunity to



be heard...the stakeholder meetings discussions, and communications, constituted adequate public participation and consultations”

35. The appellant argues that it invited members of public for consultation held on 19th and October 27, 2017 and in attendance were stake holders as well as representation of the stake holders’ membership, who made representations that were escalated to the cabinet secretary to reduce the cost per stamp which were eventually reduced. These meetings were evidenced by attendance sheets that were produced as annexures in the appellants response in the High Court.
36. We hold the considered view that the Kenya Association of Manufacturers is a large body, with representation in the whole country. The fact that there was representation of the membership of the key stakeholder in the meetings, was, with the greatest of respect, sufficient as the representation of the membership of the stakeholder had the members view on the implementation of EGMS. A consultative meeting in every county was therefore not necessary so that the EGMS could pass the public participation test.

In the final analysis, the rule of thumb is that a reasonable and real opportunity was given to the public and all interested parties, with timely access to information. In my view, having reviewed the foregoing on the issue of public participation. I am persuaded that public participation that was carried out passed the test of effectiveness and that the requirement for public participation was met.

ii. Which PPDA was in force regarding the tender issued on July 17, 2015?

37. It is not in contention that the tender in question was awarded on July 17, 2015.
- From the judgment of the trial court, it is also clear that the trial court came to a decision on the tender in question based on the [PPDA](#) 2015, and not [PPDA](#) 2005, which is Not referred to at all in the judgment.
38. I thus concur with the appellant and the 3rd respondent that the trial court applied the law retrospectively. If the more recent legislation i.e. [PPDA](#) 2015 came into force on January 7, 2016, and the tender in question was awarded on July 17, 2015, there is no question that the applicable law then would be the [PPDA](#) 2005.

iii. Did the appellant Comply with the PPDA 2005 in awarding direct procurement to the 3rd respondent?

39. The 1st respondent argued that the appellant abused the law on direct procurement, and that the said procurement was void *ab initio* because the direct tender locked out other firms and that the same violated the 1st respondent’s right to legitimate expectation.
- The appellant argued that the tender process was competitively floated and the 3rd respondent was awarded, having met the set conditions. The appellant also argued that nowhere in the Auditor General’s report was there a finding that the tender process and award of the same was flawed. The appellant also submitted that direct procurement, creating tender KRA/HQS/ICB-037/2011, was made owing to the presence of an already existing platform created by the original tender KRA/HQS/DP-423/2014-/15. Since the 3rd respondent had qualified for the original tender, a fact that was not disputed, then there was really no need to issue another tender as the work to be done was an extension in scope of the previous work.
40. The trial Judge in his judgment came to the conclusion that since the first two contracts had been terminated as the contract could not cover the extended scope, and that the variation would exceed the 25% threshold allowed by the Public Procurement Amendment Regulations, 2015, it created doubts



on the assertion by the appellant and 2nd respondent that the contract Awarded to the 3rd respondent was “an extension of previous work done.” The trial court also relied on the incomplete report by the Auditor General, which was clear that the original contract could not stand in the face of the variations, and thus cast aspersions on whether the contract awarded to the 3rd respondent was an extension of work done. The trial court’s reasoning was that direct procurement was only allowed as long as it was not to avoid competition as set out in section 103(1) of the PPDA Act.

41. It is apparent that there was some variation that rendered the scope of the original contract incapable of being carried out; and that the 25% threshold would be exceeded under Legal Notice No. 110 of June 18, 2018, as set out in the Auditor General’s report. It therefore would follow that since there was already an existing contract, and the platform was already in existence, then the easiest thing was to re-issue the tender and award it directly to the 3rd respondent, who was already laying the works in the pipeline. What was the rationale in so doing? As per the Auditor General’s report, it would have cost the consumer much if a parallel system was to be put in place. It is on account of this that I hold the view that the tender was not awarded irregularly.

The 1st respondent avers that the contract was awarded irregularly; and he who alleges must prove it. The burden ought not to have been on the appellant.

In my considered view, therefore the appellant acted in accordance with section 103(1) of the PPDA Act.

42. From the foregoing, I am drawn to the irresistible conclusion that this appeal does have merit and is accordingly allowed.
43. The appellant did not make a detailed argument regarding costs, but urged that the appeal be allowed with costs. The 1st respondent on the other hand made a very comprehensive argument as to why he should not be condemned to cost. Ordinarily, the rule of the thumb is that costs follow the event—meaning the successful party should carry the crown and all the jewels. However, there are instances when the rule may be waived. I am keenly aware that public interest litigants typically do not stand to gain financially from their zealous pursuit of filing suits in court. As a matter of fact, they risk significant economic consequences in failure to get a favourable outcome. A routine order to pay the successful party’s legal costs would stifle the ordinary citizens access to the courts in pursuit of their constitutional rights as well as critical social issues. I am persuaded that public interest litigation, is an avenue to be encouraged as it is geared towards public benefits that accrue from successful outcomes. Routine condemnation to costs will drive away the whistle blower and social ill fighters and courts must desist from taking steps that eventually scare society’s warriors away. Courts have a duty to accommodate and encourage these social warriors, and on account of that each party should bear its own costs.
44. As Musinga, J A (President) and Ngenye-Macharia, J A are in agreement with the orders that I have proposed, this appeal is hereby allowed. Each party shall bear its own costs of the appeal.

Concurring Judgment of DK Musinga, (P)

1. I have had the benefit of reading, in draft, the opinion of Omondi, J A I am in full agreement with the reasoning and the conclusion arrived at by the learned Judge.
2. As Ngenye, J A also agrees, the final orders of the Court shall be as proposed by Omondi, J A

Concurring Judgment of GW Ngenye-macharia

1. I have had the advantage of reading the draft judgment of HA Omondi, JA. I am in full agreement with the reasoning and conclusions and, therefore, have nothing useful to add.



DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

