



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
PETITION NO 191 OF 2011

(CONSOLIDATED WITH PETITION NO 292 OF 2011)

KITUO CHA SHERIA.....1ST PETITIONER
CHARLES KIOKO MUTHUSI2ND PETITIONER

VERSUS

THE CENTRAL BANK OF KENYA1ST RESPONDENT
THE PERMANENT SECRETARY TO
THE TREASURY OF KENYA.....2ND RESPONDENT
THE MINISTER FOR FINANCE.....3RD RESPONDENT
THE ATTORNEY GENERAL4TH RESPONDENT
THOMAS DE LA RUE AG5TH RESPONDENT
DE LA RUE KENYA LIMITED6TH RESPONDENT
DE LA RUE CURRENCY AND SECURITY
PRINT LIMITED7TH RESPONDENT
THE REGISTRAR OF COMPANIES8TH RESPONDENT

And

KENYA UNION OF PRINTING, PUBLISHING,
PAPER MANUFACTURING
& ALLIED WORKERS UNION INTERESTED PARTY

JUDGMENT

Introduction

1. This judgment pertains to High Court Petition Nos. 191 of 2011 and 292 of 2011. The petitioners first approached the Court separately under Certificates of Urgency on 18th October 2011 and 18th November 2011 respectively seeking diverse orders against the respondents in respect of various contracts alleged to have been entered into with or awarded to the 5th, 6th and 7th respondents.

2. The grounds on which the orders were sought were that the respondents have acted in contravention of the values and principles enshrined in the Constitution; have directly procured currency printing services from the 5th, 6th and or the respondent without a competitive process; that the actions of the respondents amount to vulture funding; that there was no openness in the transaction; and that the respondents have violated the right of citizens to access information held by the state.

The Petitions

c. The petitioner in Petition No. 191 of 2011 sought a mandatory injunction restraining the 1st and 2nd respondents from entering into a contract with the 5th, 6th and 7th respondents for the purchase of shares in the 6th respondent. In the petition dated 18th October 2011, the petitioner seeks the following orders:

a. *A declaration that the respondents should make public the transaction in which the respondents contract to issue the Interested Parties with a 10 years exclusive contract to print currency.*

b. *The respondents to provide the Petitioner with all the documents in relation to the intended contract and or any other contracts entered into between the respondents and any other parties with respect to printing of Kenyan currency.*

c. *An order of permanent injunction restraining the respondents jointly and severally from executing any agreement for either sale of shares or printing of Kenyan currency, to the Interested Parties jointly or severally.*

d. *Costs of this suit*

d. **Kituo Cha Sheria**, the 1st petitioner and the petitioner in Petition No. 292 of 2011, is a non-governmental organization working in the area of human rights and governance. It sought a plethora of orders. Briefly summarized, the orders were for a Declarations that all citizens of Kenya are entitled to access to information pursuant to Article 35(1)(a) and (b) of the Constitution; that the refusal by the respondents to disclose information to the public on the share sale and purchase agreement based on a draft share sale and purchase agreement violates this right; that the principles of public participation under Article 10(2), leadership and integrity under Article 73(1) and (2), public finance in Article 201(a) to (e), the principles governing the procurement of public goods and services under Article 227(1) read with section 2 of the Public Procurement and Disposal Act No 3 of 2005 have been violated by the respondents.

e. The petitioner also prays that the court issues orders that the respondents disclose all the information on the particulars, terms, conditions and contents of the said share sale and purchase agreement based on the draft share sale and purchase agreement; that and that the Registrar of Companies, the 8th respondent, discloses information relating to the foreign company operating in Kenya in the name and style of Thomas De La Rue AG.

f. The petitioner also seeks orders for disclosure of the directorships and shareholding in the 5th, 6th and 7th respondents and the details of the intended joint venture between themselves and the 1st, 2nd and 3rd respondents.

g. It further seeks various consequential orders. It prays that pursuant to the grant of the prayers set out above, the court grants a conservatory order against the implementation of the contract; orders that the said share sale and purchase agreement based on the draft share sale and purchase agreement be brought into court for the purpose of examination as to whether it is in breach of the Constitution and public procurement laws, and for the purpose of quashing. An order of prohibition is also sought, the purpose of which is to prohibit the 1st, 2nd, 3rd, 5th, 6th and 7th respondents from entering into any contracts with respect to currency printing and related purposes without full disclosure thereof. The petitioner also prays for the costs of the petition.

The Parties

8. On 10th February 2012, the two petitions were consolidated, with the consent of the parties, by an order made by Lenaola J. In the said order, the court directed that the 1st petitioner shall be Kituo Cha Sheria while Mr. Charles Kioko Muthusi would be the 2nd petitioner. The respondents in both petitions would be respondents in the consolidated petition, with the 1st respondent being the Central Bank of Kenya; the 2nd respondent the Permanent Secretary, Treasury; the 3rd respondent being the Ministry of Finance; and the Honourable Attorney General as the 4th respondent. Thomas De La Rue Accountant, De la Rue Kenya Ltd, and De la Rue Currency and Security Print Limited would be the 5th, 6th and 7th respondents respectively. The Registrar of Companies would be the 8th respondent while the Kenya Union of Printing Manufacturers and Allied Workers Union would be the Interested Parties.

The Petitioners' Case

9. The Parties the petitioners have set out in the affidavits in support of their petitions the facts that precipitated the filing of the petitions, the most comprehensive of the affidavits being sworn by **Ms. Priscilla Nyokabi Kanyua**, then the Executive Director of the 1st petitioner. They have also filed written submissions and authorities in support of their case.

10. According to the petitioners, the printing of Kenya currency was handled by the East African Currency Board until 1966. From 1966 to 1986, it was printed by Bradbury & Wilkinsen, a United Kingdom company which was later acquired by Thomas De La Rue & Company Limited, U.K. Thereafter, Thomas De La Rue Kenya Limited, a company that was registered on 4th February 1992, then seemed to have taken over the printing of Kenyan currency. It also built a factory in Ruaraka, Thika Road, from where the currency is now printed.

11. The petitioners allege that through an undated agreement, the Central Bank of Kenya, the Permanent Secretary to the Treasury and the Minister of Finance entered into a share sale and purchase agreement with Thomas De La Rue and/ or the De La Rue Kenya Limited and the De La Rue Currency and Security Print Limited, the 5th, 6th and 7th respondents. According to the petitioners, this agreement was to the effect that the Permanent Secretary (2nd respondent) would purchase 40% of the shares in De La Rue Company Limited and De La Rue Currency and Security Print Limited; and that this purchase was done without a competitive bidding process as provided under the Public Procurement and Disposal Act No 3 of 2005.

12. The petitioners contend that the process leading to the share sale agreement and/ or tender was questionable and irregular; that it was concealed from the public and the National Assembly, and was undisclosed and suspicious. They contend that there was no advertisement in any of the daily newspapers and no competitive bidding for the tender; that as a result of the lack of transparency in the process, members of the public are not aware of the terms, conditions and content of the share sale agreement and the tender.

13. The petitioners also allege that on 15th June 1992, the Central Bank of Kenya entered into a lease agreement with Thomas De La Rue Kenya Limited with respect to a parcel of land in Ruaraka; that the parcel of land was considered as government land, the property of the Central Bank of Kenya, with the land and buildings owned by the government of Kenya.

14. It is further alleged that following the lease agreement with Thomas De La Rue Kenya Limited, Central Bank granted an export processing license to Thomas De La Rue Kenya limited; that the said company's name appears to have changed to De La Rue Currency and Security Print Limited, the 7th respondent, which was then allowed to export its products without paying duty while charging the government Ksh3.80 for every bill printed. The petitioners allege that this charge was too high when compared to international standards whose charges are Ksh1.80 for every bill printed.

15. The petitioners further aver that on 13th September 2011, the Cabinet of Kenya issued a Memorandum directing Central Bank to enter into a ten year exclusive bank note printing agreement with the 5th -7th respondent, which agreement would come into force upon the execution of the share sale and purchase agreement.

16. The petitioners contend that the agreements that have been entered into between the 1st, 2nd and 3rd respondents on the one hand with the 5th respondent and/or the 6th respondent and the 7th respondent have been concealed from the Kenyan public; that the process used in awarding the tender is irregular and suspicious; and the assets owned by Thomas De La Rue Kenya Limited are also unknown and doubtful.

17. They therefore challenge the constitutionality of the acts undertaken by the respondents with regard to the currency printing contracts. In particular, they question the constitutionality of the share sale and purchase agreement between the respondents; the process and manner in which the share sale and purchase agreement between the respondents was entered into; the Cabinet Memorandum authorizing the Central Bank of Kenya to enter into a 10 year exclusive banknote printing agreement with the 5th and/or 6th respondent and the 7th respondent; the non-disclosure of information relating to the said agreements; the non-disclosure by the 8th respondent, the Registrar of Companies, of the foreign company operating in the country in the name of Thomas De L Rue AG as well as the directorship, shareholding and details of the venture between the 5th, 6th and 7th respondents and the 1st, 2nd and 3rd respondents. The petitioners contend that these acts of the respondents are unlawful and in violation of the law and the Constitution.

The Response

18. The allegations by the petitioners as well as the factual basis of the petitions are denied by the respondents. The basic contention by the respondents is that the consolidated petitions have no merit and should be dismissed; that they are based on newspaper cuttings with no evidential value, and they do not demonstrate any constitutional violation or raise any constitutional issue, thus failing to meet the threshold set in the case of **Anarita Karimi Njeru -vs- Republic [1976-80]1 KLR 1272**. In particular, the 1st respondent denies that it is a party to any share sale or purchase agreement with the 5th, 6th or 7th respondents, and neither is it involved in the alleged transactions.

19. The 1st respondent has filed an affidavit sworn by **Ms. Neala Kagai** on 6th November 2011, together with submissions dated 27th May 2013 and a bundle of authorities. The Attorney General, acting for the 2nd -4th and the 8th respondent, filed grounds of opposition dated 28th February 2012 and submissions dated 11th March 2014. The 5th, 6th and 7th respondents relied on an affidavit sworn by **Mr David Hepple** on 12th February 2012, grounds of opposition dated 16th February 2012, as well as submissions dated 3rd May 2013 together with a bundle of authorities.

20. I shall consider the respective submissions of the parties with respect to the factual situation in the course of determination of the legal issues raised by the petitioners.

Analysis and Determination

21. I have read the parties pleadings and submissions, the authorities cited in support, and considered the oral arguments made at the hearing of this matter. What emerges clearly is the concern that the petitioners' have with regard to the probity of the alleged contracts relating to the printing of currency in Kenya. The petitioners have alleged the violation of various constitutional and statutory provisions and principles. They assert that the acts of the

respondents violate the right of access to information guaranteed under Article 35(1)(a) of the Constitution; principles of public participation under Article 10(2); leadership and integrity set out in Article 73; principles of public finance and public procurement under Articles 201(a) and 227(1) of the Constitution, as well as the provisions of section 2 of the Public Procurement and Disposal Act. As will become evident in the following analysis, these allegations have been denied and hotly contested by the respondents.

22. In determining the issues raised in the consolidated petitions, I will do so by considering the alleged violations of constitutional and statutory principles set out above against the respective submissions of the parties and the applicable constitutional and statutory provisions.

Violation of the Public Procurement Process

23. According to the petitioners, the respondents have violated the constitutional and statutory provisions governing procurement. They submit that the undated contract between the 1st, 2nd, 3rd, 5th, 6th and 7th respondents violated these laws as it was not entered into in a competitive manner. They contend that the procurement process is a nullity as the requirements set out in the **Public Procurement and Disposal Act** for open tendering were not complied with: they submit that the contract also contains at paragraphs 8 provisions which are intended to exclude competition in the procurement process.

24. They contend therefore that the procedures used in arriving at the contract failed to adhere to the principles of fairness and transparency. They rely on the decision of Ojwang J (as he then was) in **Mombasa High Court Petition No. 6 of 2011 Kenya Transport Association –vs- Municipal Council of Mombasa & Another** to submit that the procurement process was null and void and therefore an order of prohibition should issue to prohibit the 1st, 2nd, 3rd, 5th, 6th and 7th respondents from entering into the said undated and undisclosed contract. In the said decision, the court held that:

“In parity with the Constitution, the Public Procurement and Disposal Act regulates procurement procedure in detail, guided by the principle that unequal, preferential treatment is not to be accorded to a particular person, to the prejudice of others;...”

25. In that case, the court proceeded to find that the public-private partnership between the 1st and 2nd respondents for the regulation of motor-vehicle parking, charging, and clamping of vehicles in Mombasa County was unlawful, null and void as it was entered into in breach of the Constitution and the public procurement law.

26. While reiterating that the petitioner has relied on newspaper reports and has not supplied any evidence of illegality on its part, the 1st respondent argues that nothing in the Public Procurement and Disposal Act outlaws direct procurement, citing the provisions of section 74

of the Act as allowing such procurement. It further submits that there are express statutory appeals and review mechanisms which the petitioners could follow, and that it is an abuse of process for the petitioners to institute judicial proceedings without following such mechanism.

27. The Attorney General, on behalf of the 2nd, 3rd, 4th and 8th respondents also agrees with this view. He submits, first, that the alleged breach of procurement laws is not a constitutional question. Rather, it is a matter that falls for resolution under a specific mechanism provided by law under the Act; and that mechanisms exist under the Act to deal with the alleged violations thereof. The Attorney General therefore submits that the **Public Procurement Administrative Review Board** established under the Act would have been the right forum for dealing with the procurement issues raised by the petitioners, and relies on the decision in **Harrikissoon -vs- Attorney General of Trinidad and Tobago [1980] AC 265** to submit that the right to apply to court is important but its value will be diminished if allowed to be misused.

28. The Attorney General also questions the evidential basis on which the alleged violation of the public procurement legislation is founded. He argued that there is no evidence that the procurement rules were violated; that the Act provides for alternative tendering methods, and that resorting to these procedures does not violate any constitutional provisions.

29. The Attorney General points out that the petition is based on newspaper cuttings and hearsay; that on the authority of **Wamwere vs The A.G (2004) 1 KLR**, newspaper cuttings have got no evidential weight. It was the AG's submission that the orders sought cannot issue as they are not based on cogent facts and the petition should be dismissed with costs.

30. The 5th, 6th and 7th respondents agree with the Attorney General that the petition lacks a factual basis. Further, with regard to the alleged violation of procurement laws, they contend that such alleged violation had been made, not against them, but against the other respondents. It is their case, however, that the court cannot intervene in this matter as, on the authority of **Republic -vs- Minister for Finance & Another ex parte Nyong'o and 2 Others Civil Appeal No 1078 of 2007 (2007) eKLR**, courts are only concerned with whether a body is carrying out its duties and functions in accordance with the law.

31. As I embark on a consideration of this issue, I must express my concerns and misgivings with regard to the factual basis of the consolidated petitions. While the zeal of the petitioners in ensuring that public entities conform with the law and the Constitution when they undertake projects and enter into contracts involving public finance is commendable, they are sorely lacking in concrete information which can assist in determining the issues in question.

32. As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of **Wamwere vs The A.G and Randu Nzau Ruwa and 2 Others -vs- Internal Security Minister and Another (2012) eKLR**. If I may borrow the words of the court in the **Ruwa** case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.

33. The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a “**Share Sale and Purchase Agreement**”. The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled “**De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009**”.

34. The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulates procurement.

35. Further, and again I am constrained to agree with the respondents on this, the **Public Procurement and Disposal Act 2005** contains very clear provisions with regard to public procurement. Should there be violation of its provisions, that does not amount to a violation of constitutional provisions. As submitted by Counsel for the 1st respondent, Mr. Waweru Gatonye, once a claim is based on the Public Procurement and Disposal Act, one brings oneself within its provisions and any dispute pertaining to procurement must go before the **Public Procurement Administrative Review Board**; the law being that once a procedure is prescribed by law, one should use that procedure unless there are special circumstances to show that the matter is best dealt with in the High Court. I am therefore unable to find any violation of the public procurement law.

Violation of the Right to Information

36. The petitioners allege that the Central Bank, through the 2nd and 3rd respondents, entered into a share sale and purchase agreement premised on an undated draft share sale and purchase agreement with the 5th, 6th and 7th respondent whose terms were concealed from the public in violation of Article 35; that the draft contract contains a confidentiality clause that violates Article 35; and that the printing of currency has been conducted in a manner and under terms that are undisclosed to the public. They also allege that the 8th respondent has failed to disclose information relating to the company that operates in Kenya as Thomas De La Rue AG.

37. They have relied on various authorities, both local and from other jurisdiction, relating to the right to access information. They argue that though the companies involved in this matter are private entities they carry out a public function of printing Kenya currency and such information as they have which is of a public character must be disclosed.

38. In reply to this contention, the 1st respondent argues that under Article 35, one must request for information, and only if it is not granted should one seek the assistance of the Court. It is its contention that there was not a single letter addressed to it seeking information about the issues in dispute; and in the absence of such a request, no orders should be made against it.

39. It contends, further, that even if there was a demonstrable justification of the right to get information, it is only an individual Kenyan who can get such information, not an incorporated or unincorporated body. It is its case, further, that even where a party had a right to information, there may be need to restrict the information that can be accessed, and relies for support on the decision of the Court in **High Court Petition No. 278 of 2011 -Nairobi Law Monthly Company Limited -vs- Kenya Electricity Generating Company Limited and Another.**

40. The Attorney General argues in response to the petitioners' claim with regard to the right to information that there ought to be a violation of a right or threat of violation before a party can approach the court for relief. It is his submission that the petitioner has not shown that there was violation of the right to information as they did not show that there was a request for information which was refused. The Attorney General has relied on the decision in **Andrew Omtatah Okoiti -vs- Attorney General (2010)eKLR** and **John Harun Mwau -vs- Attorney General (2012)eKLR** in which the Court ruled that courts should not deal with academic or hypothetical issue as in this case.

41. The 5th, 6th and 7th respondents, while submitting that they have no obligation as private legal corporations to supply information to the petitioner, agree with the 1st respondent and the AG that there never was a request for information by the petitioners; nor that they attempted to obtain the information about the private companies through a search. They further assert that the right to information is not a blanket cover for the petitioners to seek information that they are curious about but have not requested for.

42. Again, and with respect to the petitioners, I must agree with the respondents on this issue. There is no doubt that Article 35 guarantees to citizens the right to information. It provides as follows:

“(1) Every citizen has 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.”

43. However, as this court held in the **Nairobi Law Monthly** case relied on by the 1st respondent, the right to information under Article 35(1) is limited to natural persons who are citizens of Kenya. The court agreed in that case with the decision of Majanja J in **Famy Care Limited –vs- Public Procurement Administrative Review Board & Another High Court Petition No. 43 of 2012** in which the Learned Judge in declining to issue the orders sought by the petitioner, a limited liability company incorporated in India, took the view that the right to

information under Article 35 is limited in that it can only be enforced by natural persons. He observed at paragraph 18 of the judgment that:

“The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to ‘every person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35.

44. The Learned Judge therefore concluded that:

“A reading of the Constitution and an examination of words “person” and “citizen” within the Constitution can only lead to one conclusion: That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution.”

45. The second limitation, which has been alluded to by the respondents, is that there must be a request for information before a party entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.

46. In the present case, there is no evidence that there was ever a request made from any of the respondents for information relating to the alleged currency printing contracts. Further, while the 2nd petitioner was entitled to information under Article 35(1), on the authority of the **Nairobi Law Monthly** and **Famy Care** decisions, the 2nd petitioner, being a corporate person, was not so entitled.

47. In the circumstances, therefore, the court’s response to this issue is in favour of the respondents: there is no demonstration of a violation of the right to information.

Principles of Public Participation

48. The petitioners allege that the respondents have violated the principles of public participation which are set out in Articles 10, 201, 227 and 259. They submit that these principles require that those affected by or interested in a decision are involved when it is being made. Input from the public is thus required, under Articles 201 and 227, when public money is being used or when the state or state organs are entering into contracts. They assert that the 6th respondent was awarded a contract to print money in a very furtive manner, and the circumstances and information on the tender were never disclosed to the public, and

neither were bids invited for the process. They rely on the decision of the Court in **Ministry of Health and Another –vs- New Clicks (Pty) Limited and Others CCT59/2004, 2005 ZACC 14 and Centre for Rights Education and Awareness (CREAW) and Others –vs- The Attorney General and Others High Court Petition No. 207 and 208 of 2012** to support their contention that the respondents were under an obligation to facilitate public participation in the tender process.

49. In response, the 5th, 6th and 7th respondents submit that public participation takes many forms. They cite the case of **Consumer Federation of Kenya –vs- Attorney General and 2 Others High Court Petition No. 11 of 2012** for the proposition that public participation can take many forms. It is their contention that public participation does not mean that the public takes over the execution of government functions or that it must be involved in conducting negotiations or formulation of commercial strategy. The Attorney General did not address himself to this issue.

50. It is indeed correct that the constitution has entrenched the principles of public participation in financial matters entered into by the state. Article 10 on the national values and principles provides at sub-article 2(a) that the national values and principles include “*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.*” Article 201(a) provides as follows:

“The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;” (Emphasis added)

51. With regard to public procurement, the Constitution provides at Article 227 that:

“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...”

52. In considering the allegation that there has been a violation of the principles requiring public participation in financial matters, the same limitations that have been encountered with regard to alleged violation of public procurement laws are manifest. The evidence and documents relied on by the petitioners are so scanty that they can be of little assistance on the issue. Inevitably, the court must ask itself: Was a contract entered into? Was the contract entered into in accordance with the provisions of the Public Procurement and Disposal Act? Was it the kind of contract that required open tendering, or were there other modes provided

for in the Act employed? What was the nature of public participation contemplated in a matter such as this, relating to the printing of currency?

53. In the case of **Consumer Federation of Kenya –vs- Attorney General and 2 Others** (supra) the court, at paragraph 53 and 54 of its judgment, observed as follows with regard to public participation:

[53.] Public participation and transparency as values are relative to the context of the case. In this respect I would adopt the dictum of the Supreme Court of Appeal of South Africa in the case of *King and Others v Attorneys Fidelity Fund Board of Control and Another 2006(1) SA 474 (SCA)* where the court observed as follows, *“Public involvement might include public participation through submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.”*

[54.] In the case of *Minister of Health and Another v New Clicks (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14*, the Constitutional Court of South Africa per Sachs J (at para. 630) observed that, *“The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say. What amount to a reasonable opportunity will depend on the circumstances of each case.”*

54. The principle to be drawn from these decisions is that every case in which an allegation of lack of public participation is alleged must be considered in the peculiar circumstances of the case. In the present case, what we have is a bare allegation that the principle of public participation was violated in entering into a contract with the 5th, 6th and 7th respondent. However, the basis of this allegation is extremely shaky and threadbare, founded, as it is, on a newspaper article and an unsigned document alleged to be the contract in dispute. Given the importance and sensitivity of the subject matter, a lot more is required to enable the court make the determination and the orders that the petitioners are seeking.

Violation of the Principle of Good Governance

55. The petitioners claim that the respondents have failed to adhere to core principles of good governance by failing to recognize that these principles, set out in Article 10(2), provide that the authority assigned to public officers is a public trust to be exercised in a manner that respects the people and brings public confidence in the integrity of the office. It is their contention that excluding public participation in the tender process does not demonstrate

respect for the people and violates Articles 73(1)(a), and 73(2)(d). They ask that the decision of the Cabinet to extend the tender by 10 years be declared null and void as it is unconstitutional in that Central Bank is not mandated to take directions from any source.

56. In reply, the 5th, 6th and 7th respondents submit that they are not in a position of governance over the petitioners or any other Kenyan and are therefore not liable under this head. No submissions were made by the state on this issue.

57. I have already addressed myself to the question of public participation, which the petitioners also raise as an aspect of good governance. As already observed, the paucity of information and evidence availed makes it impossible for the court to determine whether there was indeed violation of the principle of good governance in this regard.

58. The petitioners also contend that the extension of the contract with the 5th, 6th or 7th respondent on the directions of the Cabinet through a Cabinet memo violates the Constitution in that Central Bank is not required to take directions from anyone in the performance of its functions.

59. Article 231 of the Constitution establishes the Central Bank. It provides as follows:

“(1) There is established the Central Bank of Kenya.

(2) The Central Bank of Kenya shall be responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament.

(3) The Central Bank of Kenya shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions.

(4)...

(5) An Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya.”

60. The Act of Parliament that meets the constitutional requirement is the Central Bank Act, Chapter 491 of the Laws of Kenya. Section 4 of the Act titled ***“Principal object of the Bank”*** provides as follows:

“(1) The principal object of the Bank shall be to formulate and implement monetary policy directed to achieving and maintaining stability in the general level of prices.

(2) The Bank shall foster the liquidity, solvency and proper functioning of a stable market-based financial system.

(3) Subject to subsections (1) and (2), the Bank shall support the economic policy of the Government, including its objectives for growth and employment.

(4) The Minister may by notice in writing to the Bank, specify for purposes of this sections—

(a) the price stability targets of the government; and

(b) the economic policy to be taken by the Government.”

61. In my view, from the constitutional and statutory provisions above, the role of the Central Bank vis-à-vis government in general and the Cabinet in particular is one that requires co-operation, collaboration and information sharing. In the absence of evidence that the decision alleged to have been made on the basis of a Cabinet memo was made at all, or was made without input from Central Bank, it is difficult to see a basis on which the court can declare the said decision null and void. It is expected that the Central Bank, in playing its role in “*formulat(ing) and implement(ing) monetary policy*, and in “*support(ing) the economic policy of the Government*,” would engage with government at the Cabinet level and that decisions would be made that impact on the supply of currency in the country such as is alleged to have taken place in this case. In the circumstances, I am unable to find any violation of the Constitution as alleged by the petitioners.

62. The upshot of my findings above is that I find no merit in the consolidated petition. It is therefore dismissed but with no order as to costs.

63. In closing, I must express my appreciation of the Counsel for the parties for their well-researched submissions and authorities.

64. I must also commend the petitioners for their dedication in attempting to foster constitutionalism and good governance in Kenya. The limitation that I have observed is the reliance on press articles that, as is trite law, have no probative value. What would be of greater benefit would doubtless be greater diligence in research before filing suit and demand for information from state institutions with regard to contracts entered into, and resort to court action if such information is not forthcoming, so that the court can be moved in a matter such as this on the basis of credible and reliable information.

Dated Delivered and Signed at Nairobi this 22nd day of September 2014

MUMBI NGUGI

JUDGE

Dr. Khaminwa instructed by the firm of Getrude N. Angote & Co. Advocates for the 1st petitioner

Mr. Akide instructed by the firm of Akide & Co. Advocates for the 2nd petitioner

Mr. Waweru Gatonye instructed by the firm of Oraro & Co. Advocates for the 1st respondent

Mr Waigi instructed by the State Law Office for the 2nd, 3rd, 4th and 8th respondents

Mr. Njogu instructed by the firm of Daly & Figgis & Co. Advocates for the 5th, 6th and 7th respondents.



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