Asphalt Works Investments Limited v Kenya Ports Authority (Judicial Review Application E022 of 2023) [2023] KEHC 27253 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E022 OF 2023

OA SEWE, J

DECEMBER 21, 2023

(AS CONSOLIDATED WITH JUDICIAL REVIEW APPLICATIONS NO. E020 OF 2023, E021 OF 2023 AND E023 OF 2023)

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015

BETWEEN

ASPHALT WORKS INVESTMENTS LIMITED ..... APPLICANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 21st August 2023. It was filed by the ex parte applicant, Asphalt Works Investments Limited, (herein after, the applicant) under Articles 10 (2) (b), (c), 47, and Article 227 of the Constitution of Kenya, Sections 8 & 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, Section 9(4) of the *Fair Administrative Action Act* No. 4 of 2015, Section 174 of the *Public Procurement and Asset Disposal Act*, 2015,Sections 1A, 1B, 3A and 63 (e)

of the *Civil Procedure Act* and Order 53 Rule 3 of the Civil Procedure Rules 2010, for the following orders:

(a) That the Honourable Court do issue judicial review orders in the nature of Mandamus compelling the respondent to issue the applicant with duly executed contracts in respect of tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/ CE-Framework Agreement for Specialized Painting for Roads and Yard Marking which are to be procured for a period of 2 years.

(b) That the Honourable Court do issue judicial review orders in the nature of Mandamus compelling the respondent to terminate procurement for the supply of similar services in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/ CE-Framework Agreement for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation before the lapse of 2 years and in contravention of the earlier contract with the Applicant.

(c) That the Honourable Court do issue judicial review orders in the nature of Certiorari quashing the respondent's constructive cancellation or termination, or attempted constructive cancellation or termination of procurement proceedings and contract awards in respect of tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/ CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.

(d) That the Honourable Court do issue judicial review orders in the nature of Prohibition forbidding the respondent from sending out invitation to tender for new bids or continuing with procurement proceedings in tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation to which the applicant had been awarded the tenders in Tender Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking and signed contracts with the respondent to supply the services for a period of 2 years.

(e) That the Honourable Court do issue judicial review orders in the nature of Prohibition forbidding the respondent from sending out tender invitation for services similar to those That the applicant had been awarded in tender numbers KPA/136/2021-22/ CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking and signed a contract with the respondent until the lapse of the two year contract period with the respondent.

(f) That the costs of these proceedings be borne by the respondent.

(g) That the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

2. The application was premised on the grounds That the respondent had advertised tenders in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE- Framework Agreement for Specialized Painting for Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation (hereinafter, "the subsequent tenders"), which are in respect of the same services the applicant had already been contracted by the respondent to offer for a period of 2 years. The tenders were scheduled to close between the 4th September 2023 and 8th September 2023.

3. The applicant further explained That, sometimes around June 2022, the respondent invited bids for various tenders; and That the applicant was among the bidders who tendered for Tender Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking (the initial tenders). It further averred That, in mid November 2022, the respondent notified it That it was successful and had been awarded tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking for a period of 2 years.

4. It was further the contention of the applicant That it duly acknowledged receipt of the letters of notification for the four (4) tenders and accepted the awards vide its letters of acceptance which were received by the respondent. The applicant explained That sometimes in February 2023, it received the draft contracts from the respondent with regard to the initial tenders which it proceeded to review and promptly reverted as required, confirming That all was in order. The applicant also pointed out That, on the 19th February 2023, the respondent informed it of the extension of the tender validity period and instructed it to collect the contracts on the 20th February 2023 from the respondent's offices, have them executed and returned on the same date; which instructions were strictly complied with on its part.

5. The applicant added That the respondent assured it That the contracts had been duly executed by it (the respondent) within the tender validity period and That it would be issued with its copies in due course. The applicant's cause for complaint was therefore That, thereafter, despite making numerous follow-ups and requests to be issued with the executed contracts, the respondent is yet to provide any response. Thus, the applicant asserted That the respondent's actions, in withholding the executed copies of the contracts, are unfair and have had the effect of frustrating its entreaties to perform its obligations under the tenders.

6. According to the applicant, the respondent's silence following its (the applicant's) acceptance of the award and execution of the contracts amounts not only to unreasonableness but also procedural impropriety; and was solely intended to prejudice the legal rights and legitimate expectation of the applicant to enjoy economic benefits from the subject contracts. It added That the respondent has not given any reasons for failure to issue it with the contracts as set out in the tenders; and therefore have denied the applicant the right to fair administrative action pursuant to Article 47 of *the Constitution* as read with the *Fair Administrative Action Act*, No. 4 of 2015.

7. The applicant also alleged That, the respondent's dilatory tactics, and in particular its refusal to issue it with copies of the executed contracts, violates the principles of public procurement as provided for under Articles 227 and 232 of the Constitution and Sections 3, 44(1)(f)(g), 45(3)(c), 135 and 176 of the *Public Procurement and Asset Disposal Act* (PPADA) as well as Sections 9 and 10 of the *Public Officer Ethics Act*, 2003 which, among others, obligates a public officer to carry out his duties in a way That maintains public confidence in the integrity of his office.

8. The applicant further complained That the respondent's act of advertising for procurement proceedings/tendering of similar services That had already been awarded amounts to constructive cancellation or termination, or attempts to constructively terminate or cancel the procurement proceedings in respect of tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking; and is therefore a contravention Section 63 of the PPADA, which only permits the respondent to cancel or terminate procurement proceedings before Notification for Award and not after award.

9. The grounds aforementioned were explicated in the applicant's Supporting Affidavit, sworn on 21st August 2023 by one of its directors, Salmin Salim. Thus, the applicant annexed various documents to buttress its assertions That it successfully tendered for the subject tenders; and had signed the contracts in February 2023. The documents include the applicant's tender documents, copies of the acceptance letters as well as correspondence exchanged between the applicant and the respondent in connection with execution of the contracts. The applicant also exhibited a copy of the respondent's letter dated 8th July 2023 confirming re-advertisement of the same tenders.

10. The respondent opposed the application vide the Replying Affidavit sworn by John Turasha Kinyanjui, the Corporation Secretary & General Manager of Legal Services of the respondent. He confirmed That the respondent had advertised Tender Numbers KPA/177/2022-23/CE- Framework Agreement for Concrete Works, KPA/178/2022-23/CE- Framework Agreement for Road Works, KPA/179/2022-23/CE- Framework Agreement for Specialized Painting for Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation, inviting bids to which the applicant is free to participate.

11. The respondent further confirmed That Tender Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking had been advertised, processed and awarded by it to the applicant, but That the same were deemed null and void upon the expiry of the tender validity period. Hence, at paragraph 9 of its Replying Affidavit, the respondent averred That it acted within the law in opting for a fresh tendering as there could be no breathing of life into the lapsed tender process.

12. With leave of the Court, the applicant filed a Supplementary Affidavit, sworn by Salmin Salim on 28th September 2023. The affidavit was in response to some of the assertions by the respondent in its Replying Affidavit. The applicant reiterated its stance That the initial contracts are still valid; and therefore That, having been successful in the first instance it could not, in the same vein, participate in the re-advertised tenders. It was further its assertion That the subsequent tender process is tainted with illegality. At paragraph 12 of the Supplementary Affidavit, the applicant pointed out That the respondent failed to disclose the fact That it signed some of the contracts as awarded in the initial tender process and therefore That it is unfair for the applicant's contracts to be singled out for cancellation.

The applicant annexed copies of the signed contracts as Annexure "SS-1" to the Supplementary Affidavit as well as copies of email communication between the parties to confirm That the tender validity period was in fact extended; and therefore cannot be the basis for termination of the subject contracts.

13. The respondent thereafter filed a Notice of Preliminary Objection dated 12th October 2023. It contended That the Judicial Review application is incompetent in so far as it has been taken against the wrong party; and therefore ought to be struck out in limine with costs.

14. The application was canvassed by way of written submissions, pursuant to the directions given herein on 20th September 2023. The submissions were thereafter highlighted on 24th October 2023. The applicant proposed the following issues for determination:

    (a) Whether the applicant has satisfied the parameters for judicial review;

    (b) Whether the respondent's action of advertising similar tenders to those awarded to the applicant was unlawful, unfair, unprocedural or unreasonable.

    (c) Whether the applicant has legitimate expectation having been awarded the initial tenders as the successful bidder.

    (d) Whether the applicant is entitled to the orders sought.

15. Thus, the applicant was convinced That it has satisfied the parameters for judicial review as set out in the cases of Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 Others 1997. eKLR and Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others 2016. eKLR. The applicant therefore submitted, on the authority of Republic v Principal Secretary Ministry of Mining, Ex Parte Airbus Helicopters Southern Africa (PTY) Ltd 2017. eKLR and John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others 2021. KESC 39 (KLR), That its application seeks to challenge the legal and procedural validity of the respondent's decision to abandon the signed contracts for the initial tenders as well as its action in proceeding to advertise similar tenders.

16. The applicant relied on Section 63 of the PPADA to buttress its submission That the respondent could only terminate the procurement proceedings before, and not after notification of tender award. In this regard, the cases of Geothermal Development Company Limited v Attorney General & 3 Others 2013. eKLR and Gregory Kitonga Wambua & 2 Others v County Government of Kiambu 2019. eKLR, among others, were cited to buttress the applicant's submissions.

17. In terms of legitimate expectation, the applicant submitted That, having been declared the successful bidder, there was no turning back; especially upon execution of the contract by it. The applicant added That, just as it signed contracts with other bidders, the respondent was duty bound to honour its part of the bargain to enable it perform its obligations under the subject contracts. The applicant made reference to Republic v Attorney General & Another, Ex Parte Waswa & 2 Others 2005. 1 KLR 280 for the proposition That the principle of legitimate expectation extends to a future promise or benefit yet to be enjoyed; and is intended to ensure predictability and certainty in dealings involving public bodies. Hence, the applicant urged the Court to find in its favour and grant the reliefs sought by it.

18. In the respondent's written submissions dated 16th October 2023, it was argued That the suit is incompetent on account of failure by the applicant to exhaust the alternative dispute resolution mechanism provided for under the PPADA. In this regard, the respondent had in mind Sections 167 to 175 of the Act and the specified timelines set out therein for seeking the intervention of the Public Procurement Administrative Review Board. The respondent further reiterated its stance That the

tender validity period lapsed on 18th February 2023; and therefore That the applicant slept on its rights by failing to move the Review Board for extension of the tender validity period. Thus, the respondent relied on Section 9(2) of the *Fair Administrative Action Act* and the cases of Geoffrey Muthinja & Another v Samuel Muguna Henry & Others 2015. eKLR and United Millers Ltd v The Kenya Bureau of Standards & Others 2021. eKLR for the submission That the applicant ought to have exhausted the alternative dispute resolution mechanism provided for in the PPADA before approaching the Court of judicial review.

19. In support of its submission That the suit is time barred, the respondent relied on the timelines set out in Part XV of the PPADA for review purposes. According to the respondent, since a period of almost 6 months had elapsed since the expiry of the tender validity period, the application was hopelessly out of time. The respondent further submitted That upon filing the suit, it was expected That the strict timelines set out in the PPADA for the filing and resolution of procurement disputes be adhered to. Thus, at paragraph 13 of its written submissions, the respondent posited That, since the award letters were given in November 2022 and December 2022, the applicant ought to have taken steps against its Accounting Officer before the expiry of the tender validity period on 18th February 2023 or, at the latest, within 14 days thereafter.

20. The respondent also took issue with the applicant's Verifying Affidavit as well as the Supplementary Affidavit; contending That the documents annexed thereto were not commissioned in accordance with Rule 9 of the Oaths and Statutory Declarations Rules. Reliance was placed on Jeremiah Nyangwara Matoke v IEBC & 2 Others 2017. eKLR and Fredrick Mwangi Nyaga v Garam Investments & Another 2013. eKLR for the proposition That exhibits annexed to affidavits must be appropriately sealed by a Commissioner for Oaths and duly marked with serial letters of identification. It submitted That, in so far as the applicant's annexures were neither properly sealed nor marked, they ought to be expunged from the record, and the application dismissed in line with the holding in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others 2015. eKLR.

21. Further to the foregoing, the respondent took the posturing That this judicial review application has been brought against the wrong party. It made reference to several provisions of the PPADA and the PPADR as to the responsibilities of an Accounting Officer. The submission was therefore That, under Section 170 of the PPADA, a review application ought to be brought against the Accounting Officer of a procuring entity; and That it matters not whether the review proceedings are presented before the Board or before the High Court. The respondent relied on Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Others (Civil Appeal E510 of 2022) 2022. KECA 982 (KLR) (9 September 2022) (Judgment) to buttress its argument. Thus, the respondent submitted That the whole suit is incompetent and ought to be dismissed with costs for having been brought against the wrong party.

22. With regard to the tender validity and its effect on the initial tender process, the respondent took the position That it was expressly indicated That the tender validity period would be 184 days from the date of tender opening; and therefore That, without extension by its Accounting Officer, the procurement process automatically lapsed. The respondent relied on Kivuku Agencies v Kenya Airports Authority & Another 2020. eKLR to underscore the submission That the initial contracts became invalid upon the lapse of the tender validity period. Hence, at paragraph 38, 41 and 44 of its written submissions, the respondent posited That it should neither be blamed nor held liable on account of inactions of its Accounting Officer in connection with the failure to extend the tender validity period.

23. The applicant filed Supplementary Submissions dated 20th October 2023 to address the issue of jurisdiction as raised by the respondent in its Notice of Preliminary Objection dated 12th October 2023. Other than addressing the Court on what amounts to a preliminary objection, the applicant

submitted That the respondent's Notice of Preliminary Objection does not raise a pure question of law in line with the principles laid down in Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd 1969. EA 696. The applicant further urged the Court to note That the respondent's Preliminary Objection is intended as a sword and not as a shield; and therefore is untenable. The applicant relied on the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others 2015. eKLR to buttress its assertions.

24. In response to the contention by the respondent That the Court lacks jurisdiction to hear and determine the substantive judicial review application, the applicant reiterated its posturing That this is a unique case in which the respondent purported to terminate the procurement proceedings illegally; and therefore That it was not a fit and proper matter to take to the Board. The applicant further submitted, at paragraph 15 of its Supplementary Submissions That, not all matters arising in the course of procurement proceedings must be filed before the PPARB.Section 9(4) of the *Fair Administrative Action Act* as well as the cases of Republic v National Environment Management Authority, Ex Parte Sound Equipment Ltd 2011. eKLR, Republic v Independent Electoral and Boundaries Commission (IEBC), Ex Parte National Super Alliance (NASA) Kenya & 6 Others 2017. eKLR and Fleur Investment Limited v Commissioner of Domestic Taxes & Another 2018. eKLR were cited to support the argument That there are exceptions to the exhaustion doctrine.

25. On whether the application is time-barred, the applicant urged the viewpoint That Section 175 of the PPADA applies only to disputes That are commenced at the PPARB and not to proceedings commenced at the High Court either under Section 9 of the *Fair Administrative Action Act* or pursuant to Order 53 of the Civil Procedure Rules. Thus, it posited That since the decision to re-advertise the subject tenders was only evinced in June 2023, the application was brought within the 6 months' period provided for in Order 53 Rule 2 of the Civil Procedure Rules, and without unreasonable delay as envisaged by Section 9(1) of the *Fair Administrative Action Act*.

26. The applicant likewise responded to the respondent's assertion That the Verifying Affidavit and the Further Affidavit are non-compliant with the strictures of Rule 9 of the Oaths and Statutory Declaration Rules. In its view, That assertion is false and is merely an attempt to clutch at straw. According to the applicant, the affidavits and the annexures are all properly stamped and signed by a Commissioner of Oaths. The applicant added That, in any case, failure to seal all exhibits is not fatal as it is the affidavit itself, and not the annexures, That vouch for the merits of the application. In this regard, reliance was placed on Nairobi Civil Application No. 165 of 1999: Sarah Hersi Ali v Kenya Commercial Bank, as quoted in Odunga's Digest on Civil Case Law and Practice Procedure, 3rd Ed. Vol. 2 at page 288.

27. As to whether this suit was brought against the wrong party, the applicant reiterated its stance That not all laws and rules governing proceedings before the PPARB are applicable to proceedings before this Court. The applicant added That the respondent's submission in this regard was based on an erroneous understanding of Section 170 of PPADA, which is specific to proceedings before the Review Board. The applicant pointed out That the application was filed under Section 174 and not 175 of the PPADA; and added, on the authority of Republic v Attorney General & Another, Ex Parte Orbit Chemicals Limited 2017. eKLR, That such an omission is not fatal.

28. Lastly, the applicant recapitulated its position That the tender validity period was in fact extended; and That, since the 18th February 2023 was a Saturday, the signing of the contracts on 20th February 2023 was well within the tender validity period by dint of Section 57 of the *Interpretation and General Provisions Act* regarding computation of time. Thus, the applicant urged the Court to find That the orders sought in the substantive Notice of Motion dated 21st August 2023 are all merited and to grant the same as prayed.

29. Thus, it is common ground That some time in June 2022, the respondent invited bids in respect of tenders numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking. The parties are in agreement That the applicant was one of the tenderers That responded to the invitations to bid, and was ultimately declared the successful bidder in respect of all the four tenders.

30. Accordingly, the respondent notified the applicant That it was successful and had been awarded the subject tenders vide its Letter of Award dated 14th November 2022; whereupon the applicant acknowledged receipt and intimated acceptance of the awards as by law required. To buttress these assertions, the applicant annexed the pertinent documents as Annexures SS-3 and SS-4 to its Supporting Affidavit. It is also indubitable That it was not until February 2023 That the respondent forwarded the draft contracts in respect of the four (4) tenders to the applicant for review. The email correspondence annexed to the applicant's Supplementary Affidavit confirm That the final copies were ultimately ready for signature by the applicant on 20th February 2023.

31. The respondent's dilatory conduct notwithstanding, the applicant exhibited documents to demonstrate That it not only confirmed its agreement with the contents of the agreements but also promptly signed the same and returned them to the respondent on the same date of 20th February 2023. That the respondent failed to execute the contracts in time is therefore not in contention. Instead, it proceeded to re-advertise the tenders as Tenders Numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting for Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation, without reverting to the applicant as to its reasons for That course of action. It turned out That the justification for this course of action by the respondent was That the tender validity period had expired before the contracts could be signed by the respondent's accounting officer.

32. As has been pointed out hereinabove, the applicant blames the respondent for inaction following its (the applicant's) acceptance of the award and execution of the contracts; and posited That the same amounts to unfairness and procedural impropriety; and is intended to prejudice its legal rights and legitimate expectation to enjoy the economic benefits of the subject contracts. In the applicant's view, the respondent has not given any plausible reason for failure to issue it with the contracts as expected; and therefore has unjustifiably denied it of the right to fair administrative action as envisaged by Article 47 of the Constitution as read with the *Fair Administrative Action Act*.

33. In the premises, the issues arising for determination in this matter are:

    (a) Whether the Court has jurisdiction to hear and determine the judicial review application;

    (b) Whether the application has merit, and

    (c) Whether the applicant is entitled to the orders sought.

A. On Jurisdiction:

34. The primacy of jurisdiction was well explicated in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989. eKLR thus:

> ...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending

other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion That it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."

35. Similarly, in Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others, Civil Application No. 11 of 2016, the Supreme Court quoted with approval the decision of the Supreme Court of Nigeria in Case No. 11 of 2012: Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others thus:

> ...It is settled That jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost..."

36. Needless to add That jurisdiction is conferred either by *the Constitution* or a statute. The Supreme Court aptly restated this inSamuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others 2012. eKLR, thus:

> A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding That which is conferred by law. We agree with counsel for the first and second Respondents in his submission That the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

37. The respondent did not impugn the jurisdiction of the Court from the standpoint of Articles 22, 23, 47 or 165(3) of the Constitution, which give the Court the jurisdiction to entertain judicial review matters and grant the sort of orders prayed for herein by the applicant, but on the following grounds:

    (a) That application is incompetent for failure to exhaust the alternative dispute resolution mechanisms provided for under the PPADA;

    (b) The application is incompetent for being time-barred;

    (c) the application is incompetent for being in breach of the *Oaths and Statutory Declarations Act* and the Rules thereto;

    (d) The application is incompetent for being directed against a wrong party;

38. In the premises, it is imperative for the Court to determine the preliminary points thus raised before engaging in a merit consideration of the application.

a. On Alternative Dispute Resolution:

39. There can be no doubt That alternative dispute resolution mechanisms play a critical role in the administration of justice and indeed, have the pride of place in Article 159(2)(c) of the Constitution; which mandates That:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

40. To my mind, this provision, far from being a complete ouster of jurisdiction of the Court as was suggested by the respondent, simply provides for a postponement of approach to the Court in favour of the expediency contemplated by pursuing the available alternative dispute resolution mechanisms in the first instance; hence the doctrines of exhaustion and avoidance. Indeed, in Speaker of National Assembly v Karume 1992. KLR 21 it was held That:

> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, That procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

41. Likewise, in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others 2015. eKLR, the Court of Appeal restated its position thus:

> It is imperative That where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring That there is a postponement of judicial consideration of matters to ensure That a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue That this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

42. The same position was taken in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) 2020. eKLR in which it was held, at paragraph 52, That:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring That there is a postponement of judicial consideration of matters to ensure That a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*."

43. Moreover, Section 9 of the *Fair Administrative Action Act*, which is one of the provisions relied on by the applicant, states in part That:

> (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or

to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate court shall, if it is not satisfied That the remedies referred to in subsection (2) have been exhausted, direct That the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

44. There is no gainsaying, therefore, That where an alternative dispute resolution mechanism is provided for, the same ought to be followed first; and That the court's jurisdiction should only be invoked as a last resort measure. That is not to say That it is impermissible for a party to approach the Court directly, even where an alternative dispute resolution mechanism is available to a party, where That course of action is the most appropriate in the circumstances. Indeed, in Kenya Ports Authority v Threeways Shipping Services (K) Limited 2019. eKLR, the Court of Appeal held That:

> "...we bear in mind That the *Kenya Ports Authority Act* has no express provision for striking out a suit. We also bear in mind That access to justice as enshrined in Article 48 of *the Constitution* is a fundamental right, That cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice."

45. Accordingly, in the case of Mohamed Ali Baadi and others v Attorney General & 11 others 2018. eKLR, the court held:

> "While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly vs James Njenga Karume {1992} KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia it was held That:
>
> > "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint in its totality....the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

46. The same position was articulated in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others 2017. eKLR, thus:

> 46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find That exhaustion requirement

would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues That verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake..."

47. In the instant matter, the applicant explained That the tender process in which it was involved (the initial procurement process) had come to a close and Letters of Award issued. The applicant further demonstrated That it had gone as far as signing the contract; and therefore had no reason for complaint in connection with the first procurement process. These averments were not refuted by the respondent. The applicant further explained That after signing the contracts, the respondent went quiet in spite of numerous follow-ups by it. Thus, the contention of the applicant was That, it only got to discern a change of heart; what it deemed to be constructive termination of contract, when the respondent re-advertised the same tenders in July 2023. In the circumstances, the applicant's contention That it had already lost the opportunity to file an application for review before the PPARB is a plausible justification for approaching this Court directly, granted That by July 2023 the window for complaint to the PPARB had long closed.

48. In any case, there is considerable merit in the applicant's assertion That, while Section 136 of the PPADA expressly provides for remedies to a procuring entity in case a successful tenderer fails or refuses to sign a contract, the Act is silent on the remedies available to a successful tenderer in similar circumstances. Thus, even if the applicant had the opportunity to file a Request for Review before the PPARB, it is doubtful That the Review Board would have the requisite jurisdiction to entertain the matter in so far as the first procurement was concerned. As for the second procurement, it is plain That, having not submitted a bid for That particular tender, the applicant would hardly pass the threshold requirement of being an "aggrieved party" as contemplated by Section 167(1) of the PPADA. It is noteworthy in this regard That, in James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others 2019. eKLR, the Court of Appeal held thus in connection with Section 175(1) of the PPADA:

> It is not in dispute That the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or That they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;
>
> > " subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."
>
> It seems plain to us That in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were That the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground That the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies That section 167(1) was designed of keep out. The Board ought to have ruled them

to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge."

49. In the premises, the only recourse available to the applicant at the material time was to file the instant application for judicial review. Indeed, in Fleur Investments Limited v Commissioner of Domestic Taxes & Another 2018. eKLR it was held:

> Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

b. On whether the application is time-barred:

50. The respondent relied on the timelines set out in Part XV of the PPADA for judicial review and submitted That, since a period of almost 6 months had elapsed since the expiry of the tender validity period, the application was hopelessly out of time. The respondent further submitted That upon filing the suit, it was expected That the strict timelines for filing and resolution of procurement disputes be adhered to. Thus, at paragraph 13 of its written submissions, the respondent submitted That, since the award letters were given in November 2022 and December 2022, the applicant ought to have taken steps against its Accounting Officer before the expiry of the tender validity period on 18th February 2023 or within 14 days thereafter.

51. That argument is however plainly flawed, for Section 167 of PPADA is explicit That:

> (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

52. Needless to mention That the administrative procedure intended by Section 167 of PPADA is the review procedure before the PPARB under Part XV of the Act. Since the applicant was the successful tenderer, it had no grievance against the respondent and therefore had no reason for approaching the PPARB for resolution within the first 14 days after the award. Moreover, Subsection (4) of Section 167 of PPADA is explicit That:

> The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
>
> (a) the choice of a procurement method;
>
> (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and
>
> (c) where a contract is signed in accordance with section 135 of this Act.

53. Accordingly, there being cogent proof That the parties in this instance were at the contract signing state, I have no hesitation in holding That the issue of delay from the standpoint of Section 167 of

PPADA does not arise. Likewise, as the PPARB did not assume jurisdiction in the matter, the timeline of 14 days provided for in Section 175 of PPADA is entirely inapplicable. Indeed, the Court had occasion to pronounce itself at the leave stage and satisfied itself That the application had been brought within time, for purposes of Section 9 of the *Fair Administrative Action Act* and Order 53 Rules 1 and 2 of the Civil Procedure Rules. I find no justification to warrant a departure from That posturing.

c.On whether the applicant's affidavits are compliant for purposes of Rule 9 of the Oaths and Statutory Declaration Rules:

54. The respondent impugned the applicant's Verifying Affidavit as well as the Supplementary Affidavit on the ground That the documents annexed thereto were not commissioned in the manner envisaged by Rule 9 of the Oaths and Statutory Declaration Rules. Hence, the respondent relied on Jeremiah Nyangwara Matoke v IEBC & 2 Others (supra) in which a finding was made That the documents annexed to the supporting affidavit were not properly marked; and on That account the same were expunged from the record. The Court held:

> "In conclusion I find is sic. That the petitioner, will at the hearing of this petition, be limited to refer only to those annextures That are properly marked as exhibits. In this regard I note That the petitioner's affidavit has a total of 7 annextures That are properly marked as exhibits and I therefore find That any other document attached to the affidavits That do not bear exhibit marks must be rejected. The upshot of. this ruling is That save for the objection to the annexures That are not duly marked, dated and attested to by a commissioner for oaths, which are hereby expunged from the record, the rest of the objections raised are hereby dismissed with a further order That costs of the objection shall abide the outcome of the petition. Consequently, direct That the petition proceeds for hearing."

55. The respondent also relied on Fredrick Mwangi Nyaga v Garam Investments & Another (supra) in which it was held:

> "Indeed, as pointed out by counsel for the 1st Defendant, the draft Amended Notice of Motion annexed to the Supporting Affidavit is not so marked "A". In my opinion, the viewpoint of Hayanga J. in the Abraham Mwangi case is most persuasive in That the exhibit itself must be marked. As set out in Hayanga J's Ruling at page 5, I am bound by the Court of Appeal's decision in Galaxy Paints Co. Ltd. v Falcon Guards Ltd Civil Appeal No. 219 of 1998 when the Court stated:
>
> > "The Rules are designed to facilitate justice and further its ends. They are not things designed to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But due to rampant inefficiency, negligence, dishonesty and general disregard for professional ethics on the part of the majority of the advocates in the country, the Rules are abhorred."
>
> As Hayanga J. commented: "They cannot be ignored as though they did not exist."

56. Accordingly, the respondent urged for the expunction of the annexures; and for the consequent dismissal of the substantive application. In this regard, Rule 9 of the Oaths and Statutory Declarations Rules provides That:

> "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

57. There is no gainsaying That the annexures to the applicant's affidavits were secured to the affidavits and appropriately identified; such That there is no confusion as to the identification thereof. However, it is notable That the Commissioner's seal was affixed, not on the face of the documents intended to be identified, but on separate sheets of papers attached thereto. Hence, it is plain That the situation obtaining herein is markedly distinguishable from the facts of Jeremiah Nyangwara Matoke v IEBC & 2 Others (supra) in which the exhibits were neither signed nor dated. Nevertheless, the impugned documents fall in the category of fly sheets in the manner described by Hon. Hayanga, J. in HCCC No. 1511 of 2002: Abraham Mwangi v S.O. Omboo & Others. The judge held:

> "The rules envisage marking on the very document and That is to safeguard certainty. Exhibits should never be identified by fly papers attached to the document. The exhibit itself must be marked. We do not have detailed rules on this in Kenya but the Practice Rules in the English Order 41 of RSC That deals with the forms of affidavits and exhibits are common sense rules which should be adopted. It divides exhibits into documents and none documents. Fly papers are misleading and is fraught with uncertainty. Exhibits to affidavit which are loose flysheets for identification attached to them and do not bear Exhibit mark on them directly must be rejected. The danger is so great."

58. In the premises, the question to pose is whether, in the circumstances, failure to strictly comply with Rule 9 of the Oaths and Statutory Declarations Rules is fatal to the application, as posited by counsel for the respondent. In my considered view I do not think so; because in certain instances, of which this is one, the use of the word "shall" is merely directory. I find succor in the decision of Hon. Ringera J. (as he then was) in Milimani HCCC 462 of 1997: Standard Chartered Bank Ltd v Luncton (K) Ltd (unreported) That:

> "There appears to be a common belief That the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one.
>
> As I understand the canons of statutory interpretation, the use of the word 'shall' in a statute only signifies That the matter is prima facie mandatory. The use of the word is not conclusive. It may be shown by a consideration of the object of the enactment and other factors That the word is used in a directory sense only. As long ago as 1861 in the case of Liverpool Borough Bank V Turner 1861. 30 L.J ch 379 pages 380-381 Lord Campbell had laid it down That:
>
> > "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered. And from principles of statutory interpretation by Justice G.P Singh a former CJ Madhya Pradesh HC in India, the following instructive passage appears at page 242:
> >
> > > "The use of the word "shall" raises a presumption That the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such object flowing from such construction. There are numerous cases where the word 'shall' has, therefore, been construed as merely directory."

59. It is therefore instructive That, in connection with affidavits, Order 19 Rule 7 of the Civil Procedure Rules provides That:

> "The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."

60. Indeed, in Milimani HCCC 26 of 2004: PatrickThinguri & 1006 Others V KTDA Company & Another (unreported) the court stated:

> "Turning to the defects conveyed in the jurat, it is important to consider whether the defect as described is as to form or is fundamental and is likely to touch on jurisdiction. Firstly, it is alleged That apart from appearing on a separate page, there is any other defect like in the name or place of swearing for example. The court finds That this is not a fundamental defect in irregularity and is both curable under the order and affidavits namely Order 18 Rule 7..."

61. It is therefore my considered finding That the fact That the seal and identification marks in respect of the exhibits annexed to the applicant's Supporting Affidavits appear on a separate page is not fatal to those affidavits. Moreover, Section 72 of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya provides:

> 72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law on instatement or document which purports to be in That form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead." (see also Nairobi Civil Application No. 165 of 1999: Sarah Hersi Ali v Kenya Commercial Bank, as quoted in Odunga's Digest on Civil Case Law and Practice Procedure, 3rd Ed. Vol. 2 at page 288)

d. Whether the application has been brought against the wrong party:

62. The respondent took the posturing That this judicial review application has been brought against the wrong party. It made reference to several provisions of the PPADA and the PPADR as to the responsibilities of the Accounting Officer. The submission was therefore That, under Section 170 of the PPADA, a review application ought to be brought against the Accounting Officer of a procuring entity; and That it matters not whether the proceedings are before the Public Procurement Administrative Review Board (PPARB) or before the High Court. The respondent relied on Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Others (Civil Appeal E510 of 2022) 2022. KECA 982 (KLR) (9 September 2022) (Judgment) to advance the argument That the whole suit is incompetent and therefore ought to be dismissed with costs for having been brought against the wrong party.

63. Needless to state That Section 170 of PPADA falls under Part XV of the PPADA, which is devoted to administrative review of procurement and disposal proceedings. It provides That:

> The parties to a review shall be—
>
> (a) the person who requested the review;
>
> (b) the accounting officer of a procuring entity;
>
> (c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine."

64. Therefore, one of the authorities relied on by the respondent to advance its argument in this regard is the case of James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Ltd & 8 Others (supra). This was an appeal from the decision of Hon. Ogola J, in Elroba Enterprises & 5 Others v James Oyondi t/a Betoyo Contracters & 5 Others 2018. eKLR in which the position taken by the Hon. Judge was That:

> "Parties form an integral part of the trial process and if a party is omitted That ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5th Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5th Respondent. The failure to do so meant That the 5th Respondent could not entertain the proceedings before it. The 5th Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications."

65. The Court of Appeal upheld the decision of the High Court and observed thus:

> "It is clear That whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires That the accounting officer of the procuring entity, be the party. Like the learned judge we are convinced That the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive That it is the accounting officer who is to be a party to the review proceedings...When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply."

66. It is noteworthy however from the facts of the above case That the High Court handled the matter pursuant to its jurisdiction under Section 175 of the PPADA. This was after the parties had approached the PPARB and a decision rendered by the Board which was then challenged before the High Court by way of administrative review. Clearly therefore, the facts of the case are distinguishable from the facts hereof in so far as the applicant, in this instance, opted to approach this Court directly, pursuant to Section 9 of the *Fair Administrative Action Act* and Order 53 of the Civil Procedure Rules as read with Section 174 of the PPADA; which recognizes That the right to review under Part XV of the Act, is in addition to any other legal remedy a person may have.

67. Accordingly, I find the respondent's argument That Section 170 is applicable not only before the Review Board but also before the High Court strained and therefore untenable. Indeed, had it been the intention of the legislature to That Section 170 would be applicable to proceedings commenced directly before the High Court, it would have couched Section 174 of PPADA in similar terms as Section 175. It is therefore my considered finding That the provisions of Section 170 of the PPADA as to the joinder of the accounting officer of a procuring entity do not necessarily apply to matters

filed directly before the High Court for purposes of Section 9 of the *Fair Administrative Action Act* or Order 53 of the Civil Procedure Rules.

68. I find succor for this posturing in the decision of Hon. Nyamweya, J. (as she then was) in Republic v Public Procurement Administrative Review Board; Kenya Airports Authority & Another, Ex Parte Kenya Airports Parking Service Limited 2019. eKLR That:

> 35. A plain reading of the section 175, as well as the application of the expressio unius est exclusio alterius (to express one thing is to exclude another) principle in the construction of words and phrases of a statute, leads to the conclusion That the parties in section 170 are not necessarily intended in judicial review applications brought before this Court, which can be brought by any person aggrieved by a decision made by the Respondent.
>
> 36. In addition, having joined the procuring entity as a party to this application, no value would be added by the joinder of its Managing Director, whose role in the procurement process as accounting officer was in the capacity of an agent of the 1st Interested Party. It is also pertinent That the 1st Interested Party as a corporation has legal capacity to sue and be sued under the *Kenya Airports Authority Act*. Lastly, the decision in El Roba Enterprises & 5 Others vs James Oyondi t/a Betoyo Contracters & 5 Others (supra) is distinguished on the ground That it did not involve proceedings before this Court, but proceedings before the Respondent, where section 170 rightly applies. The preliminary objection therefore fails."

69. Additionally, in Republic v Attorney General & Another, Ex Parte Orbit Chemicals Limited (supra), it was held:

> "...the failure to commence judicial review seeking the orders of mandamus against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on non-joinder or misjoinder of parties. This was the position adopted in Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 2003. KLR 582, where it was held That issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability."

70. Consequently, considering That the application is expressed to have been brought under Articles 10 (2) (b), (c), 47, and Article 227 of the Constitution of Kenya, Sections 8 & 9 of the *Law Reform Act*, , Section 9(4) of the *Fair Administrative Action Act*, Section 174 of the *Public Procurement and Asset Disposal Act*, 2015,Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and Order 53 Rule 3 of the Civil Procedure Rules, as opposed to Section 175 of the PPADA, it is my considered finding That the instant suit has indeed been brought against the right party and is therefore competently before the Court. I likewise find That non-joinder of the respondent's accounting officer is not at all fatal to the suit.

B. On the merits of the application:

71. It is trite That judicial review is largely concerned with the decision-making process as opposed to the merits of the impugned decision. In Municipal Council of Mombasa v Republic & Another 2002. eKLR the Court of Appeal expressed itself as follows in this respect:

> "The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and That, as we have, is not the province of judicial review"

72. Accordingly, the applicant had the onus to demonstrate That the decision or act complained of is tainted with illegality, irrationality or procedural impropriety; or That it is otherwise deficient in terms of proportionality. Hence, in Republic v The Commissioner of Lands, ex- parte Lake Flowers Limited, Nairobi Misc. Application No. 1235 of 1998 it was held:

> "..Courts must resist the temptation to try and contain judicial review in a straight jacket... Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear That human rights will evolve and grow with the society."

73. The same position was reiterated by the Court of Appeal in Kuria & 3 Others v Attorney General 2002. 2 KLR 69 thus:

> "So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies That the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

74. Accordingly, in the case of Pastoli v Kabale District Local Government Council and Others 2008. 2 EA 300 the elements That need to be proved by any party seeking judicial review were reiterated by the Court of Appeal thus:

> "In order to succeed in an application for judicial review, the applicant has to show That the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, That no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

75. Needless to point out That, in the course of a process review, the Court is at liberty to engage in some measure of analysis of the merits of the impugned decision to enable it ascertain whether or not the decision was procedurally fair for purposes of Article 47 of the Constitution and its derivative legislations. Accordingly, in Saisi & 7 Others v Director of Public Prosecutions & 2 Others 2023. KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court pointed out That:

> "For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say That the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion That the action taken was within or outside the range of reasonable responses. It was not to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception That judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of *the Constitution* which required the courts to interpret it in a manner That inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

76. With the foregoing in mind, I have given careful consideration to the evidence presented herein by the parties. This disputation revolves around the failure by the Accounting Officer of the respondent to sign the contracts within the tender validity period and the re-advertisement of the subject tenders for fresh bids. Hence, the question to pose is whether, in the circumstances, the respondent acted

illegally or irrationally; and whether the impugned actions were procedurally improper. It would also be imperative for the Court to consider the principles of proportionality and legitimate expectation.

77. First and foremost, Article 227 of the Constitution provides That:

(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..."

78. In the same vein, Article 232 of the Constitution speaks to the values and principles of public service; which include:

(a) efficient, effective and economic use of resources;

(b) responsive, prompt, effective, impartial and equitable provision of services;

(c) accountability for administrative acts;

(d) transparency and provision to the public of timely, accurate information;

(e) fair competition and merit as the basis of appointments and promotions.

79. The same principles are reiterated and expanded in Section 3 of the PPADA thus:

> Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—
>
> (a) the national values and principles provided for under Article 10;
>
> (b) the equality and freedom from discrimination provided for under Article 27;
>
> (c) affirmative action programmes provided for under Articles 55 and 56;
>
> (d) principles of integrity under the *Leadership and Integrity Act*, 2012 (No. 19 of 2012);
>
> (e) the principles of public finance under Article 201;
>
> (f) the values and principles of public service as provided for under Article 232;
>
> (g) principles governing the procurement profession, international norms;
>
> (h) maximisation of value for money;
>
> (i) promotion of local industry, sustainable development and protection of the environment; and
>
> (j) promotion of citizen contractors.

80. Accordingly, upon processing the initial tenders to the point of award and having caused the applicant to sign the contracts, it was imperative for the respondent, through its accounting officer, to ensure it signed the contracts timeously and facilitated the applicant in the discharge of its responsibilities under the contracts. Section 44(2)(f) and (g) of the PPADA is explicit on this. In addition, Section 45 of the Act provides:

(1) For the purpose of ensuring That the accounting officer's decisions are made in a systematic and structured way, an accounting officer shall establish systems and procedures to facilitate decision making for procurement and asset disposal.

(2) The procedures required under subsection (1), shall be consistent with this Act and the Regulations.

(3) All procurement processes shall be—

(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;

(b) undertaken by a procuring entity as per the threshold matrix prescribed; and

(c) undertaken in strict adherence to Article 227 of *the Constitution*.

(4) All asset disposal processes shall be handled by different persons in respect of identification, consolidation, preparation of a disposal plan, pricing and the disposal itself."

81. The responsibility for preparation of procurement contracts is, by dint of Sections 134 and 135 of the PPADA, reposed in the Accounting Officer of the procurement entity. In particular, Section 135 states in part That:

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications That emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of That notification provided That a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid."

82. Moreover, Section 176(1)(c) of PPADA, is explicit as to the respondent's obligation to ensure the contract was signed within the prescribed period. It provides That:

> "A person shall not...delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations."

83. Since there is no dispute That, in the subject procurement, the respondent did not sign the contract within the tender validity period, the question arising therefrom is whether it had a justifiable cause for the delay. In this connection, the respondent's explanation was That the tender validity period was expressly indicated to be for 184 days from the date of tender opening; and therefore That,

without extension by its Accounting Officer, the procurement process automatically lapsed on the 18th February 2023. This is because Section 88 (1) of the Act is explicit That:

> "Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend That period."

84. The respondent relied on Kivuku Agencies v Kenya Airports Authority & Another 2020. eKLR in which the Court of Appeal held:

> "Whereas Section 88 provides for an extension of tender validity, the provision is not coached in mandatory terms; it leaves it to the discretion of the accounting officer to decide whether to extend the validity...Just like the trial Judge, we cannot fault the respondents for not extending the period of validity or for not construing the period of validity was from 26th July, 2017 given That the tender document indicated it was valid for ninety (90) days from the date of issue. Furthermore, there was no request made by the appellant following the decision of the Board to the accounting officer to extend the validity period. So, we do not have any reasons to fault the respondent for opting for a fresh tender."

85. Hence, at paragraph 38, 41 and 44 of its written submissions, the respondent posited That it should neither be blamed nor held liable on account of inactions of its Accounting Officer in connection with the tender validity period. That explanation however falls short of justifying the inaction of its accounting officer in the face of the applicant's assertion That:

(a) it wrote several reminders to the respondent after the award which elicited no response from the respondent.

(b) it was assured by the respondent That the tender validity period had been extended;

(c) the respondent signed similar contracts in favour of other tenderers.

86. The documents annexed to the two affidavits filed by the applicant confirm That, upon the Letter of Award being issued by the respondent on 14th November 2022 the respondent did not prepare the contract or cause it to be signed by the applicant within the tender validity period as required by Section 135(3) of the PPADA. Hence, in the absence of any explanation to the contrary, the applicant cannot be faulted for postulating That, in failing to sign the contract in time, the respondent was merely intent on deliberately running down the clock towards expiry of the tender validity period. The same conclusion was arrived at by the Court of Appeal in Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) 2022. KECA 982 (KLR) (9 September 2022) (Judgment) thus:

> "The High Court made a finding That "the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period." The learned judge held, and rightly so in our view, That "a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct That is inimical to the constitutional principles on accountable procurement processes in public procurement." The 1st respondent's contention was That in appropriate cases the 2nd respondent is bestowed with powers under the PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process."

87. It was therefore duplicitous for the respondent to argue That the applicant slept on its rights and failed to move the Review Board for a remedy of extension of the tender validity period. Indeed, Section 88(2)

of the PPADA places the responsibility of extension of the tender validity period on the accounting officer. It provides That:

> "The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender."

88. Moreover, the applicant endeavoured to show That the respondent assured it That the tender validity period had been extended vide its emails dated 19th February 2023. The emails, written in respect of each of the four contracts, read as hereunder:

> "Please take note That following extension of tender validity period for a limited time the contracts will be ready for pick up from KPA legal offices on Monday 20th February 2023. You are therefore requested to make arrangements to have the contracts collected on Monday, have them executed and returned on the same date. Apologies for the short notice..."

89. There being credible evidence That the applicant complied by collecting and signing the contracts on 20th February 2023 and returning the same to the respondent on the same date as instructed, there can be no justification for the failure by the respondent to sign the said contracts on the same date. It is noteworthy That the respondent evidently signed similar contracts on the same date of 20th February 2023. The said contracts are annexed to the applicant's Further Affidavit as Annexure SS-1. It is also significant That, since the 18th February 2023 was a Saturday, the signing of the contracts on 20th February 2023 was well within the tender validity period by dint of Section 57 of the *Interpretation and General Provisions Act* regarding computation of time. The provision states:

> In computing time for the purposes of a written law, unless the contrary intention appears –
>
> (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
>
> (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if That day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."

90. In the circumstances, there was no justification for the ostensible termination of the initial contracts by the respondent. Moreover, Section 63 of the PPADA recognizes That the respondent could only terminate the procurement proceedings before, and not after notification of tender award. The provision is explicit That:

> (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence That prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

91. There is no indication at all That the aforementioned requirements were complied with by the respondent. In the premises, I am satisfied That the respondent's decision to cancel the initial awards made to the applicant in respect of Tenders Numbers KPA/136/2021-22/CE-Framework Agreement for Drainage & Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking is so fraught, not only with illegalities as pointed out herein above, but also with procedural improprieties, to warrant the intervention of the Court.

92. Additionally, having been issued with Letters of Award and required by the respondent to sign the subject contracts, the applicant had the legitimate expectation That it would be furnished with duly signed copies thereof to enable it commence implementation. In this regard, the Supreme Court of Kenya pronounced itself thus in Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others 2014. eKLR:

> (263) "Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council, 1986. A.C. 668 at 692 (Lord Bridge):
>
> > ...the courts have developed a relatively novel doctrine in public law That a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".

(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation That is within its power to fulfil. A party That seeks to rely on the doctrine of legitimate expectation, has to show That it has locus standi to make a claim on the basis of legitimate expectation.

93. Upon reviewing both local and comparative jurisprudence on the point, the Supreme Court concluded thus at paragraph 269. of its Judgment:

> The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

94. In this instance, the applicant has demonstrated That it was issued with a Letter of Award for purposes of Section 87 of the PPADA; and That it was thereafter invited to sign and did sign the subject contracts on the assurance That the tender validity period had been extended by the respondent's accounting officer. Nevertheless, the reality of the matter is That failure on the part of the respondent to sign the subject contracts within the tender validity period had the effect of rendering the contract null and void from the standpoint of Section 135(3) of the PPADA, which is explicit That:

> The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of That notification provided That a contract shall be signed within the tender validity period.

95. Thus, the inescapable conclusion is That the contracts became null and void for all intents and purposes and are therefore incapable of resuscitation. (See Kivuku Agencies v Kenya Airports Authority's Accounting Officer & Another (supra). Indeed in Mcfoy v United Africa Company Limited 1961. 3 AllER 1169, Lord Denning held:

> "...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..."

C. On whether the applicant is entitled to the orders sought:

96. The applicant prayed for orders of Mandamus, Certiorari and Prohibition. In respect of the scope and efficacy of the order of Mandamus, Halsbury's Law of England, 4th Edition, Volume 1 states thus at page 111:

> "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end That justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing That right; and it may issue in cases where, although there is an alternative legal remedy, yet That mode of redress is less convenient, beneficial and effectual."

97. In respect of the remedies of Certiorari and Prohibition, the Court of Appeal had the following to say in Kenya National Examinations Council v Republic, Ex-Parte Geoffrey Gathenji Njoroge & Others 1977. eKLR:

> "The remedies of certiorari and prohibition are tools That the court uses to supervise public bodies and inferior tribunals to ensure That they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated;
>
> > "Certiorari deals with decisions already made ... Such an order can only be issued where the court considers That the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

98. The Court then proceeded to state thus:

> "What does an ORDER OF PROHIBITION do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids That tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law Of England, 4th Edition, Vol.1 at pg.37 paragraph 128...The point we are making is That an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition..."

99. Accordingly, the orders That commend themselves to me, and which I hereby grant, having taken into account all the foregoing pertinent factors, are as follows:

(a) That an order in the nature of Mandamus be and is hereby issued compelling the respondent to terminate the procurement for the supply of services in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement

for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation.

(b) That an order in the nature of Prohibition be and is hereby issued prohibiting the respondent from sending out invitation to tender for bids or continuing with procurement proceedings in respect of tender numbers KPA/177/2022-23/CE-Framework Agreement for Concrete Works, KPA/178/2022-23/CE-Framework Agreement for Road Works, KPA/179/2022-23/CE-Framework Agreement for Specialized Painting Roads & Yard Marking and KPA/181/2022-23/CE-Framework Agreement for Drainage and Water Reticulation which the applicant had been awarded as tender numbers KPA/136/2021-22/CE-Framework Agreement for Drainage and Water Reticulation, KPA/137/2021-22/CE-Framework Agreement for Road Works, KPA/138/2021-22/CE-Framework Agreement for Concrete Works and KPA/145/2021-22/CE-Framework Agreement for Specialized Painting for Roads and Yard Marking.

(c) That an order in the nature of Mandamus be and is hereby issued compelling the respondent to re-advertise the subject tenders to enable all eligible bidders, including the applicant, to participate therein.

(d) That each party to bear own costs of these proceedings.

(e) The Judgment and Orders issued herein to likewise apply to Judicial Review Applications No. E020, E021 and E023 of 2023.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF DECEMBER 2023

OLGA SEWE

JUDGE