



Ikua v Attorney General & another; Public Procurement Administrative Review Board & 2 others (Interested Parties) (Petition E332 of 2020) [2024] KEHC 11467 (KLR) (Constitutional and Human Rights) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11467 (KLR)

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

PETITION E332 OF 2020

EC MWITA, J

SEPTEMBER 24, 2024

BETWEEN

JACKSON WANJIRU IKUA PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY - NATIONAL TREASURY AND
PLANNING 2ND RESPONDENT**

AND

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD INTERESTED PARTY**

**THE PUBLIC PROCUREMENT REGULATORY AUTHORITY ... INTERESTED
PARTY**

THE NATIONAL ASSEMBLY INTERESTED PARTY

JUDGMENT

1. In 2015, the National Assembly enacted the *Public Procurement and Asset Disposal Act* 2015 (PPADA) to implement article 227 (2) of the *Constitution*. The Act came into force on 7th January 2016.
2. On 22nd April 2020, the cabinet Secretary, National Treasury and Planning (CS Treasury) gazetted the *Public Procurement and Asset Disposal Regulations* 2020 (the Regulations) through Legal Notice No. 69 published in the Gazette Notice No.4952.



3. The National Assembly considered, approved and adopted the Regulations. They were then published in Legal Notice No. 53 dated 9th July 2020 on 24th July 2020 and came into operation.
4. The petitioner filed this petition challenging the constitutionality of regulation 202 (2) (d) on grounds that the filing fees to be paid when making a request for review before the Public Procurement Administrative Review Board (the Board) is exorbitant, unreasonable and without legal justification.
5. According to the petitioner, tenderers with low tender sums stand to suffer as fees of 10% of the tender sums (of not more than Kshs. 2,000,000) will, in effect, shut out genuine grievances on account of inability to raise the fees. This, the petitioner argue, is contrary to national values and principles in Articles 10 and 227 of the *Constitution*.
6. The petitioner further argues that fees based on a percentage of the tender sum is not only discriminatory against tenderers with low sums, but also converts justice into a commodity for sale in so far as procurement challenges are concerned, a violation of Articles 48 and 50 of the *Constitution*.
7. It is also unfair and discriminatory to the extent that tenderers with larger sums do not suffer the same prejudice. They are required to pay up to Kshs. 200,000, while bidders with tenders amounting to millions of shillings are required to pay only Kshs. 250,000. This offends Articles 27, 47 and 48 of the *Constitution*. The petitioner maintains that it is unreasonable to set fees at 10% yet the bid bond security is not more than 2%.
8. The petitioner takes the view, that there is no reasonable basis for the impugned regulation to treat people differently based on their financial standing. It has the effect of unfair treatment and discrimination based on social origin, financial and socio-economic status contrary to Articles 27(1), (2), (4) & (5) and 159(2) (a) of the *Constitution*.
9. The petitioner asserts, that the impugned regulation contravenes the legitimate expectation of the public and denies the public the right to equal protection of the law guaranteed under Articles 22(1), 25(c), 48 and 50(1) of the *Constitution*. The petitioner maintains that the fees imposed by the impugned regulation will deter persons with legitimate grievances and make it impossible to lodge procurement complaints, thereby defeating the purpose of section 167 of the Act and the Board. It will also give procuring entities and accounting officers unfettered powers over procurement matters without any form of control or regulation, contrary to the objectives of Article 227 and section 28 of the Act.
10. The petitioner takes the position, that the impugned regulation limits the right to a fair hearing before a court or independent tribunal guaranteed in Articles 50 and 10 of the *Constitution* and the Universal Declaration of Human Rights, respectively. The regulation has the further effect of rendering Article 227 of the *Constitution* and the safeguards of procurement under the Act ineffective thus, unlawfully depriving courts and independent tribunals their oversight role in procurement matters.
11. The petitioner posits, that the impugned regulation fails to meet the requirement under Article 24(d) of the *Constitution* as it fails to strike a balance between the right of access to justice and need to prevent frivolous applications challenging procurement processes. The petitioner takes the view, that the regulation contravenes Articles 21(3), 55(b) and 56(b) of the *Constitution*, discriminates against the youth and marginalised in society.
12. The petitioner relies on, among others, the decisions in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR; *Tukero Ole Kina v Attorney General & another* [2019] eKLR; *Paul Pkiach Anupa & Another v Attorney General & another* (2012) eKLR; *Okenyo Omwansa George &*



Another v Attorney General & 2 others [2012] eKLR and *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

13. Regarding the respondents' argument that the regulation challenged does not sexist, the petitioner submits that reference to *regulation* 202 (2) (d) as the impugned regulation, was inadvertently and erroneous. It should have read regulation 203(2)(d). He urges that the error be cured under Article 159(2) (d) of the *Constitution*. The petitioner relies on *Albert Mburu Karinga v Peter Mambo Karinga & another* [2014] eKLR and urges the court to consider any reference to regulation 202 (2)(d) as reference to regulation 203(2) (d). The petitioner maintains, therefore, that the matter is properly before the court.
14. The petitioner further argues that the doctrine of exhaustion does not apply, as he is not exclusively required to exhaust the remedy in Article 119 (1) of the *Constitution* (presenting a petition to Parliament) before filing a constitutional petition before this court to challenge the constitutionality of the regulation.
15. The petitioner relies on *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* [2021] eKLR and *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR.
16. Responding to the argument that the filing fees imposed under regulation 203(2) (d) are necessary for purposes of public interest, the petitioner argues that this is problematic because it is an outright discrimination against people of lower economic and bars them from enjoying their right to fair administrative action contrary to Article 48 of the *Constitution*.
17. The petitioner maintains that he has demonstrated that the fees imposed in the Fifteenth Schedule to the Regulations in accordance with regulation 203(2) (d) are unreasonable and impede access to justice due to the exorbitance and inequitable application.
18. The petitioner posits, therefore, that what is in contention is the law and not the policy as claimed. He maintains that the regulation contravenes various Articles of the *Constitution* and as such it should be declared unconstitutional, null and void.
19. Based on the above arguments, the petitioner seeks a declarations that *Regulation* 202(2) (d) of the *Public Procurement and Asset Disposal Regulations* 2020 is unconstitutional and therefore null and void; An order of permanent injunction permanently restraining and staying the operation and implementation of Regulation 202(2) (d) of the *Public Procurement and Asset Disposal Regulations* 2020; an order suspending Regulations 202(2) of the *Public Procurement and Asset Disposal Regulations* 2020 to the extent that it affects assessment of fees of the repealed regulations and such other or further orders as the court may deem just and appropriate in the circumstances. The petitioner also prayed for costs

Respondents' and 1st interested party's case

20. The respondents and 1st interested party oppose the petition through replying affidavits and written submissions. They contend that since the coming into force of the impugned regulation, there has been a noticeable decline in the number of review cases filed, especially in respect to bidders with low tender sums. They associated themselves fully with the submissions filed by the 3rd interested party.

3rd interesting party's case

21. The 3rd interested party has opposed the petition through grounds of opposition. The 3rd interested party contends that the petition is misconceived as the petitioner has failed to demonstrate the how



- regulation 202(2) (d) (which does not exist) violates the Constitution; that the petitioner did not amend the petition to indicate the correct regulation challenged, thus, the petition is a non-starter.
22. Regarding the unconstitutionality of regulation 203 (2) (d), the 3rd interested party argues that the petitioner does not impugn the process of enacting this regulation: Rather, he takes issue with the amount of filing fees required to be paid by litigants which is a policy issue that falls outside the purview of this court's jurisdiction. It is the 3rd interested party's case, that the impugned regulation should not be construed in isolation, but be read with sections 167 to 175 of the Act (Part XV), and articles 159, 48, 47, 50 and 227 of the Constitution.
 23. According to the 3rd interested party, the rationale for the security and the timelines imposed under the impugned regulation, is that once the procurement dispute resolution mechanism established under Part XV of the Act is engaged, the procurement entity is required, under section 168, to suspend the procurement proceedings pending conclusion of the dispute resolution process.
 24. It is the 3rd interested party's further case, that various statutes impose strict timelines and conditions for the carrying out of certain matters and that this does not amount to a violation of Constitution or the Bill of Rights. If aggrieved, the right avenue would be, first; to petition Parliament under Article 119 of the Constitution read with the Petitions to Parliament (Procedure) Act, 2012 for review of the impugned provision, including the entire Part XV of the Regulations.
 25. The 3rd interested party asserts that the petitioner has not shown litigants who have been locked out of the dispute resolution process for failure to meet the fees set in the impugned regulation. The petition does not also meet the test set in Anarita Karimi v Republic [1979] eKLR.
 26. The 3rd interested party relies on Article 119 of the Constitution, the Petitions to Parliament (Procedure) Act 2012 and decisions in Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2011] eKLR; In the Matter of the National Land Commission [2015] eKLR; Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others [2017] eKLR; Tinyefuza v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997] 3 UGCC; In the Matter of Kenya National Commission on Human Rights [2014] eKLR; Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR and Katiba Institute v Attorney General & 9 others [2020] eKLR. It urges that the petition be dismissed with costs. In the event the court decides otherwise, it should remit regulation 203 (2) (d) back to Parliament for consideration.

Determination

27. This petition challenges the constitutionality of regulation 202(2) (d) of the Regulations. The Regulations were placed before the National Assembly for consideration and were adopted. They were then published by the CS Treasury in the Kenya Gazette thus, came into operation.
28. Following this development, the petitioner filed this petition challenging the constitutionality of regulation 202 (2) (d) on grounds that the filing fees to be paid when applying for review before the Board, is exorbitant, unreasonable and without legal justification, for introducing a percentage of fees to be paid when challenging tendering processes.
29. Before dealing with the issue, it is important to briefly consider the principles that guide courts in determining constitutionality of statutes or statutory provisions.
30. First; is a general, but rebuttable presumption principle that a court should presume a statute or a statutory provision enacted by the legislature to be constitutional, unless the law is clearly unconstitutional or violates a fundamental right. The burden is, however, on the person alleging unconstitutionality to prove the invalidity. This is because it is assumed that the legislature, as the



- people's representative, understands the problems people face and, therefore, enacts legislations with the intention of solving the problems. (See *Hamdarada Nakhana Union of India Air* [1960] 354).
31. The principle was restated in *Ndynabo v Attorney General of Tanzania* [2001] EA 495, that an Act of Parliament is presumed constitutional and that the burden is on the person who contends otherwise to prove the contrary.
 32. Second; the court should examine the purpose or effect of a statute. The purpose of enacting a legislation, or the effect of implementing such legislation, may lead to nullification of the statute or its provision if found to be inconsistent with the *Constitution*. In *R v Big M. Drug Mart Ltd*, [1985] 1 SCR 275; 1986 LRC (Const.) 332, the Supreme Court of Canada stated:

“[80] Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus, its validity.”
 33. The Court was clear that the initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effect needs only to be considered when the law under review has passed the purpose test. The effect test can never be relied on to save legislation with an invalid purpose.
 34. In *Olum and another v Attorney General* [2002] EA, the court again stated thus:

“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the impugned statute or section thereof shall be declared unconstitutional.”
 35. The same point was made in *Centre for Rights Education and Awareness & another v John Harun Mwan & 6 others* [2012] eKLR, that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, and this can be discerned from the intention expressed in the Act itself.
 36. The petitioner's concern, as I understand it, is that tenderers with low tender sums will be required to pay a fee of 10% of the tender sums (where the tender sum is not more than Kshs. 2,000,000). This will most likely shut out genuine grievances from being placed before the Board as many would be challengers will not raise the fees. This, the petitioner argues, is contrary to national values and principles in Articles 10 and 227 of the *Constitution*. The petition, therefore, challenges the constitutionality of regulation 202 (2) (d) and seeks a declaration that this regulation is unconstitutional null and void and an order of permanent injunction restraining and staying the operations and implementation of the regulation.
 37. The respondents and the interested parties argue that the impugned regulation (202 (2)(d)) does not exist. In that respect, they contend, the petitioner having not amended his petition, the declarations are sought against a non-existent regulation and cannot be granted.



38. As is clear from the pleadings and submissions by parties, the reliefs sought in the petition target regulation 202(2) (d) that it is constitutionally infirm and a stop to its implementation.
39. The petitioner argues that the effect of the regulation is to deny those aggrieved from challenging the tender processes. The petitioner further argues that the regulation has a discriminatory effect in that tenders of high value/money will pay less in terms of filing fees than those with less tender amount.
40. I have carefully gone through the *Public Procurement and Asset Disposal Regulations* 2020. The Regulations do not have regulation 202(2)(d). First, regulation 202 (2) does not even have clauses, let alone clause(d). In that regard, as correctly submitted by the respondents and interested parties, the regulation challenged does not exist. Second, regulation 202 according to the marginal note, is on “Disposal to employees” thus, has nothing to do with fees.
41. The petitioner’s petition and written submissions addressed the non-existent regulation. However, the Supplementary submissions seemed to change course and addressed regulation 203(2)(d). In the supplementary submissions, the petitioner urges that reference to regulation 202(2)(d) was erroneous and such reference should be deemed to be with regard to *regulation* 203(2)(d).
42. There is no denial that the regulation challenged does not exist. This fact is admitted by the petitioner who submits that reference to regulation 202(2)(d) was inadvertent and erroneous. Despite this admission, the petitioner did not seek to amend his petition to bring forth the correct regulation he challenges. His only attempt was urge through written submissions that reference to regulation 202 (2) (d) as the impugned regulation was inadvertent and erroneous and any reference to regulation 202(2) (d) should read to refer to regulation 203(2)(d). The petitioner argues that the error is curable under Article 159(2) (d) of the *Constitution*.
43. The law is settled that parties are bound by their pleadings. A party cannot change or amend pleadings through submissions since submissions are not pleadings, but arguments. The petitioner had an opportunity to amend his petition to correct the error but did not do so. Even during the hearing when parties were highlighting their submissions, he did not even make an oral application for leave of court to amend the petition to correct the error. He urges through submissions that any reference to regulation 202(2)(d) should be taken to be reference to *regulation* 203 (2)(d).
44. When a party discovers an error in his pleadings and thinks there is need to amend the pleadings to correct the error, he ought to notify the court of the intention to amend the pleadings and take steps to seek leave where required. An application for leave can be made orally and the court would give the respondent an opportunity to state whether he opposes the request or not. The court would then decide whether to allow the oral request or ask the party to file a formal application to give the other side an opportunity to respond. This is so in this case bearing in mind that respondents had already filed responses to the petition. The petitioner did not do so.
45. The petitioner again argues that the error can be cured under Article 159(2) (d) of the *Constitution*. Article 159 (2) (d) provides that justice shall be administered without undue regard to “procedural” technicalities. The Article talks about technicalities of procedure. The issue raised here is that the regulation challenged does not exist. This is not a procedural technicality but a substantive issue that goes to the root of the matter. Where a provision challenged for being unconstitutional does not exist, that is not a procedural technicality as the petitioner wants the court to believe but a substantive issue that affects the substratum of the petition.
46. In *Kiu & another v Khaemba & 3 others* [2021] KECA 318 (KLR), R N Nambuye, JA. observed that the exercise of jurisdiction under Article 159 of the *Constitution* is unfettered especially where



- procedural technicalities pose an impediment to the administration of justice, However, Article 159(2) (d) is not a panacea for all procedural ills.
47. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the Court of Appeal stated that it is a misconception to claim that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act*. It is not in doubt that the courts were referring to procedural infirmities but not substantive aspects of the cases.
 48. The petitioner having discovered that the regulation he challenged in his petition did not exist, was under obligation to take steps to correct the error through an amendment to bring forth the correct regulation under challenge. The defect in the rule challenged not being procedural infirmity, has a serious effect on the competence of the petition with the result that it makes the petition untenable. I say so, because the averments in the petition; depositions in the supporting affidavit and arguments in the written submissions all make reference to regulation 202(2)(d). further, the reliefs are a declaration that regulation 202(2)(d) is unconstitutional and an order staying implementation of that particular regulation.
 49. Without amendments to the petition, it denied the respondents and interested parties an opportunity to respond to the correct provision given that they had already filed their responses. Proceeding in the manner the petitioner urges, by assuming that the provision challenged is not that in the pleadings but a different one not pleaded, would infringe the respondents' and interested parties' the right to a fair hearing.
 50. In the circumstances, the conclusion I come to is that the provision challenged not being in existence the petition is not well founded.
 51. However, for completeness of the matter and in case I be wrong on my conclusion above, is *regulation* 203(2)(d) unconstitutional? *Regulation* 203 is on request for review under section 167 of the Act which has to be in the form in the Fourth Schedule to the rules. The request has to state the reasons for the complaint; be accompanied by necessary statements; be made within 14 days of the occurrence of the breach complained of, if made before the making of an award; notification under section 87 or the occurrence of the breach complained of where the request is made after making of an award.
 52. The impugned regulation 203(2) provides that the request for review, (d) be accompanied by the fees set out in the Fifteenth Schedule of these *Regulations*, which shall not be refundable. Paragraph (d) does not contain the fee complained of. Rather, fees are in the Fifteenth Schedule to the Regulations. The Schedule gives the percentage of fees to be paid pegged on the tender amount, subject to a minimum amount of fees stated in the Schedule.
 53. As can be seen, *regulation* 203(2) (d) does not provide for the fees to be paid when applying for a review before the Board. The fee structure is in the Sixteenth Schedule a different part of the regulations whose constitutionality has not been assailed. A party who alleges that a statutory provision is constitutionally inform, must go beyond the mere allegation and demonstrate the constitutional invalidity. In the circumstances of this petition, I do not see merit in the alleged constitutional infirmity in regulation 203(2)(d) since the constitutionality of the schedule of fees has not been assailed and no order has been sought to nullify it.

Conclusion

54. Having considered the petition, responses and arguments by parties and upon examination of the impugned regulation(s), the conclusion I come to, is that the petitioner has failed to prove



that regulation 202(2)(d) exists. He has also not shown how regulation 203(2)(d) would be unconstitutional without challenging the Schedule of fees.

55. Consequently, I find no merit in the petition and is dismissed.

56. This being a public interest litigation, I make no orders on costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE

