



**Nyasimi & another v Eng. (CPA) Antony Wamukota; Kenya Electricity
Transmission Company Limited (Interested Party) (Petition
E193 of 2023) [2024] KEELRC 2537 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2537 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E193 OF 2023**

B ONGAYA, J

OCTOBER 18, 2024

**IN THE MATTER OF ARTICLES 20, 27, 28, 29, 40, 47, 48, 73, 159, 227 AND 232 OF
{{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA**

**IN THE MATTER OF SECTIONS 7, 11, AND 13 OF THE {{>/
AKN/KE/ACT/2012/19 LEADERSHIP AND INTEGRITY ACT}}**

**IN THE MATTER OF SECTION 10(1) OF THE {{>/
AKN/KE/ACT/2003/4 PUBLIC OFFICER ETHICS ACT}}**

**IN THE MATTER OF {{>/AKN/KE/ACT/2015/33 PUBLIC
PROCUREMENT AND ASSET DISPOSAL ACT}} NO. 33 OF 2015**

BETWEEN

ROBERT KANDA NYASIMI 1ST PETITIONER

RENTCO AFRICA LIMITED 2ND PETITIONER

AND

ENG. (CPA) ANTONY WAMUKOTA RESPONDENT

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . INTERESTED
PARTY**

RULING

1. The petitioner filed the petition dated 09.10.2023 through Limo and Njoroge Advocates and prayed for judgment for:



- a. A declaration that in view of his conduct relating to the procurement process to KETRACO-ST-009-2021 for request for proposals for design, construction, and commercial operation of Tier IV Data Centre on a revenue sharing model, and the findings of the High Court in Nairobi Judicial Review Misc. E001 of 2022, Republic V Public Procurement Administrative Review Board & Another; Rentco Africa Limited (Ex parte) (Judicial Review Miscellaneous Application E100 of 2022) [2022] KEHC 12978 (KLR) (Judicial Review) (21 September 2022) (Judgment) the respondent is unfit to hold public office.
 - b. A declaration that in view of his conduct relating to the procurement process to KETRACO-ST-009-2021 for request for proposals for design, construction, and commercial operation of Tier IV Data Centre on a revenue sharing model, and the findings of the High Court in Nairobi Judicial Review Misc. E001 of 2022, Republic V Public Procurement Administrative Review Board & Another; Rentco Africa Limited (Ex parte) (Judicial Review Miscellaneous Application E100 of 2022) [2022] KEHC 12978 (KLR) (Judicial Review) (21 September 2022) (Judgment) the respondent is unfit to hold the office of the General Manager, Design & Construction of the Kenya Electricity Transmission Company Limited.
 - c. An order of Mandamus compelling the interested party to conduct a fresh recruitment to the office of the General Manager, Design & Construction of the Kenya Electricity Transmission Company Limited.
 - d. An award of damages against the respondent.
 - e. The respondent to bear costs of the petition.
2. The petitioner's case is that in the judgment mentioned in the prayers, the High Court held that any conduct that tends to defeat a fair, equitable, transparent, competitive, and, cost-effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227(1) of *the Constitution* and any officer responsible for such conduct risks sanctions including but not limited to a declaration that they are unfit to hold public office. It is alleged for the petitioners that the claimant's alleged conduct of flouting that was subject of the High Court decision, and, his alleged continued flouting of public procurement processes violated *the constitution* and further violated infringed the petitioners' rights.
3. The respondent and the interested party filed a notice of preliminary objection dated 07.11.2023 through Adrian Kamotho Njenga & Company Advocates. The notice stated as follows:
- a. That the jurisdiction of the Honorable Court has been improperly invoked since it's expressly ousted by dint of 165 (5) (b) of *the Constitution*.
 - b. There subsists no employment or labour relations dispute whatsoever, between the Petitioners on one part, and the Respondent and Interested Party on the other.
 - c. The petitioners have not invoked the provisions of Article 41 & Article 162 (2) (a) of *the Constitution* nor any specific provision of the *Employment and Labour Relations Court Act, 2011*, thus affirming the sheer jurisdictional misplacement of the petition herein.
 - d. The Honourable Court cannot legitimately be invited to second guess the decision of the High Court in Nairobi Judicial Review Misc. E100 of 2022, Republic vs Public Procurement Administrative Review Board & another; Rentco Africa Limited (ex parte).
 - e. THAT the petition does not in any manner whatsoever disclose with precision and particularity any constitutional or human rights violations, as is legally mandatory, and thus



gravely offends the principles laid down in various judicial decisions and principally, in the matter of *Anarita Karimi Njeru v Republic* [1979] eKLR as affirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

- f. THAT the petition herein has been lodged for collateral purposes in utter abuse of legal process, more so to arm-twist and influence procurement decisions of the respondent.
 - g. THAT the petition does not disclose any cause of action known to law, against the respondent or the interested party.
 - h. THAT the instant petition is absolutely incompetent, and cannot be entertained by this Honorable Court, having been airlifted from the Judicial Review division, after determination and conclusion of the dispute.
 - i. THAT the Bill of Rights affords protections and guarantees for natural persons as individuals, which protection does not extend to limited liability companies such as the 2nd Petitioner herein. According to Article 19(3)(a) of *the Constitution*, the rights and fundamental freedoms in the Bill of Rights belong to individuals and are incapable of being granted to a limited liability company.
 - j. THAT it is in the interest of proper administration of justice that the petitioner approaches the Court that issued the orders in contest, in the event of any supplemental grievance, of which none is discernible in the current Petition.
 - k. THAT the petition discloses an egregious case of forum shopping and downright abuse of the court process.
4. The parties filed their respective submissions. The Court has considered the respective cases and returns as follows.
 5. First, while there is no employer – employee relationship between the petitioner and the respondent or the interested party, there is no dispute that the respondent as a public officer is currently in the employment of the interested party. The petitioner appears to move against the employee and employer as envisaged in section 12 (2) of the *Employment and Labour Relations Court Act*, 2011. Such is consistent with subject matter jurisdiction of the Court. However, as urged for the respondent and interested party, the petitioner appears to revisit the mentioned High Court judgment in which a procurement or tendering process was challenged. The Court finds that the overriding dispute was procurement and tendering processes and for which the High Court made a decision. Thus, while strategic litigation or public interest litigation would be permissible in proper disputes where the subject matter is employer, employee or work and work spaces, in the instant case the predominant dispute was tendering and procurement as already determined in the mentioned judgment of the High Court.
 6. Second, while a suit can be founded on a judgment, in the instant petition, the petitioners seeks to enforce a finding or holding of the High Court and which would be properly satisfied by the Court, which made the judgment and, in accordance with the relevant provisions of the *Civil Procedure Act*. It is pleaded for the petitioner that the petition is indeed about specific holding of the High Court in the cited judgment about the alleged conduct of the petitioner. Indeed, satisfaction of the holding lies to the jurisdiction of the Court that made the judgment. It appears that the petitioners failed to make specific prayers against the respondent in the earlier suit already decided by the High Court and now seek to fill up the gap through the instant petition. No reason is advanced why, with due diligence, the matters now raised could not be raised in the earlier suit. It appears to the Court that the instant



petition is res judicata and an abuse of court process as the matter was decided or ought to have been decided by the High Court in the Judicial Review proceedings subject of the prayers herein.

7. Third, petitioners have invoked the *Public Officer Ethics Act*, 2003. The Act sets out a regime of a disciplinary process to be followed by a person alleging that a public officer has breached the public officer code of conduct and ethics. There is no suggestion that the petitioners have invoked that procedure or invoked it but the efforts failed. Accordingly, the petition appears to have been filed in total disregard of written law provisions applicable to public officers alleged to breach the code.
8. Fourth, the provisions of the Bill of Rights refer to “person” and the Court considers that the Bill of Rights apply to all persons including companies and within definition of “person” in Article 260 of *the Constitution*. The submission for the respondent and interested party that the Bill of Rights applies only to individuals suggesting natural persons cannot hold.
9. Fifth, while the petitioner has enumerated provisions of *the constitution* in the petition, it is also correct that in the facts as pleaded and prayers, nowhere have the petitioners stated how the respondent has violated their rights. It appears to the Court that as a petition for alleged violation of rights, a cause of action has not been disclosed against the respondent and as urged in the preliminary objection.
10. Sixth, to the extent found in favour of the preliminary objection, the parameters for a proper preliminary objection have been met as no evidence was needed to reach the findings.
11. Seventh, the preliminary objection will succeed to the extent as found in this ruling. The court has considered history of the dispute and each party to bear own costs.
12. In conclusion, the preliminary objection is upheld to the extent as found herein and the petition is hereby dismissed with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 18 TH OCTOBER, 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

Page 3 of 3

