

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
PETITION NO. 43 OF 2014

HON. WILLIAM OLE NTIMAMA.....1ST PETITIONER
LEDAMA OLE KINA.....2ND PETITIONER
JOSEPH OLE KARIA.....3RD PETITIONER

VERSUS

GOVERNOR, NAROK COUNTY.....1ST RESPONDENT
NAROK COUNTY GOVERNMENT.....2ND RESPONDENT
KAPS (K) LIMITED.....3RD RESPONDENT

JUDGMENT

In a Petition dated and filed on 29th May 2014, in the Judicial Review and Constitutional & Human Rights Registry in Nairobi, the Petitioners sought the following orders -

(a) A declaration do issue that the Petitioners were entitled to receipt of the information sought from the 2nd and 3rd Respondents for purposes of transparency, accountability and enforcement of their fundamental rights and freedoms.

(b) That all the contractual documents between the 2nd and 3rd Respondents authorising the 3rd Respondent to inter alia existing public-private partnership between the 2nd and 3rd Respondents, regulating motor vehicle parking, collection of parking fees/charges, and clamping of motor vehicles within County of Narok, management of revenue collection in the Mara Triangle and Maasai Mara National Reserve, any sort of revenue collection administered by KAPS (K) Limited be supplied to the petitioners forthwith.

c. All documentation, including the proposal submitted by the 3rd Respondent to the 2nd Respondent to undertake the works as stated in paragraph (b) above, the approvals obtained by the 1st and 2nd Respondent from the County Assembly by undertaking works

of such magnitude as required by section 8 of the County Government Act No. 17 of 2012 be supplied to the Petitioners forthwith.

d. Evidence of documentation that the proposals by KAPS (K) Limited was subject for public participation as required by section 87 of the County Government Act No. 17 of 2012 be supplied to the Petitioners forthwith.

(e) A conservatory order do issue restraining the 1st and 2nd Respondents from further implementing, all the contractual arrangements/and or public-private partnership between the 2nd and 3rd Respondents, or authorising the 3rd Respondent to inter alia regulate motor vehicle parking, collection of parking fees/charges, and clamping of motor vehicles within County of Narok, management of revenue collection in the Mara Triangle and Maasai Mara National Reserve, any sort of revenue collection administered by KAPS (K) Limited – for having been obtained/secured in breach of the law and for being unconstitutional.

(f) A declaration do issue that the existing public-private partnership between 2nd and 3rd Respondents, regulating motor vehicle parking, collection of parking fees/charges, and clamping of motor vehicles within Narok County for having been obtained/secured in breach of the law and is therefore unconstitutional, null and void.

(g) A declaration do issue that the decision by the 1st and 2nd Respondents to enter into a public-private partnership with the 3rd Respondent in relation to revenue collection for the entire Narok County was a major policy decision that required public participation.

(h) A declaration do issue that the decision as to which private entity would help the 2nd Respondent in relation to revenue collection for the entire county of Narok required public procurement under Article 227(1) of the Constitution and under Sections 2, 3 and 4 of the Public Procurement and Disposal Act.

i. This Honourable Court be pleased to issue any other order or relief as it may deem fit and just to ensure that law, order and constitutionality is observed; and

(j) Costs of the Petition.

2. The Petition was based upon the provisions of the Constitution of Kenya 2010, and in particular -

- (a) Article 2(1) – the Supremacy of the Constitution,
 - (b) Article 3(1) – every person has an obligation to respect, uphold and defend the Constitution,
- (c) Article 10 – the National values and principles of governance,
 - (d) Article 19(1) the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
- The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.
 - (e) Article 20 – the Bill of Rights applies to all law and binds all state organs and all persons,
 - (f) Article 22(1) – 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,
 - (g) Article 23 – grants the High Court jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights,
 - (h) Article 27 – provides for equality of every person before the law, and the right to equal protection and equal benefit of the law,
- (I) Article 35 – provides for the right of access to -
 - (a) information held by the State, and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - (c) the State shall publish and publicise any information affecting the nation.

3. The Petition was also said to be founded on the facts set out in Part C of the Petition, the County Government Responsibilities with respect to Management and Control of Public Finance set out in paragraph D of the Petition, the **Constitution and Public Finance Management Act** set out in Part E of the Petition, and alleged violations of the **Constitution and Fundamental Rights and Freedoms** set out in Part F of the Petition – viz -

i. *Violation of Article 10 of the Constitution inter alia -*

- *The Respondents actions of declining to issue the information sought by the Applicant contravenes the principles of good governance, integrity, transparency and accountability.*

(ii) *Violation of Article 27 - inter alia the Respondent's attempt to bar the Petitioners from accessing information needed to protect their fundamental rights and freedoms is a violation of the Petitioner's rights to equality before the law,*

(iii) *Violation of Article 35 of the Constitution inter alia -*

The Respondent's actions of deliberately refusing/ignoring/neglecting to give the requisite documents to the Petitioners is a violation of the Petitioner's rights to information as the information is required for enforcement of the fundamental rights and freedoms of the Petitioners and citizens participation in governance,

(iv) *Violation of Article 47 of the Constitution inter alia -*

:The Respondent's action of failing to release the requisite documents is a violation of the Applicants' rights to fair Administrative action,

(v) *Violation of Article 48 of the Constitution inter alia -*

“The First and Second Respondents have barred the Petitioners from accessing information needed in enforcing the Petitioner's rights hence they have denied the Petitioner's rights to access to justice.

vi. *Violation of Article 227 of the Constitution*

The First and Second Respondents are enjoined by Article 227 of the Constitution to enter into contracts in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The Petitioners have been denied this right and equal protection of the law, by flouting of the tender rules and procedures under the Public Procurement and Disposal Act,

(vii) *Violation of Articles 210 & 260 of the Constitution inter alia -*

“That under the Public Finance Management Act, the only organ that can collect county revenue besides a public officer appointed by the County Executive Officer for Finance is the Kenya Revenue Authority. This is because County offices are obligated to comply with the requirements of the law under Section 162 of the Public Finance Management Act,

“under Article 260 of the Constitution and the definition of a public officer it is clear that the Third Respondent or any of its employee cannot fall under that categorization or specie.”

4. Filed with the Petition was a Notice of Motion of the same date and brought under a Certificate of Urgency, under the Constitution (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 seeking conservatory orders against the Petition 43 of 2014 | Kenya Law Reports 2015 Page 4 of 18.

Respondents, pending the hearing and determination of the Petition. Both the Motion and the Petition were certified urgent, by the Hon. Majanja J. on 20/05/2014 and fixed it for directions on 4.06.2014.

5. On 4.06.2014, the court noted that this matter fell within the jurisdiction of the High Court in Nakuru and directed that it be transferred to this court for hearing and final determination.

6. Accordingly when counsel appeared before me on 10th July 2014, they confirmed that the respective Respondents had filed their responses, and proposed that the Petition be disposed of by way of written submissions. A Replying Affidavit sworn on 17th June 2014 by LENKU KANAR SEKI was filed on 23rd June 2014 on behalf of the First and Second Respondents. The Third Respondent's Replying Affidavit sworn by one Lawrence Madialo Odero on 3rd July 2014 was filed on the same day. An affidavit in Response to the Affidavit of Lenku Kanar Seki sworn by Ledama Olekina was filed on 10th July 2014.

7. With those pleadings on record as of 10th July 2014, Counsel recorded a consent that the Petition be determined by way of written submissions. The Petitioners written submissions dated 5th August 2014 were filed on 6th August 2014 together with a List of Authorities dated and filed on the same date. The First and Second Respondents' written submissions dated 1st September 2014 together with a list of authorities were filed on 5th September 2014. The written submissions for the Third Respondent dated 3rd October 2014 were filed on the same day.

ORAL SUBMISSIONS

8. Placing reliance on the grounds, in the Petition, the written submissions, Mr Omwanza learned Counsel for the Petitioners submitted that what is in issue under the Petition was the contract signed between the Second and Third Respondents for the collection of revenue under which the Third Respondent was appointed sole agent revenue collection on behalf of the Second Respondent. The Petitioners contend that the arrangement under the said Agreement is contrary to Article 210 of the Constitution of Kenya 2010, as well as contrary to Sections 2(b) and 3 of the Private Public Partnership, Act 2010. The Petitioners also allege that the Agreement is contrary to Sections 57 and 58 of the Public Private Partnership 2013, which lays down the procedure for such arrangements.

9. Counsel referred to Section 2(3)(a) of the Public Private Partnerships Act which describes contracts involving such arrangements. The arrangement in this case is the collection of revenue for the entire county. The Petitioners concern counsel submitted is that the county did not get value for money. It was the Petitioners' case that the entire contract did not comply with the provisions of the Public Private Partnerships Act, and adds no value for the money expended and should be declared null and void.

10. Secondly, Petitioners' counsel submitted, that the signature to the Agreement was that of the County Secretary, contrary to Section 57(1) and (2) of the Public Private Partnership Act which provides that such agreement should be signed by the County Executive Committee Member responsible for Finance.

11. Counsel explained that the reason for this is to be found in a reading or interpretation of Section 62 of the Public Finance Management Act together with Section 260 of the Constitution which designates public officers as persons authorized to collect public revenue, and that the third Respondent does not qualify as a public officer, and cannot therefore be appointed as a revenue collection agent for a County and as averred in paragraph 18 of the Supporting Affidavit of Ledama Ole Kina and for this reason as well, the contract should be nullified.

12. The third reason for seeking nullification of the agreement is that the fee of nought decimal five (0.5%) per cent of the revenue collected as stated in paragraph 36(b) of the Replying Affidavit Lawrence Odera, on behalf of the Third Respondent and currently translates to Ksh 340 million of the total revenue collected, is a significant sum, and should have been submitted to public scrutiny. Counsel relied on the decision of the court in the case of **ERICK OKEYO VS. COUNTY GOVERNMENT OF KISUMU & 2 OTHERS [2014] eKLR** held that the matter should have been submitted to public scrutiny or participation. Counsel also relied on the case of **KENYA TRANSPORT ASSOCIATION VS. MUNICIPAL COUNCIL OF MOMBASA & ANOTHER [2011] eKLR** where the court declared a Public Private Partnership agreement null and void.

13. Counsel further relied on the decision of the Supreme Court of South Africa in **THE PROVINCIAL GOVERNMENT OF THE EASTERN CAPE & 4 OTHERS VS. CONTRACT-PROPS 25 (PTY) LIMITED (CASE NO. 414/99)** where the court noted that

“it was important to understand the language of the Act (the Tender Board Act (Eastern Cape) (2 of 1994), its nature and scope, the mischief it seeks to prevent and the consequences of visiting invalidity upon the transaction are all relevant considerations; and ... to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender, to fulfill the provincial needs, and to ensure the fair, impartial and independent exercise of the power to award Provincial contracts. If contracts were to be concluded without reference to the Tender Board without any sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.”

14. Counsel further submitted that in light of the acknowledgement by the Third Respondent that it is a private legal entity and the arrangement qualified under the Public Private Partnership Act, he thereby acknowledged that Sections 57 and 58 came into play, and the contract having been concluded contrary to those provisions, it should be declared null and void.

15. Lastly counsel for the Petitioners submitted that despite numerous calls and correspondence to furnish the Petitioners with the necessary information the Respondents, contrary to Article 35 of the Constitution and Section 96 of the County Government Act 2012 (*No. 17 of 2012*), declined to furnish the Petitioners with information they sought.

16. For all those reasons counsel for the Petitioners urged the court to grant the orders sought.

THE RESPONDENTS SUBMISSIONS

17. The Petition was opposed and Mr. Havi learned counsel for the First and Second Respondents in his submissions relied **firstly**, upon the Replying Affidavit of LENKU KANAR SEKI, sworn on 17th June 2014 and filed on 24th June 2014, **secondly**, the arguments in the written submissions dated First September 2014 and filed on 5th September 2014.

18. Counsel pointed out that both the Petitioners' counsel's written submissions and oral submissions indicated a departure from their case as pleaded in the Petition. In a departure from their case as pleaded in paragraphs 20-23 of the Petition, that there is an arrangement between the First and Third Respondents, which was not procured competitively, to now, that the arrangement was a Public Private Partnership, which was kept secret, and that the secrecy has kept them away from accessing information to enable them to access justice. Counsel submitted that those arguments were far from the issues at hand. These in his view were the issues raised by the Petitioner.

WHETHER THE PETITIONERS RIGHT TO INFORMATION HAS BEEN BREACHED

19. Counsel referred to Annex I of the Replying Affidavit of Lenku Kanar Seki which is an extract of an Advertisement contained in the Standard Newspaper of Monday 25, 2013, entitled Republic of Kenya NAROK COUNTY GOVERNMENT -

1. An invitation to Tender.
2. Re-Advertisement, (*Expressions of Interest*).

20. Counsel submitted that both the Advertisement and the Re-advertisement were for the contract in issue. The said contract is annexed to the Replying Affidavit of Lawrence Odero (*sworn as stated on 3rd July 2014 and filed on the same day*), and also annexed thereto are letters dated 28th March 2014, from the Public Procurement Oversight Authority (PPOA) to the First Respondent following an inquiry on the proposed procurement of the contract. That query is responded to by a letter dated 9th April 2014.

21. Counsel consequently submitted that the advertisement for expressions of interest shows that the procurement was not done in secrecy, that it was an open tender to which the entire public was invited. The right to information counsel submitted, under Article 35 of the Constitution was not absolute, and the person seeking that information had to demonstrate the need for the information in order to protect his rights.

Counsel submitted that the law relating to release of information in procurement contracts, is the Public Procurement and Disposal Act. This is, counsel argued, because Article 35 of the Constitution relating to access to information does not give details on how such information should be accessed. In this case, counsel submitted, the ruling provision is Section 96(3) of the County Governments Act, read in conjunction with Section 45(3) of the

Public Procurement and Disposal Act, which requires the procuring entity to disclose information after procurement, to persons who submitted a tender, proposal or quotation or if it was direct procurement, the person with whom the procuring entity was negotiating.

22. In conclusion on this point, counsel submitted unlike the Petitioners, the Respondents had demonstrated compliance with the relevant procurement law, the Petitioners had not demonstrated non-compliance by the Respondents with Article 35 of the Constitution of Kenya 2010.

23. The Second issue argued by counsel for the First and Second Respondents was **whether Agreement between the First and Third Respondents is a Public/Private Partnership.**

24. Counsel argued that for the Petitioners to succeed in that argument, the Petitioners had to show with facts and the law that the arrangement is a public private partnership. Counsel submitted that there was no such arrangement between the Second and Third Respondents. On the contrary counsel argued that the arrangement between the Second and Third Respondents is a contract procured under the Public Procurement and Disposal Act which provides for the Public Procurement Oversight Authority whose function is to oversee public procurement processes, hence the query on the procurement was made by that Authority and was responded to by the Second Respondent.

25. Counsel submitted of a clear dichotomy between a Private/Public Partnership and a contract under Section 6 of the County Governments Act. Section 6(2)(a) empowers a County Government to enter into a contract whereas Section 6(3) empowers a County Government to enter into a private/public partnership.

26. Counsel submitted that the face of the contract itself, and the preceding invitation to express interest documents clearly shows that the Respondents chose to enter into a contract, there was no plea, testimony or submission that the entry into the contract by the Second and Third Respondents breached the applicable law, that is the Public Procurement and Disposal Act, or the rules thereunder, and concluded that the attempt by the Petitioners to dress the contract into a Public Private Partnership was an ingenious attempt to clothe the contract contrary to the applicable law, the Public Procurement and Disposal Act.

27. The last issue addressed by counsel for the First and Second Respondents was **whether there was public participation.**

28. Counsel submitted that there was such public participation. The facts set out in the Replying Affidavit of Lenku Kanar Seki, show an invitation to express interest, a response, consideration of the responses followed by a Request for Proposals, consideration thereof and the award of contract.

29. Counsel conceded that the fee for the services was at 6.5% of all revenue collected, quite substantial. There can be no public participation under the Constitution, without public invitation to express interest as public participation is required under Article 227(1) to attain a system that is fair, equitable, transparent competitive and therefore cost effective.

30. Besides, Counsel argued, Part III (Sections 87-88) of the County Government Act provides for public participation under which the citizens are empowered to challenge by way of Petitions to the County Government. No such Petition was made by the Petitioners jointly or any one of them. They never challenged the process, it was now late in the hour to challenge it.

31. Finally counsel contrasted the cases relied upon by the Petitioners with this case. The case of ROBERT N. GAKURU VS. COUNTY OF KIAMBU concerned a legislative process which the court found had no public participation. In this case there was full participation and application of the law. In the circumstances, counsel urged the court to determine those issues and dismiss the Petition with costs.

SUBMISSIONS OF COUNSEL FOR THE THIRD RESPONDENTS

32. Mr. Wamaasa learned counsel held brief for Kiragu Kimani Esq. learned counsel for the Third Respondent. In opposition to the Petition, Counsel relied **firstly** upon the Replying Affidavit of Lawrence Madialo Odera sworn and filed on 3rd July 2014, and **secondly** counsel's written submissions dated and filed on 3rd October 2014. In addition, counsel associated himself with the submissions of counsel for the First and Second Respondents.

33. Counsel submitted that the contract between the Third Respondent and Second Respondent was properly entered into, the parties having complied with the Public Procurement and Disposal Act, and any issues arising under that Act ought to have been addressed under that Act to the Public Procurement Oversight Authority (PPOA). He submitted that the Petition was an afterthought and should be dismissed.

34. Counsel also observed that the Petitioners have been changing their pleadings. The claim that the Third Respondent was earning 6.5% of the revenue collected as fees, is not pleaded anywhere in the Petition. The Petition was never amended and urged the court to disregard that submission.

35. On alleged lack of information, counsel submitted that the Petitioners were not entitled to any information. They did not participate in the public procurement process. They have not demonstrated at all that any of their rights were violated by lack of such information. Consequently counsel submitted that the Petition lacks merit, and ought to be dismissed with costs.

RESPONSE BY COUNSEL FOR THE PETITIONERS

36. The response by Mr. Omwanza learned counsel for the Petitioners was threefold. **Firstly** on the question of lack of pleading for the fee of 6.5% of the revenue, counsel submitted, that is pleaded in paragraphs 18-19 of the Supporting Affidavit of Ledama Ole Kina. **Secondly** on the question of choice of contract to collect revenue, was contrary to Section 6 of the County Government Act, that the Public Procurement and Disposal Act only relates to procurement of goods and services. Counsel submitted that the vehicle chosen was a function which is supposed to be performed only by the First or Second Respondent as designated by the Second Schedule to the Constitution dividing functions to be performed by

the National and County Governments respectively and reiterated that the proper law was the Public Private Partnerships Act and not the Public Procurement and Disposal Act.

37. **Thirdly** on the question of public participation, counsel submitted that an invitation to express an interest or to tender is not equivalent to public participation and relied on the case of **ERICK OKEYO VS. COUNTY OF KISUMU** (*supra*).

38. **Fourthly** counsel submitted that the Petitioners were entitled to the information they sought and that for all those reasons, the Petition be allowed with costs to the Petitioners.

THE ISSUES, ANALYSIS THEREOF

39. I have considered the pleadings in the form of the Petition, the Supporting Affidavit and Further Affidavit in Response by Ledama Ole Kina, the Replying Affidavits on behalf of the First and Second Respondents, by Lenku Kanar Seki, and the Replying Affidavit of Lawrence Madiallo Odero. I have also considered the submissions of counsel for the Petitioners and the authorities relied upon in support thereof, as well as the submissions of counsel for the Respondents together also with the authorities relied upon. In this opinion also, I will consider the relevant provisions of the Constitution of Kenya 2010 and the relevant schedules referred to by counsel for the Petitioners, the Public Procurement and Disposal Act, 2005, the Public Private Partnerships Act, 2013, the County Governments Act, 2012, and of course the authorities cited by counsel on either side.

40. The basic question surrounding the Petition and Counsel's argument is which of the two pieces of legislation, the Public-Private Partnerships Act, (*which the Petitioners argue applies*), or the Public Procurement and Disposal Act (*which the Respondents maintain applied to the contract of 18th February 2014 between the Second and Third Respondents*) which is the subject of the Petition and this Ruling. To answer that question, the Petitioners and Counsel for the Respondents raised the following similar issues -

1. *Whether the Petitioners are entitled to the receipt of the information sought from the Second and Third Respondents for purposes of transparency, accountability and enforcement of their fundamental rights and freedoms.*

2. *Whether the decision by the First and Second Respondent to enter into the contract of 18th February 2014 was a public private partnership arrangement and what was the effect thereof.*

3. *Whether the decision as to which private entity would help the Second Respondent in relation to revenue collection for the entire County of Narok required public procurement*

under Article 227(1) of the Constitution, and under Sections 2, 3 and 4 of the Public Procurement and Disposal Act 2005.

4. *Whether the decision by the First and Second Respondents to enter into a public private partnership and/or contractual arrangement with the Third Respondent in relation to revenue collection for the Narok County was a major policy decision that required public participation and lack of which made the entire arrangement null and void and of no effect.*

5. *Can costs be ordered to be borne by any party to the proceedings in an issue of such constitutional significance?*

OF WHETHER THE PETITIONERS ARE ENTITLED TO RECEIPT OF THE INFORMATION FROM THE SECOND AND THIRD DEFENDANTS

41. I entirely agree with the submission of Mr. Omwanza, learned Counsel for the Petitioners that information is the oxygen of democracy. If the citizens do not know what is happening in their midst or what their government is doing, then there can be no meaningful participation in the affairs of their society. Information is an essential part of good government, bad government needs secrecy to survive, because it allows inefficiency, wastefulness and corruption to thrive. Indeed as Amartya Sen the Nobel-Prize winning economist observed of his native India – ***“there has not been a substantial famine in a country with a democratic form of government and a relatively free press.”***

42. Information allows people to scrutinize the actions of a government and is the basis for proper, informed debate of the actions of Government, National or County. That is why the right to information is embedded in Article 35 of the Constitution of Kenya 2010 in these terms -

“35(1) Every citizen (of Kenya) has a right of access to -

(a) information held by the State, and

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

43. Likewise Section 96 of the County Governments Act 2012 (*No. 17 of 2012*)(*Revised Edn. 2013*), provides -

“S. 96(1) Every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other state organ in accordance with Article 35 of the Constitution,

2. *Every County Government and its agencies shall designate an office for purposes of ensuring access to information as required by subsection (1),*

3. *subject to national legislation governing access to information a county government shall enact legislation to ensure access to information,*

4. *legislation may make provision for fees and charges for accessing such information.*

44. Whereas indeed the right to information is, as stated above, anchored both in the Constitution, and the County Governments Act, it is no brainer to say that right is not automatic. The qualification is to be found right in Article 35 itself – the information sought is “*for the exercise or protection of any right or fundamental freedom.*”

45. Though this provision appears to relate to the right of access to information held by a non-state actor or private person, the qualification equally applies to information held by the State or State organ. Construing Article 32 of the Constitution of South Africa which is in *pari materia* with Article 35 of the Constitution of Kenya in **CAPE METROPOLITAN COUNCIL VS. METRO INSPECTION SERVICES (WESTERN) CC & OTHERS 2001 (3), SA 103 (SCA)**, para 28 at 1026 Streicher JA summed up -

“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of Section 32, an applicant has to state what the right is that he wishes to exercise or protect what the information is, which is required and how that information would assist him in exercising or protecting that right.”

46. The above interpretation was applied by Ngugi J, in the case of **NAIROBI LAW MONTHLY COMPANY LTD VS. KENYA ELECTRICITY GENERATING COMPANY LTD & 2 OTHERS [2013] eKLR**. I would with respect apply it in this case, and hold that the Petitioners have not established what right they required to exercise or fundamental freedom they wish to protect. The Petitioners cited a litany of Articles (para 3 supra) which they say were breached by the Respondents but have not established how those rights or principles have been breached in relation to this. The Petitioners fail on that issue.

OF WHETHER THE DECISION BY THE FIRST AND SECOND RESPONDENTS TO ENTER INTO CONTRACT OF 18TH FEBRUARY 2014 WAS A PUBLIC PRIVATE PARTNERSHIP AND THE EFFECT THEREOF

47. In their Petition at p. 16, paragraph 26, the Petitions claimed that the public/private partnership entered into by the Respondents herein did not comply with the terms of the Public Procurement and Disposal Act, 2005 (*now Cap. 412C of the Laws of Kenya*), and is contrary to the terms of the Constitution.

48. However in their submissions, paragraphs 33-37, the Petitioners now claim that the Agreement dated 18th February 2014 entered into between the Second and Third Respondent was a Public/Private Partnership subject to the provisions of the Public Private Partnership Act 2013 (*No. 15 of 2013*) and is therefore illegal and should be declared null and void by reason of non-compliance with that Act.

49. I think this is a disingenuous argument on the part of the Petitioners. Having pleaded one way, they cannot even in a Constitutional Petition and for convenience change their minds mid-way to ensure that this Petition is allowed. The Petitioners made a complaint to the Public Procurement Oversight Authority (PPOA), the body charged with the authority of overseeing the procurement process under the Public Procurement and Disposal Act (PPDA), and which process led to the Agreement dated 18th February 2014. I think even in Constitutional Petitions the rules of estopped apply. The Petitioners are estopped by their own pleadings (*Petition*) without first amending them from moving away from their pleadings under the PPDA to the Public Private Partnership Agreement or Arrangements (PPAs).

The PPDA defines procurement as -

“... the acquisition by purchase, rental, lease, hire purchase, licence, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods, including livestock or any combinations. It defines “services” as any objects of procurement or disposal other than works and goods and includes professional, non-professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services.”

On the other hand the objects and purpose of the PPPA as in its heading -

“an act of Parliament to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes.”

And Public Private Partnerships agreements are defined as -

“contracts concluded between the contracting authority and a project company which the project company is entrusted to undertake a project – and whether initiated by a public authority or by a private party.”

50. In this case, the Second Respondent was not engaged in any scheme to develop an infrastructural project such as a concession (Rift Valley Railways) or building a new airport in

the Mara which would make for a Public Private Partnership arrangement (for the Second Respondent to avail land, and the Third Respondent to Build-Operate-and-Transfer (BOT) – if had the finances, to construct, operate and maintain an infrastructure facility, and would transfer it to the contracting party, in this case, the Second Respondent, at the end of a specified term, and in respect of such facility, a term not exceeding thirty years.

51. In this, all that the Second Respondent needed to acquire was the professional services of a person to act as the county revenue collection agent. The acquisition would be done by contractual means, all within the definition of procurement and services under the PPDA.

52. From the outset, as per the Replying Affidavits of both Lenku Kanar Seki and on behalf of the First and Second Respondents, and Lawrence Madialo Odero on behalf of the Third Respondent, the Agreement dated 18th February 2014 was concluded after an elaborate procurement process through Expressions of Interest and Request for Proposals (RFP) under Section 76 of the PPDA. There is no similar procedure under PPPA. The procedure in SS 37 – 60 of the PPPA is, significantly different. Reference to Fourth Schedule of the Constitution on the distribution of function of the National and County Government's does not enhance the Petitioner's case. The Constitution does not prohibit the contracting out of those functions whether by the National Government or County Government. It is for instance a core function of the National and County Government to enact legislation for raising revenue. The collection of such revenue can be contracted out whether by legislation (*like Kenya Revenue Authority*) or contractual as collection of fees at Airports. There is no illegality in that provided the procurement of such services meets the thresholds of Article 227(1) of the Constitution -

“227(1) When a state organ or any other public entity contracts for goods or services it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following -

(a) – (d)

53. The law clearly intended under that Article is the Public Procurement and Disposal Act which *inter alia* provides for the matters and sanctions envisaged under Article 227(1) of the Constitution.

54. In my view therefore, the PPPA legislation is a vehicle for implementation of the national government's functions under the Fourth Schedule, and in particular Items 18 and 19. The law is intended or meant for the participation of the private sector, in financing construction, development operation or maintenance of infrastructure (*such as the Thika Superhighway*) or development projects of the National Government through concession or other contractual arrangements and should not be confused with procurement under the PPDA.

55. In this case the Second Respondent only required a revenue collection agent. This does not fall within financing, construction, development, operation or maintenance of infrastructure as envisaged by the PPP Act. This was an Agreement for the provision of professional service, and fell squarely under the PPDA.

56. In my judgment therefore the Agreement of 18th February 2014 was properly procured under the Public Procurement and Disposal Act, and any reference to the PPP Act has no basis in law, and is therefore rejected.

57. This conclusion also covers the Petitioners' question whether the decision as to which private entity would help the 2nd Respondent in relation to revenue collection for the entire County of Narok required public procurement under Article 227(1) of the Constitution and Sections 2, 3 and 4 of the Public Procurement and Disposal Act, and needs no more consideration.

OF WHETHER THE DECISION TO PROCURE SERVICES OF A COLLECTION AGENT WAS DONE WITHOUT PUBLIC PARTICIPATION

58. I have reviewed very carefully the Petitioners' submissions and arguments that there was no public participation. In so arguing the Petitioners seem to suggest that the procurement procedure leading to the Agreement dated 18th February 2014 was an agreement to select the person to manage the county's economy. This is in my view a clear manifestation of total misapprehension of the functions of the Third Respondent under the Agreement. It does therefore bear to restate and understand that function. Under the Agreement the Third Respondent's sole function is to collect revenue on behalf of the Second Respondent and remit the collected revenue to the Second Respondent on a weekly basis. Clause 36 of the said Agreement clearly details the procedures for collection, accounting, inspection and auditing of revenue collected. It cannot be said from any political, economic or monetary aspect that the Third Respondent is managing the Second Respondent's economy as the Petitioners contend. The Third Respondent (*just like KRA – a state organ*) has no say and is not even aware of how the funds collected are utilised by the Second Respondent once they are remitted.

59. Section 87 of the County Governments Act, sets out very broad principles on citizen participation on the various aspects of County Governments including in particular the formulation and implementation of policies, laws and regulations which directly affect them as persons, such as minorities or business affairs such licensing and issue of permits.

60. In this case the Second Respondent was merely procuring the services of a county revenue collection agent. Even reading the Agreement in bad faith, this cannot be said to be either formulating or implementing policies, laws and regulations.

61. Under the Agreement of 18th February 2014, the Third Respondent's duty as already stated, is to collect revenue on behalf of the Second Respondent and remit the said revenue on weekly basis after charging and subtracting its charges or fees. The role of formulating the economic policy on how the funds are to be used remains the sole responsibility of the Second Respondent and in respect of which the Petitioners as citizens of the County and entitled to question.

62. I think it is of vital importance that we understand what it is that citizen participation entails as set out **Part VIII – Citizen Participation Sections 87-91** of the County Governments Act. The Citizen's participation will not overlook the role of the elected Members of the County Assemblies (MCAs), the County Executive, led by the Governor. These elected leaders and County Executive have a critical role in the affair of the County Governments. So what does citizen participation mean? In **ROBERT N. GAKURU & OTHERS VS. GOVERNOR KIAMBU COUNTY & OTHERS [2014] eKLR** which the Petitioners have relied upon in their submissions, Hon. Odunga J at paragraph 55 of his judgment quoted with approval the decision of the Supreme Court of South Africa in **DOCTORS FOR LIFE INTERNATIONAL VS. SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS (CCT 12/05) [2006] ZACC: 2006 (12) BCLR (CC) 2006 (6) SA 416 (CC)** where it was held -

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identifying themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because its open and public in character it acts as a counterweight to secret lobbying and influence peddling.”

63. This view affirms the opinion that public participation envisaged by Section 87 of the County Governments Act is required on issues relating to the broad formulation and implementation of laws and policies. It would stagnate and hinder the orderly implementation of such laws and policies if citizen participation extended to the routine execution of a County Government's laws and policies such as procurement of the services of a revenue collecting agent. Besides in light of strict timelines on matters of public procurement, there is a real danger of defeating such timelines if the county executive were hamstrung by citizen participation as they are not bound by such timelines.

64. The purpose of the Public Procurement and Disposal Act as stated in Section 2 thereof is the promotion of competition as well as ensuring that competitors or bidders receive fair treatment thereby promoting integrity and fairness of the procurement process, and increasing transparency and accountability in those processes. The process of advertisement, whether by open public letter, invitation to submit expressions of interest, or calls for proposals under Section 76 of the PPDA, are all deliberately and expressly designed to ensure public awareness of the procurement and its processes.

65. In fact due to the requirements of transparency and accountability, no procuring entity would comply with the requirements of the PPDA if the invitation to tender or to submit Expressions of Interest (EOI's) were not made to the general public. The only exception to this general rule is where the procuring entity applies restricted tendering or direct procurement which methods were not applied and were in applicable in this case.

66. In this case as stated from the beginning of this Judgment, the invitation to submit EOIs was published in the Standard, a Newspaper of wide circulation in the Republic of Kenya. In the event a resident of Narok County such as the Petitioners, was aggrieved by the decision by the Second Respondent's decision to invite EOIs the appropriate recourse would be to challenge the process by petitioning the Narok County Government as provided under Section 88 of the County Governments Act.

67. Section 89 of the County Governments Act imposes an obligation upon the County Government to respond to all Petitions and challenges lodged by citizens. The lack of any sanction under Section 88 aforesaid demonstrates that at the time in issue, no citizen was aggrieved by the decision of the Second Respondent to procure the service of a County collection agent. It follows therefore that there was sufficient time for public participation and the Petitioners' argument that the Agreement dated 18th February 2014 ought to be nullified due to lack of public participation lacks merit.

CONCLUSION

68. From the above analysis I make the following conclusions -

(a) the Petitioners have failed in relation both to the Second Respondent and the Third Respondent as a private citizen to demonstrate grounds why those Respondents should be ordered to provide information in terms of Article 35(1) of the Constitution and Section 96(1) of the County Governments Act,

(b) The Petitioners have failed to prove that by procuring the services of a county revenue collection agent and by entering into the Agreement dated 18th February 2014 the Second and Third Respondents violated any of the Petitioners' fundamental rights and freedoms,

(c) Through their pleadings and submissions the Petitioners have shown that their sole intention is to have the Agreement dated 18th February 2014 declared null and void. This is in my view an improper use of the court process, and courts do not countenance the improper use of its process.

DISMISSAL & COSTS

69. For all those reasons the Petition herein dated and filed on 29th May 2014 is hereby dismissed. In light of the public nature of the Petition, each party shall bear its costs.

70. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 7th day of November 2014

M. J. ANYARA EMUKULE

JUDGE



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