



**REPUBLIC OF KENYA  
THE PETITION COMMITTEE  
PETITION No. 1 of 2015**

**ITNL INTERNATIONAL PTE LTD AND  
HEMBY HOLDINGS LIMITED.....APPLICANTS/PETITIONER**

**-AND-**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT  
THE PPP COMMITTEE.....2<sup>ND</sup> RESPONDENT  
H. YOUNG/GIBB CONSORTIUM.....INTERESTED PARTY**

**BEFORE**

**KIHARA MURUTHI  
ISAAC BONDET**

**- CHAIRPERSON  
- MEMBER**

## RULING

### **The Petitioner's Application.**

1. The Counsel for the Petitioner has today made an application before the Petition Committee (hereinafter referred to as the "Committee") seeking disclosure of information and/or documents pursuant to Regulation 60(1)(c) of the Public Private Partnerships Regulations, 2014 and Guideline 6(b) of the Petition Committee Guidelines, 2014. His prayer is that this Committee directs the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to provide the following information:-
  - a) All the clarifications sought and responses received from the Petitioner and the Interested Party.
  - b) Communication between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent.
  - c) Communication and reports from the Transaction Advisor.
  
2. Counsel informed the Committee that his request was reduced into writing vide a letter dated 9<sup>th</sup> July 2015 by Messrs. Oraro & Co. Advocates. The Counsel for the Petitioner submitted that the Committee has powers under Regulation 60(1) (c) and Guideline 6(b) to direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to produce the information and/or documents sought.

3. The Petitioner's Counsel referred the Committee to the 2<sup>nd</sup> Respondent's affidavit sworn by Dr. Kamau Thugge and requested that the Petitioner be supplied with information relating to the analysis leading to the Project Evaluation Report referred to in Paragraph 7 of the affidavit. The Counsel submitted that the Petitioner has been deprived of the report which bears analysis leading to the Project Evaluation Report. The Counsel submitted that the Committee would require the information and/or documents sought to make a decision in this Petition.
4. The Petitioner also sought the clarifications sought and responses received from the Petitioner and the Interested Party. The Counsel for the Petitioner submitted that he was of the view that there appears to have been clarifications sought.
5. The Petitioner also sought information as to whether the Transaction Advisor participated or contributed to the evaluation exercise. The Petitioner's Counsel submitted that the information and/or documents sought by the Petitioner will assist the Committee whilst making its decision.
6. Counsel referred this Committee to Section 29(2) of the Public Private Partnerships Act, 2013 in support of his application. Section 29(2) of the said Act states that *"in procuring and awarding a contract to a private party under the Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and*

*equal opportunity in accordance with the guideline made under this Act."*

7. The Counsel for the Petitioner also referred the Committee to Article 47 and 50 of the Constitution of Kenya in support of his prayer. Counsel finally referred the Committee to Section 6 of the Fair Administrative Action Act, 2015 which commenced on 17<sup>th</sup> June 2015.
8. To illustrate his submissions, Counsel for the Petitioner highlighted the case of **R Vs. Lancashire County Council ex p Huddleston (1986) 2 ALL ER 941** and an extract of **Fordham Judicial Review Handbook (5<sup>th</sup> Edition) at paragraph 10.4**

#### **1<sup>st</sup> Respondent's Reply**

9. The 1<sup>st</sup> Respondent opposed the Petitioner's application. Counsel for the 1<sup>st</sup> Respondent submitted that there is no power given to the Committee to compel a party to provide documentary or other evidence to another party. According to the Counsel, Regulation 60(1(c) of the Public Private Partnerships Regulations, 2014 and Guideline 6(b) of the Petition Committee Guidelines, 2014 are to be invoked by the Committee to direct a party to provide information and/or documents that may be required by the Committee itself when it deems it necessary to do so. The Counsel submitted that it's the Committee's prerogative to invoke Regulation 60(1(c) of the Public Private Partnerships

Regulations, 2014 and Guideline 6(b) of the Petition Committee Guidelines, 2014.

10. Counsel for the 1<sup>st</sup> Respondent further submitted that granting the orders sought would jeopardise the procurement process as the same has not been concluded. As regards the Constitutional provisions, the Counsel submitted that the right to information under Article 35 of the Constitution of Kenya is not one of the rights that cannot be limited under Article 25 of the Constitution. Limitation of rights, according to the 1<sup>st</sup> Respondent's Counsel, can be done in cases such as this.
11. The Counsel for the 1<sup>st</sup> Respondent concluded that the Petitioner is on a fishing expedition to identify possible breaches to ventilate their case.

### **2<sup>nd</sup> Respondent's Reply**

12. The 2<sup>nd</sup> Respondent's Counsel fully adopted the submissions of the 1<sup>st</sup> Respondent's Counsel. He further emphasized that Dr. Kamau Thugge's affidavit had laid out in clear detail the entire tender process and in Counsel's view, the Petitioner was seeking to delay the conclusion of this case.

### **Interested Party's Reply**

13. The Interested Party's Counsel on his part adopted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions.

### **Reply by the Petitioner**

14. The Petitioner's Counsel in reply attacked the submissions of the Respondents and wondered how the procurement process would be jeopardised or prejudiced as the process had been stalled by the Order of this Committee. The Counsel submitted that the Article of the Constitution relating to fair hearing (Article 50) was not to be construed to be applicable to criminal matters only but should extend to civil matters too.

### **Issues to be Determined**

15. This Committee has carefully considered the Petitioner's application, the submissions of the parties, cited laws and case law and documents placed before it. The Committee has also reviewed the responses to the said application by the Respondents and the Interested Party. The gist of the Petitioner's application is right to information. The Committee has looked at the statutory law that was canvassed by the Counsels earlier and will deal with each of these laws separately. The Committee has isolated the following issues which have emerged from the submissions of the parties and we shall now address the issues whilst taking into consideration the Constitution of Kenya, any other applicable statutory law and case law.

16. **Issue No. 1** – *Can the Committee direct the Respondents to provide copies of the documents requested by the Petitioner pursuant to Regulation 60(1)(c) of the Public Private Partnerships Regulations, 2014 and Guideline 6(b) of the Petition Committee Guidelines, 2014?*
17. Regulation 60(1)(c) states as follows;  
*“When dealing with a petition or a complaint, the Petition Committee may compel a person in relation to the petition or the complaint to produce documents for examination by the Petition Committee.”*
18. Guideline 6 (b) of the Petition Committee Guidelines, 2014 states that ;  
*“A Respondent who has been served with a petition shall provide additional information to the Petition Committee including documents prescribed under Parts 7 and 8 of the Act as may be required by the Petition Committee.”*
19. Regulation 60(1)(c) of the Public Private Partnerships Regulations, 2014 and Guideline 6(b) of the Petition Committee Guidelines, 2014 makes it a prerogative of the Petition Committee to demand for additional or further information and/or documents as it may require from time to time. The main purpose of these provisions is to enable the Committee seek for further information when it deems necessary. Indeed, the Committee vide its letter dated 29<sup>th</sup> July 2015 invoked the said provisions and directed the 1<sup>st</sup> Respondent to supply the draft Concession Agreement.

Should the Committee require any document and/or information to enable it reach its decision, it shall again invoke these provisions of the law.

20. If these provisions were to be available for the parties to demand or to apply to the Committee to compel a party to a petition or complaint to avail information and/or documents to another party, the law should have indicated so.

21. The position under Civil Procedure Act is different. Section 22 of the Civil Procedure Act states that;

*"the court may, at any time either on its own motion or on application of any party make such orders as may be necessary or reasonable in matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and discovery, inspection, production, impounding and return of documents or other material objects producible as evidence"*

22. Section 22 of the Civil Procedure Act applies to civil cases before ordinary courts of law. However, in relation to petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under the Public Private Partnerships Act, 2013, the applicable rules of procedure are the PPP Regulations, 2014 and Petition Committee Guidelines, 2014. The procedure under these provisions is that orders for

production of documents are issued at the Committee's own motion and the documents are to be produced to the Committee.

23. In summary, the provisions relied upon by the Petitioner cannot be available to a party before the Committee to seek information from another party but the provisions gives prerogative powers to the Committee to direct a party to a petition or complaint to avail information and/or documents to the Committee for its own use when it requires such information and/or documents.
24. **Issue No. 2** – *Do the provisions of Articles 35, 47 and 50 of the Constitution of Kenya support the Petitioner's Application?*
25. Article 35 (1) of the Constitution of Kenya states that;  
  
*"Every citizen has the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom."*
26. The right to information under Article 35 (1) of the Constitution of Kenya is conferred only to natural persons who are citizens of Kenya. The Petitioner is a legal entity and it is not entitled to the right to information under Article 35(1) of the Constitution of Kenya. This is the position held in **HCCC. No. 278 of 2011; Nairobi Law Monthly Co. Limited Vs. Kenya Electricity Generating Co. Ltd and 2 Others.**

27. Similarly in the case of **Family Care Limited Vs. The Public Procurement Administrative Review Board and Five (5) Others; HCCC No. 43 of 2012**, the Applicant sought the procuring entity to be compelled to disclose on oath a complete record of correspondence. The Applicant purported to enforce Article 35 of the Constitution of Kenya whilst seeking this relief. The procuring entity pleaded that the Applicant was a limited liability company and a foreign citizen and Article 35 was not available to the Applicant. The Court held that the Applicant was not entitled to the relief as it was not a citizen of Kenya and further it was not a natural person.
28. Article 47 of the Constitution of Kenya relates to fair administrative action. Article 47 directs Parliament to enact legislation to give effect to the rights under Article 47. The Counsel for the Petitioner referred the Committee to Section 6 of the Fair Administrative Action Act, 2015 to illustrate this point. Section 6 of the said Act cannot be read in isolation but with Section 5 of the said Act which is applicable to the rights and interests of a group of persons or general public. In the instant case, the person is singular and cannot invoke this provision.
29. Article 50 (1) of the Constitution of Kenya relates to the entitlement to be heard in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. Article 50 (2) of the Constitution of

Kenya only relates to matters of a criminal nature and are not applicable to the circumstances herein.

**ORDERS:**

In consideration of the Committee's findings on the two questions above, the ruling of the Committee is that the Petitioner's request to the Committee to direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to forth with provide copies of:-

- (a) All clarifications sought and responses received from the Petitioner and the Interested Party;*
- (b) Communication between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents;  
and*
- (c) Communication and reports from the Transaction Advisor.*

is hereby denied.

DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of August 2015



**ISAAC BONDET**  
Member



**KIHARA MURUTHI**  
Chairperson



**Delivered in the presence of: -**



**Secretary / CEO ,  
PPP Petition Committee**

For the Petitioner:

W.A Amoko and J.O. Awele

For the 1<sup>st</sup> Respondent:

Professor. Albert Mumma

For the 2<sup>nd</sup> Respondent :

Mr. Obura h/b for Mr. Mwangi  
Njoroge

For the Interested Party:

Charles Adede