



**Barasa v Cabinet Secretary, Ministry of Treasury & Economic Planning
& 3 others (Petition E065 of 2024) [2025] KEHC 1455 (KLR)
(Constitutional and Human Rights) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E065 OF 2024

EC MWITA, J

FEBRUARY 28, 2025

BETWEEN

MARTIN NYONGESA BARASA PETITIONER

AND

**THE CABINET SECRETARY, MINISTRY OF TREASURY & ECONOMIC
PLANNING 1ST RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF TREASURY & ECONOMIC
PLANNING 2ND RESPONDENT**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT FOR
AGRICULTURE 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. On 16th January 2024, the Ministry of Agriculture and Livestock Development advertised an International Tender No. MoALD/SDA/IT/001/2023-2024, (the Tender) Inviting international bids for leasing of Nzoia Sugar Company Limited, Chemelil Sugar Company Limited and South Nyanza Sugar Company Limited (the sugar companies). The timeline for submitting bids was to expire on 15th February 2024.
2. This was after ministries of National Treasury and Economic planning and Agriculture and Livestock had written letters to the managing directors of the sugar companies asking them to pass resolutions for leasing of the companies to enable the procurement ministry carry out procurement of leases for those sugar companies.



3. Boards of directors of the sugar companies had called board meetings and set dates for those meetings to be held between 8th January 2024 and 11th January 2024 for purposes of passing the resolutions as directed.

Petitioner's case

4. Following these developments, the petitioner filed this petition, as a public interest litigation, challenging the decision to invite bids for privatization of the sugar companies. The petitioner argued that the privatisation of the sugar companies through long term leases was being done without public participation in violation of the Constitution.
5. The petitioner took the position that the Principal Secretary, State Department of Agriculture, (the 3rd respondent), and the Ministry of Agriculture had no authority to direct or compel the boards of directors of the sugar companies to pass resolutions in a particular manner. The time limit given for submission of bids was also unreasonably short and defeated the purpose of transparent, equitable and fair tendering process.
6. The petitioner asserted that the impugned actions were being carried out despite a conservatory order staying implementation of section 21 of the Privatization Act, rendering the actions illegal and unlawful. The actions also violated the people's legitimate expectation and fair administrative action.
7. The petitioner argued that the respondents violated Article 10 of the Constitution by making the decision to privatize the sugar companies through long term leases without public participation. He relied on the decision in Republic v County Government of Kiambu Ex parte Robert Gakuru & Another [2014] eKLR.
8. The petitioner asserted that the respondents made the decision without giving written reasons and without prior notice of the intention to the make the decision, a violation of Article 47 of the Constitution. The petitioner relied on Richard Owuor & 2 others (Suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others [2021] eKLR.
9. It was the petitioner's case, that the respondents did not follow the procedure required by the Constitution for inviting tenders. This was because the letter directing and compelling boards of directors of the sugar companies to pass resolutions to hand over powers was sent eight days before the invitation for tenders was published; the 1st and 2nd respondents sent standard extracts of the board resolutions for signing 5 days before the tender notice was published and the boards of directors of respective sugar companies invited board meetings only 3 days apart, actions that were being taken in a rush.
10. The petitioner argued that the respondents did not justify the unreasonably short timelines in this process compared with the time it took to make the decision. The petitioner relied on an article by Vicki C. Jackson "Constitutional Law in an Age of Proportionality" Yale Law Journal No. 8 Vol. 124 and section 4 of the Fair Administrative Action Act, 2015 in support of his argument.
11. The petitioner maintained that managing directors of the sugar companies and their boards of directors were compelled to pass resolutions to hand over power to the respondent ministries to enable the ministries carry out procurement of the long-term leases in spite of an existing court order. Any act that was done during the existence of the order was an illegality as court orders are not be issued in vain and must be obeyed. He relied on Republic v Fazul Mahamed & 3 others Ex-parte Okiya Omtatah Okoiti [2018] eKLR.



12. Citing Articles 22 (1), (2) (c) and 23(3) of the Constitution and the definition of public interest in Black's Law Dictionary 10th Edition, (page 1425), the petitioner urged the court to allow the petition and grant the following reliefs:
- a. A declaration that the actions and/or inactions of the respondents of not allowing the public to participate in making the decision whether or not to lease the public sector-owned/controlled sugar companies is in contravention of national values under Article 10, and the principles of public service under Article 232(1) of the Constitution of Kenya 2010.
 - b. A declaration that the Invitation to Tender dubbed International Tender Notice, No. MoALD/SDA/IT/001/2023-2024 by the respondents is unconstitutional to the extent that it contravenes constitutional principles of good governance, transparency, accountability, and public participation.
 - c. A declaration that the petitioner's fundamental rights and freedoms as enshrined in Articles 29(d) and 47 of the Constitution have been contravened and infringed by the respondents.
 - d. A judicial review order of certiorari quashing the International Tender Notice, No. MoALD/SDA/IT/001/2023-2024.
 - e. A permanent injunction stopping and/ or halting the tendering process of the International Tender Notice, No. MoALD/SDA/IT/001/2023-2024 advertised by the 3rd respondent intending to lease public sector-owned/controlled sugar companies without public participation.
 - f. An order awarding costs of the petition to the petitioner.
 - g. Any other or further orders, writs, and directions this court considers appropriate and just to grant for the purpose of enforcement of the petitioner members' fundamental rights and freedoms; the enforcement and defence of the Constitution pursuant to Article 23(3) of the Constitution.

Respondents' case

13. The respondents opposed the petition through a replying affidavit sworn by Prof. Njuguna Ndung'u, (Prof. Ndung'u), the 1st respondent. The respondents contended that the sugar industry is struggling, making the country a high-cost sugar producer thus, an attractive destination for sugar imports from COMESA region and beyond.
14. According to the respondents, the government established a task force on sugar industry (the taskforce) in November 2018 to examine the challenges facing public sugar companies and provide appropriate recommendations. The taskforce invited a wide spectrum of participants, including members of the public, sugar cane growers, farmers' organizations, co-operative societies and unions, among others in the sugar industry, to gather views on the challenges facing the sugar companies.
15. The task force submitted its report in February 2020, identifying challenges making sugar companies less competitive with recommendations for revival through commercialization. Most stakeholders who gave views to the Task force agreed on privatization of the sugar companies. The task force recommended mobilization of resources for capital injection through strategic investors as Parliament had approved in 2015. This would enable the sugar companies acquire financial strength for effective revival of their operations.



16. The respondents stated that despite government's heavy investment, the sugar companies were unable to achieve desired levels of efficiency to compete locally and globally. This necessitated a partnership with the private sector to inject capital investment and leverage on expertise and technology to enhance efficiency and productivity and strengthen Kenya's position as a major sugar producer.
17. The respondent asserted that on 3rd and 4th May 2023, the 1st respondent, in collaboration with the Cabinet Secretary, Ministry of Agriculture and Livestock Development, hosted elected leaders, including governors and members of Parliament from sugar-growing counties, who unanimously agreed to the leasing model. In August 2023, the 1st respondent submitted a memorandum of action plans for the revival and commercialization of the sugar companies to the National Assembly to allow stakeholders provide views on the proposed action plans in compliance with public participation.
18. The respondents contended that there was meaningful public participation at every stage of the plan to revive and commercialize the sugar companies. According to the respondents, after tabling the memorandum in the National Assembly on 22nd August 2023, the Speaker of the National Assembly directed that the memorandum be referred to the Departmental Committees on Finance and National Planning and Agriculture and Livestock for collection of views, consideration and reporting.
19. The respondents asserted that between 5th and 7th September 2023 the departmental committees held meetings with various stakeholders at the Kisumu Best Western Hotel. Stakeholders appeared before the committees and unanimously endorsed the proposal to revive and commercialize the sugar companies through leasing under the *Public Private Partnership Act*, 2021 (PPP Act).
20. The report was tabled before the National Assembly which considered, adopted and approved the views from stakeholders. The National Assembly vacated the privatization model approved in 2015. It approved the leasing model as well as the cabinet decisions to write off the debts owed by the sugar companies. The National Assembly further rejected the proposal to merge Chemelil and Muhoroni sugar companies.
21. The respondents maintained that upon approving the memorandum on leasing of five sugar companies under the *PPP Act*, the National Assembly set timelines for implementing the recommendations.
22. The respondents denied the allegations that they compelled boards of directors of the sugar companies to pass resolutions. They argued the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries, and Irrigations, as the procuring entity under the PPP followed the timelines set by the National Assembly and sent out letters requesting boards of management of the respective sugar companies to pass resolutions approving the leasing model.
23. On 16th January 2024, the 4th respondent advertised a tender inviting bids for leasing of the four (4) sugar companies. The tender was to close on 15th February 2024 but was extended to 29th February 2024. The respondents took the position, that the petitioner misapprehended Article 227 of the *Constitution* and did not appreciate the import and object of the PPP which is to provide for participation of the private sector in financing, construction, development operations, or maintenance of infrastructure or development projects through PPP. The 3rd respondent complied with the requirements of transparency and competitive processes. They maintained that the process was under the *PPP Act* and not the *Privatization Act*.
24. The respondents asserted that the petition was filed prematurely and offended the doctrine of exhaustion because the International Tender Notice was only a request for prequalification and no



strategic partnership model had been settled on yet. Further, sections 6, 75 and 75(4) of the PPP Act provide for statutory remedies before the jurisdiction of the Court is invoked.

25. The respondents argued that the petitioner's complaint should have first been lodged with the Petitions Committee, then the Public Private Partnership Committee, and lastly, to Court. They relied on sections 75 and 75(4) of the PPP Act and the decisions in Speaker of the National Assembly v James Njenga Karume [1992] eKLR; Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015] eKLR and B Jerke Terminals v Kenya Ports Authority [2016] eKLR.
26. Regarding the legality of the International Tender Notice and the process leading to the invitation of bids, the respondents argued that the petitioner misled the Court into issuing the conservatory orders since there was no imminent threat. The 3rd respondent was undertaking leasing of the sugar companies through the PPP and not privatisation under section 21 of the Privatization Act which had been suspended by the Court.
27. The respondent maintained that they complied with the law and that the Public Private Partnership project was still at infancy stage since the 3rd respondent was yet to identify partners who meet the criteria set in the Tender Notice. Further, that the joint committees of the National Assembly conducted extensive public participation prior to and during the deliberations on the revival and commercialization of the sugar companies.
28. They relied on Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11 and Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR that there was public participation. They urged the court to dismiss the petition.

Determination

29. I have considered the petition, the response, arguments by parties and the decisions relied on. The issues that arise for determination are whether the tendering process violated conservatory orders and whether there had been public participation.

Violation of court orders

30. The petitioner argued that the advertisement of the international tender to lease the sugar companies was done during a subsisting conservatory order and, therefore, the action was illegal and unlawful. According to the petitioner, the notice inviting bids was published on 16th January 2024 at a time when the Court had issued a conservatory order suspending section 21 of the Privatisation Act, 2023 under which the process was being undertaken thus, the decision was unlawful. According to the petitioner, boards of directors of the sugar companies were forced to sign resolutions for to hand over management of the sugar companies for privatisation. The respondents maintained that they were undertaking leasing under the PPP Act and not privatization under the Privatisation Act hence they did not violate court orders.
31. I have considered the arguments by parties on this issue and perused the record. The petitioner's case is that the sugar companies were being leased through the Privatisation Act, 2023 and the tender notice was issued in January 2024, despite the court having suspended section 21 of the Privatisation Act. In the petitioner's view, the action proposed to be taken when the section was suspended was illegal.
32. The record shows that initially, the respondents were considering privatization and indeed stakeholders had agreed that sugar companies be commercialized through privatisation following a report of a task force appointed to find out what was ailing the sugar industry in the country. The task force



recommended mobilization of resources for capital injection through strategic investors, as had been approved by Parliament in 2015. This was to enable the sugar companies acquire financial resources required for their revival. The process which had started way back in 2015 with the intention to privatize the sugar companies was however not completed.

33. The recommendation for privatization of the sugar companies was later shelved and leasing through public private partnership under the PPP Act adopted. This followed recommendations by the joint committees of the National Assembly after taking views from stakeholders. That was why the international tender notice was published inviting bids for leasing of the sugar companies. It is also clear from the tender notice that the process being undertaken was leasing through public private partnership under the PPP Act.
34. The petitioner argued that the international tender notice was issued during subsistence of conservatory orders suspending sections 21 of the Privatisation Act thereby violating the court orders. According to the petitioner, since section 21 of that Act had been suspended, any decision taken to proceed with the tendering process was unlawful. The respondent maintained that the petitioner misapprehended both Article 227 of the Constitution as well as the applicable law since what was being undertaken was leasing under the PPP Act and not privatization under the Privatization Act and, therefore, the orders suspending section 21 of the Privatization Act did not apply to the process.
35. The court had indeed suspended section 21 of the Privatisation Act in late 2023 through Petition No. 491 of 2023 which was challenging privatisation of 11 eleven public entities. Those orders were still in force when the tender notice was published in January 2024. However, from the facts on record, the respondents in this petition were not acting under the Privatisation Act whose section 21 had been suspended. The process being undertaken was a public private partnership under the PPP Act. In that premise, the petitioner's argument that the decision to lease the sugar companies and the action of inviting international bids through the international tender notice published in January 2024 violated the court order was not correct.
36. Even though the action was taken during the subsistence of a court order, there could not have been violation of the court order suspending section 21 of the Privatisation Act since the process was not being undertaken under that legal regime but through the Privatisation Act. The order had no effect on the process being taken under the Public Privat Partnership Act.

Public participation

37. The next issue is whether there was public participation. The petitioner argued that the process of leasing the sugar companies under the Privatization Act was being undertaken without public participation in violation of the Constitution. The respondents maintained that there was public participation at every stage of the process and that the petition was filed prematurely since there are remedies provided for under the PPP Act.
38. Public participation is one for the founding values in our Constitution as a principle of good governance under Article 10 of the Constitution. The principles of good governance, (including public participation), bind all State organs, State officers, public officers and all persons whenever they, among others, make or implements public policy decisions.
39. In Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR, the Court of Appeal stated that:

[20] The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to



institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.

40. The decision to lease the sugar companies was made by the National Assembly following recommendations by the committees on Finance and National Planning and that on Agriculture and Livestock. This was a shift from the earlier decision to privatise the sugar companies under the Privatisation Act which had been made in 2015. Whether the process of leasing the sugar companies required further public participation after the National Assembly adopted the recommendations of the Joint Committees was not raised as an issue in this petition and parties did not make submissions on it.
41. However, the respondents' position was that since the sugar industry had been struggling for long, the government established a task force in 2018, to examine the challenges the sugar companies were facing and provide appropriate recommendations. The task force conducted public participation; invited members of the public, sugar cane growers, farmers' organizations, co-operative societies and unions, among other stakeholders in the sugar sector and gathered views on the challenges facing those companies. A report identifying the challenges that make sugar companies less competitive was submitted recommending revival of the sector through commercialization of the sugar companies.
42. The replying affidavit by Prof. Ndung'u filed in response to the petition and the annexures thereto show that although initially approval had been given for privatization of the sugar companies, that position was shelved when the National Assembly approved long term leasing following recommendations from the Joint Committees. Indeed, the report signed on 14th September 2023 by the Joint Committees on Finance and National Planning and that on Agriculture and Livestock, attached to the affidavit as "LK11" and submitted to the National Assembly, recommended, among others, approval of the leasing of five (5) sugar companies under the provisions of the Public Privat Partnership Act; that the House vacates the privatization model that had been earlier approved by the National Assembly in 2015 and approval of the decision of the Cabinet to write off tax arrears owed by the five (5) sugar companies (Nzoia; Chemelil; Muhoroni; Miwani and South Nyanza Sugar Companies).
43. The report was prepared after stakeholders' engagement with the joint committees and contains the views received from the people who appeared before the joint committees. The report was tabled before the National Assembly; the National Assembly vacated the privatization model approved in 2015; approved the leasing model as well as the Cabinet decision to write off debts owed by the sugar companies as recommended in the joint committees' report. Following adoption of the recommendations, the Ministry of Agriculture and Livestock issued the impugned international tender notice inviting bids for the leasing of the sugar companies. This is in annex "LK1" in the replying affidavit which showed that the tender notice invited bids for leasing of the sugar companies and not privatisation.
44. When an action is challenged for being unconstitutional, the burden is on the State organ or agency responsible to prove otherwise. In this case, the duty fell on the respondents to prove that their action complied with the Constitution and the law. In this respect, the respondents demonstrated through documentary evidence that there was stakeholders' engagement and the National Assembly approved leasing of the sugar companies.
45. It is also important to point out here, that the challenge in this petition was that the process being undertaken was privatisation under the Privatisation Act and in violation of a subsisting court order.



The challenge was not directed at a process under the PPP Act. There was no suggestion that the provisions of the PPP Act were not complied with and if so, how. In fact, the petition did not address any of the provisions of the PPP Act. That was why the respondents maintained that the petition was premature since the Public Private Partnership Act provides for the processes to be followed, including that complaints are to be made to the committees established under the Act before invoking the court's jurisdiction. The petitioner did not challenge the respondents' position and therefore the less I say about the argument on the processes under the PPP Act, the better.

Conclusion

46. Having considered the pleadings and arguments by parties, the conclusion I come to, is that the respondents were undertaking leasing of the sugar companies under the Public Private Partnership Act and not privatisation under the Privatisation Act. The tender notice for leasing having been issued under the Public Private Partnership Act, the Privatisation Act was not applicable and, therefore, the action did not violate the conservatory order that had been issued suspending section 21 of the Privatisation Act. There was public engagement which led to the recommendations that the sugar companies be put on leasing. Whether there should be public participation under the Public Private Partnership Act was not raised in this petition for consideration.

Disposal

47. In the circumstances, and for the above reasons, the petition fails and is dismissed. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

E C MWITA

JUDGE

