

REPUBLIC OF KENYA
IN THE PUBLIC PRIVATE PARTNERSHIPS PETITIONS COMMITTEE AT NAIROBI
PETITION NO.1 OF 2021

BETWEEN

LAMU ISIOLO ROAD CONSORTIUM
LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY
[KENHA].....RESPONDENT

AND

PUBLIC PRIVATE PARTNERSHIPS
UNIT.....INTERESTED PARTY

DECISION

(CORAM: Prof. Githu Muigai, SC, EGH, Eunice Lumallas, Janice Kotut, Mohamed
Abey, Sadick Doufa.)

PETITIONER'S LEGAL REPRESENTATIVE

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NAIROBI

RESPONDENT'S LEGAL REPRESENTATIVE

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P.O. BOX 10481-00100
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A. INTRODUCTION

1. The Brief facts of this matter as contained in parties' Pleadings on record are that the Petitioner challenges the validity and legality of a decision by the Respondent herein, the Kenya National Highway Authority, (KenHa), of 2nd December 2020 terminating

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- negotiations for a Privately Initiated Investment Proposal (PIIP) between a consortium affiliated with the Petitioner and the Respondent.
2. On the 22nd of December 2016, the Lamu Isiolo Road Consortium, comprising of the Development Bank of South Africa (DBSA), Transnet SOC Ltd (Transnet), Mwalimu Trading Co Ltd (Mwalimu) and the Group Five Construction Ltd (Group Five) submitted a Privately Initiated Investment Proposal (PIIP) for the Lamu Port and Lamu-Garissa-Isiolo Road to the Ministry of Transport, Infrastructure, Housing and Urban Development.
 3. The consortium's proposal was submitted to the PPP Committee which gave its concurrence and an approval was granted to the consortium to proceed with negotiations on the 15th of May 2017.
 4. Meetings were held on the 8th of June and 24th of July 2017 between the parties leading to the signing of Heads of Agreement (Commercial Terms) on the 29th of November 2017 that acted as a precursor and guiding framework for negotiations to enable parties reach financial close.
 5. Specific legal documents were meant to be produced by the consortium in support of the application
 6. In March 2018, the Petitioner and its consortium were invited to commence negotiations
 7. On the 6th of July 2018, the Petitioner communicated a proposal for the addition of two members and the withdrawal of one from the consortium.
 8. This necessitated fresh due diligence and request for supporting documents. This was done in April of 2019
 9. On 23rd April 2019, the Respondent invited the Petitioner to recommence negotiations
 10. On the 16th and 20th of September 2019, the Petitioner requested to change membership of the consortium, a process necessitating fresh due diligence and request for legal documents,
 11. A further progress meeting was called for by the Respondent and held on the 30th of January 2020 where the 'Ppetitioner' presented a different membership for the consortium and in a letter dated 7th of February 2020, it sought to revise the membership of the consortium.
 12. A further meeting was called for on the 9th April 2020 where it was agreed that the Petitioner would submit among other things an executed consortium agreement detailing the reconstituted structure with the new members



13. A further due diligence on the new members was undertaken by the Respondent on the 27th July 2020
14. On the 7th August 2020, the Petitioner committed to submit required legal documents but submission in the right format was not done ahead of the meeting that was scheduled for the 17th of August 2020.
15. The Petitioner failed to submit an executed consortium agreement detailing the reconstituted structure with new members as requested for in the meeting of 17th August 2020 despite reminders to do so.
16. The Respondent on the 31st of August 2020 recommended the termination of the further engagement with the petitioner and the PPP Committee on the 13th of November 2020 approved the termination of the PIIP.
17. The Petitioner In a letter of 20th November 2020 states that it was forwarding the initialed consortium agreement and explains that its timelines were delayed.
18. The decision to terminate the PIIP was communicated to the Respondent vide a letter dated 2nd of December 2020 which letter is stated to have been received on the 22nd December 2020

B. THE PETITIONER'S CASE AND THE RESPONSES.

The Petitioner's Case.

19. It is the petitioner's case that the Respondent's decision to terminate further negotiations under the PIIP was irregular, unfair, unprocedural, unlawful and contrary to the rules of natural justice. That the decision violates the principle of legitimate expectation and therefore ought to be set aside and declared null and void.
20. The Petitioner denies the existence of delays caused by the lack of capacity on its part and states that notwithstanding any such delays, such a delay would not constitute a legal basis under the PPP Act-2013 and PPP Regulations 2014 upon which the contracting authority could terminate or discontinue negotiations under a PPP project.
21. The Petitioner further argues that the decision by the Respondent is unreasonable, irrational, unlawful, erroneous, irregular, and unjustified and relies on Section 58 of the



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Interpretation and General Provisions Act Cap 2 and argues that the section should apply in the circumstances of the case due to absence of any clear specific timelines provided for in the PPP Act and Regulations with regards to PIIPs.

22. The Petitioner argues that the Respondent Contravened Section 58 of the PPP Act and Section 54 of the PPP Regulations in its decision.
23. The Petitioner anchors its Petition on articles 10, 20 & 47(3)(a) of the Constitution of Kenya 2010, Section 67 of the PPP Act, Sections 7(1)(b) of the fair administrative actions Act regulations 52(1) Of PPP regulations 2014 and PPPPC Guidelines and requests the Petitions Committee to set aside the decision of the Respondent dated 2nd December, 2020 and award costs to the Petitioner.
24. The Petitioner filed its amended Petition together with written submissions on 10th June 2021.
25. In its amended Petition dated 10th June 2021, the Petitioner seeks the following orders from the Committee; -
 - (i) The decision of the Respondent/Contracting Authority (CA) contained its letter dated 2nd December 2020 be declared irregular, unfair, un procedural and unlawful
 - (ii) The Decision of the Respondent/CA contained in its letter dated 2nd December 2020 be annulled and set aside
 - (iii) That the Petitions Committee makes further orders as it deems expeditious and fit for the interest of justice
 - (iv) That the Respondent be directed forthwith to resume negotiations with the Petitioner for the PIIP for the Lamu-Garissa Isiolo PPP for the Road Project and to award the tender in accordance with the process prescribed under the PPP Regulations 2014
 - (v) The Respondent be directed to appoint a transaction advisor to assist the Respondent in the preparation, accession and conclusion of the project agreement and the financial close in respect to the subject PIIP for the Lamu-Garissa-Isiolo PPP for the Road Project.



(vi) Costs for the Petition

The Respondent's Case.

26. The Respondent contends that the decision to terminate the negotiations was lawful, fair, regular, and procedural and was taken due to the inordinate delay of the Petitioner to provide requisite legal information needed with respect to its consortium and its apparent lack of technical and financial capacity to undertake the approved PIIP project
27. It argues that the Petitioner has no *locus standi* or legal capacity to institute any complaint against it as the consortium allegedly before the Committee is not the consortium that was approved to proceed with negotiations towards actualization of the PIIP project under reference.
28. To the Respondent, there is no consortium before the committee capable of negotiating for a PIIP.
29. Further, the Respondent argues that there is no valid consortium before the Committee capable of performance under the approved PIIP and that the Petitioner has no capacity, technical or financial to deliver on the PIIP.
30. The Respondent states that section 58 (2) of the PPP Act 2013 mandates Contracting Authorities to cancel tenders only upon approval by the PPP Committee. This then means the PPP Committee was well within its statutory powers to approval cancellation.
31. It states that there was no breach of administrative action as provided for at Art 47 of the constitution and in the fair Administrative Act 2015 as there were always letters, meetings, warnings and invitations to be heard for the three years' that parties have been relating.
32. The Respondent submits that the rationale and circumstances necessitating the negotiations as existed in 2016 are no longer present. The urgency to have the infrastructure in place is overtaken by events as the first berth of the Lamu port was completed and launched in May of 2021. Hence it would be illegal and unlawful as provided for under section 61 (1) (a) and 61 (10) (a) to proceed in any other manner than competitive bidding.



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33. Pursuant to section 61(2)(a) of the Public Private Partnerships Act '2013 and section 51 of the Public Private Partnerships Regulations, the Respondent developed a negotiation criterion against which the outcome of the negotiations would be evaluated.

34. The Respondent maintains that the membership of the Petitioner kept mutating casting doubt as to its capacity to undertake the project as well as causing delay in negotiations and decision making, which led to the Respondent invoking the principle of public interest to allow the project to continue for the benefit of the greater Kenyan public.

35. The Respondent argues that the Petitioner is the author of its own misfortune since it caused the delay from the time, they made a PIIP in December 2016 to December 2020 when the negotiations were cancelled due to the delay in providing the necessary information and the proposed changes to members of the consortium affecting the capacity of the consortium to undertake the project.

36. The Respondent filed a replying affidavit and written submissions in opposition to the petition on 12th July 2021 and seeks orders that the Petition be dismissed with costs.

The Interested Party's Case

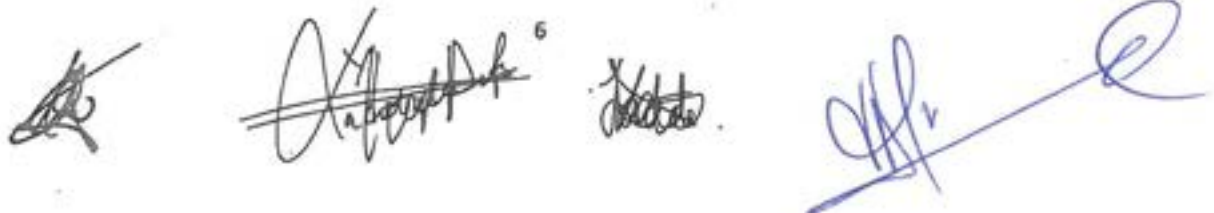
37. On 8th July 2021, the PPP Committee applied to be interested party in these proceedings. Its interest is to submit on matters that would enable the petitions Committee properly and comprehensively determine the matter in the interest of the public.

38. It was admitted as interested party in accordance with guideline 24 of the 2014 PPPPC Guidelines

39. The Interested party argues that the consortium as currently constituted lacks technical capacity to deliver the project especially after the exit by Group Five Construction Limited. It argues that it would be fundamentally adverse for public interest to have continued delay of the construction of the project owing to the negative impact it would have on the Lamu Development Corridor and Lamu Port.

40. It argues that the PIIP was submitted and approved as a two-part proposal comprising both the road project and the Lamu Port operation and maintenance project. So that to the interested party, further delays in the road construction would be inconsistent with the scope of the PIIP project as approved on 15th May 2017 to ensure that the port is not frustrated by the lack of feeder and offtake infrastructure.

41. The Interested party argues that the decision to terminate the negotiations was lawful, fair, regular, and procedural and that it was taken due to the inordinate delay of the



Petitioner to provide information needed, lack of capacity of the petitioner to undertake the project and public interest consideration.

42. The interested party therefore opposed the petition and filed a replying affidavit and submissions both dated 16th July 2021.

C. ISSUES FOR DETERMINATION

Parties set out their separate issues for determination in their written submissions as follows; -

PETITIONER'S ISSUES

- i. Whether the impugned decision is ultra vires because the PPP committee lacks statutory powers to terminate negotiations in PIIP.
- ii. Whether the impugned decision to terminate negotiations on the PIIP was procedurally unfair and contrary to the rules of natural justice.
- iii. Whether there was non-disclosure of information by the Respondent of materials, and evidence to be relied upon in making the decision to terminate negotiations.
- iv. Whether the impugned decision to terminate negotiations was materially influenced by errors of law and therefore tainted with illegality.

RESPONDENT'S ISSUES.

- i. Whether the petitioner has locus standi to institute these proceedings before the petition committee
- ii. Whether there is a valid consortium agreement before the petition committee
- iii. Whether it would be lawful to continue with the PIIP process in the circumstances of this case

INTERESTED PARTY'S ISSUES

- i. Whether the PPP Act 2013 and the PPP regulations 2014 permit cancellation of negotiations for PPP project and
- ii. Whether it was in the public interest to cancel negotiations between the petitioner and the respondent on the Lamu- Garissa Isiolo PPP road project.

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The bottom of the page features several handwritten signatures and initials. From left to right, there is a signature that appears to be 'C. O.', a large signature that is mostly illegible, a signature that looks like 'J. O.', and a signature that looks like 'M. O.' with a long horizontal line extending to the right. A small number '7' is written above the second signature.

6. The Committee notes that the Petitioner does not address issues on locus as raised by the Respondent in its responses.
7. Locus is an important issue to determine since without it, the Petition fails to have the capacity to move to determination on merit.
8. It is the ability to bring an action and demonstrate one's right to participate in the action or otherwise connection to the claim.
9. A look at section 67(1) of the PPP Act requires the Petitions committee to consider *all petitions and complaints submitted by a private party* during the process of tendering and entering into a project agreement.
10. The Petitions committee agrees with both the interested party and the Respondent that the Party before the Committee is indeed not the same party, the Consortium that was initially awarded the PIIP.
11. The Committee notes that the structure and character of the consortium has changed severally and with every change and proposed change, relevant communication was made between the parties and often, the new parties have been accepted upon undertaking due diligence.
12. The Petitions Committee further finds that in all meetings for the PIIP, the common denominator and participant has been Mwalimu Trading Company Limited and its representative, Mr. Samuel Koskei Too.
13. In determining whether the Petitioner has locus, the committee will be guided by the text of section 67 (1) and will delink the question of the Petitioner's technical and financial capacity from that of the right to institute the Petition as a private party.
14. Consequently, since the Act allows this Committee to entertain all complaints and petitions from private entities, the Committee finds that the Petition is rightfully filed before it.
15. CONSEQUENTLY, the Committee finds that the Petitioner is not only connected to this matter, right from its commencement but that as a private entity, it has the requisite legal standing to institute a Petition or lodge a complaint before this Committee.

ISSUE NO. 2. WHETHER THE DECISION TO TERMINATE THE PIIP WAS LAWFUL, REGULAR AND PROCEDURAL

16. The Petitioner states that the Respondent's 2nd December 2020 decision to cancel the PIIP negotiations on grounds of lack of capacity on its part, inordinate delays and that



an alternative procurement method was approved by the cabinet was unreasonable, irrational, unlawful, erroneous, irregular and unjustified.

17. The Petitioner Claims that since there are no legal timelines for how long PPP negotiations ought to be held, the CA ought to have been guided by section 58 of the Interpretations and General Provisions Act Cap 2. The section provides as follows;

"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises"

18. He further claims the decision was in breach of provisions of sections 58 of the PPP Act 2013 and Regulation 54 of the PPP regulations 2014 and that the decision failed to take into consideration exigencies of Covid-19 and its impact on work, travel and physical meetings.

19. Further, the Petitioner states that the decision did not take into consideration the Petitioner's right to fair Administrative Action as protected by Article 47 and the fair Administrative Action Act 2015, it violated his legitimate expectations, and denied him his right to fair hearing thus violating natural justice principles in the circumstances of the case.

20. The Respondent and the interested party opposed the petition on the grounds of unreasonable delays attributed to the Petitioner, lack of both technical and financial capacity to execute the contract and particularly from the interested party's perspective, public interest consideration. They relied on the provisions of the PPP Act 2013, PPP Regulations 2014, and the World Bank guidelines on PIIP.

21. The Public Private Partnerships Act 2013 places the responsibility of scrutinizing feasibility and viability of public private partnerships proposals on the contracting authority with the support of the PPP Unit

22. Section 58(1) of the PPP Act 2013 stipulates that a contracting authority may cancel a tender process anytime before the execution of the contract if fundamentally serious adverse consequences are likely to occur if the tender process is allowed to go.

23. Further section 58(2) stipulates that a contracting authority shall not cancel a tender unless the committee approves the cancellation, and the proposal evaluation team

submits its recommendations to the contracting authority on the cancellation of the tender.

24. On public interest considerations, the Tribunal agrees with the interested party that the project having been for the benefit of the people has a significant public policy component which ought to be taken into consideration.
25. Section 31 of the PPP Act no 15 of 2013 stipulates that the contracting authority must identify the projects to be undertaken through PPP and justify the need for the same and the gains towards the public.
26. The urgency of the matter arose from the fact that the Government had commenced construction of the first three berths of Lamu port in 2014 with completion slated for mid-2018. Negotiations were similarly structured to align to these timelines. Parties had agreed that the agreement would be terminated should 31st December 2018 be reached and substantially no progress towards financial close has been made on the road project clause 11.1.6
27. For purpose of ensuring, that the port was capable of becoming fully operational upon completion it was quite critical and paramount that the road system between Lamu and Isiolo was delivered within set time- lines for better service delivery. It is therefore quite clear from the foregoing that, this urgency was not achieved and the rationale behind the concept of PIIP defeated altogether.
28. We find that the period of upward three years while pursuing negotiations was inordinate in the circumstances particularly in light of the fact that there was no clear road map for conclusion of the negotiations at the time of cancellation in December 2020. This delay cannot be cured by the provisions of section 58 of the Interpretations and General Provisions Act Cap 2 as suggested by the Petitioner.
29. We are persuaded by the decision in the case of Kenya Union of Aviation Workers VS Cabinet Secretary for transport & infrastructure & 4 others High Court Constitutional Pet No. 57 of 2017, where considerations of capacity in executing a PIIP were center stage as in this foregoing case and the Court held that the Kenya Airways had no financial capacity to undertake a PIIP to maintain and manage the Jomo



Kenyatta International Airport and therefore the negotiations were terminated on public interest considerations and lack of capacity.

30. Just like in the Kenya Airways case, the Lamu-Garissa –Isiolo project was a public utility and attracted public interest consideration requiring savings in terms of finance and time.
31. Further, the issues of legitimate expectation, natural justice and fair administrative action fly off the face of evidence on record which demonstrate not just good faith on the part of the Respondent, but also that there was a long and intense journey of three years; marred by many letters, invitations for meetings, meetings, requests for information, several extensions of time offered to the Petitioner to reconstitute the consortium, several attempts to reconstitute, failure to submit legal documents in support of PIIP.
32. These are avenues for hearing for both parties and we find that these streams of communication were open all through the period of subsistence of the relationship.
33. The Committee has also observed that the Petitioner failed to submit an executed consortium agreement detailing the reconstituted structure with new partners Raubex Construction Co. Ltd and WBHO Construction Limited.
34. The Tribunal does not agree with the Petitioner that the delays, if any, were due to complex procedures replicate in PPP Projects and neither is the Tribunal persuaded with the Petitioner's argument that the negotiations stalled due to lack of a transactional Advisor that ought to be availed by the Respondent, this issue was never raised by the Petitioner at the material time and we find that it is an afterthought. Besides, a look at section 36 and 52 of the PPP Act 2013 demonstrates that a transactional advisor, though useful, is not a mandatory requirement.
35. Section 58 of PPP Act no.15 of 2013 provides for the procedure of handling privately initiated investment proposals, there is a requirement for the cancellation to be in writing with reasons for cancellation provided, we find that the petitioner was informed of the decision and the reasons for the decision as required by law. In which way the statutory mandate of the Respondent was discharged.

36. Similarly, the Committee is persuaded by the holding in the case of Rift Valley Railway VS Kenya Railways & Another HCC NO 137 of 2017 where the High Court allowed the termination of a PIIP concession under the PPP Act no 15 of 2013 and held it to be lawful.

37. In cancelling the PIIP, the Respondent was upholding values and principles of Governance as contained in Article 10 of the Kenyan Constitution 2010 among them good governance, integrity, transparency and accountability;

38. Neither is there a breach of article 227 of the constitution as alleged by the Petitioner since the logical option upon cancellation of the PIIP affiliated with the Petitioner is to open up the process for competitive bidding, this way public interest is secured by getting value for money.

39. ACCORDINGLY, from the analysis of the law and authorities presented, and from the Parties' oral and written submissions, the committee finds that the decision of the contracting authority to terminate the PIIP was procedural, lawful and regular.

ISSUE NO. 3: WHAT ARE THE ORDERS AS TO COSTS AND INTEREST

40. The Committees' power to award costs is premised at Regulation 60 (e) of the PPP regulations 2014 in the following terms;

60. (1) When dealing with a petition or a complaint, the Petition Determination of Committee—

(e) may allocate the costs of hearing the petition or complaint to the parties to the petition or complaint

41. The general principle in Law is that costs follow the event, taking into consideration all the facts and attendant law, and additionally, observing the conduct of parties, we find no reason to depart from this principle.

42. Having found that the Respondent's decision cancelling the PIIP was procedural and lawful, the Petition fails.

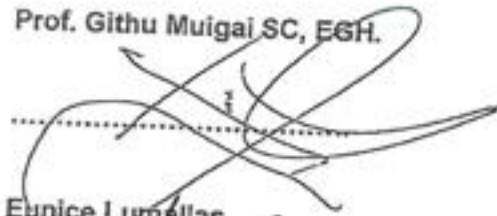
43. Consequently, costs in this matter are hereby awarded to the Respondent.

ORDERS



44. In light of the foregoing, the Petition fails in its entirety and is dismissed with costs
DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF AUGUST 2021.

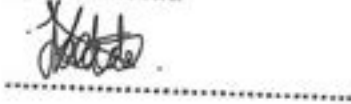
Prof. Githu Muigai SC, EGH.



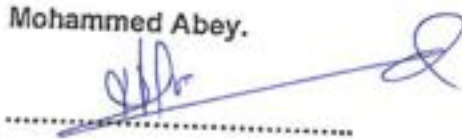
Eunice Lumallas.



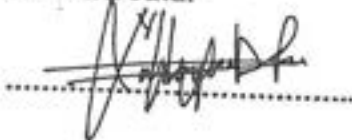
Janice Kotut.



Mohammed Abey.



Sadick Doufa.



DELIVERED IN THE PRESENCE OF:

1. Mr. Justus Omollo of Sigano & Omollo LLP for the Petitioner
2. Prof. Albert Mumma of Prof Albert Mumma & Co Advocate for the Respondent
3. Mr. Gideon Magara – Advocate for the Interested party
4. Denis Kibet – Court Assistant