



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E218 OF 2021

OKIYA OMTATAH OKOITL.....PETITIONER

-VERSUS-

THE NATIONAL TREASURY AND PLANNING.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

KINGSWAY BUSINESS SYSTEMS CONSORTIUMS

(comprising of Business Systems Limited,

Kobby Technologies Limited and Inplenion Eastern Africa Limited).....3RD RESPONDENT

-AND-

ORACLE TECHNOLOGY SYSTEMS (KENYA) LIMITED.....INTERESTED PARTY

RULING NO. 1

Background:

1. Pursuant to the order of this Court made on 29th July, 2021, the parties filed their respective submissions on the competency of the Petition herein and the jurisdiction of this Court in view of the alternative dispute resolution mechanism provided under Part XV of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as '*the Act*') and some related matters which were either finalized or were pending.

2. The matters were: -

(i) Public Procurement Administrative Review Board (PPARB) Application No. 18/2021, ADK Technologies & Another -vs- The Principal Secretary National Treasury and Planning & Others.

(ii) Nairobi High Court Judicial Review No. E027 of 2021 Republic -vs- PPRAB & 3 Others ex-parte ADK Technologies

(iii) Nairobi Court of Appeal Civil Application No. E134 of 2021 ADK Technologies & Others -vs- PPARB.

3. The submissions were quite elaborate and referred to several decisions. This Court is indeed grateful to all the parties.

Analysis:

4. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will take into account the

parties' positions, arguments and decisions referred to in the discussion herein.

5. Having carefully considered this matter, I find that the following issues are for determination: -

(a) Whether the complaints raised by the Petitioner against the Respondents are pre-mature and debarred by the doctrine of exhaustion.

(b) If the answer to (a) above is in the negative, whether the Petition is debarred by either the doctrine of res judicata or the doctrine of sub-judice.

6. I will begin with the first issue.

(a) Whether the complaints raised by the Petitioner against the Respondents are pre-mature and debarred by the doctrine of exhaustion:

7. Whereas the parties did not come out clearly to address the doctrine of exhaustion, nevertheless they variously spoke to the doctrine in the submissions. As such, I will deal with the nature and the legal position in respect to the doctrine of exhaustion, but first the background of this matter.

8. The Respondents' case is that the dispute before Court ought to have been instead dealt with under Part XV of the Act. The part deals with Administrative Review of Procurement and Disposal Proceedings. In short, it was contended that the dispute ought to have been dealt with under the mechanisms provided for in Part XV of the Act instead of the current proceedings.

9. It was pleaded and submitted that the National Treasury, the 1st Respondent herein, sought to procure for Provision of Onsite Support for IFMIS E-Procurement & Independent Integrated Financial Management System for Semi-Autonomous Government Agency (SAGA) (hereinafter referred to as "*the Services*") vide Tender Number TNT/049/2019-2020 (hereinafter referred to as "*the Tender*").

10. Kingsway Business Systems Limited, Kobby Technologies Limited and Inplention Eastern Africa Limited, the 3rd Respondent herein, procured the Tender Document which among others, detailed the requirements, tendering procedures, and applicable guidelines. The 3rd Respondent completed its proposal and subsequently submitted it as required under the Tender Document. Upon closing on 22nd July, 2020 the 1st Respondent undertook the process of tender evaluation and by a letter dated 25th January, 2021, the 3rd Respondent was notified by the 1st Respondent that its bid had been accepted.

11. The 3rd Respondent was required to express its acceptance within 14 days'. The letter also indicated that the 3rd Respondent would be notified when the contract was ready for signing.

12. By a letter dated 26th January, 2021 and received by the 1st Respondent on 2nd February, 2021, Kingsway Business Systems Limited, as lead bidder, accepted the notification of award. On 8th February, 2021, ADK Technologies Limited in consortium with Transnational Computer Technology Limited filed a Request for Review and Statement in Support of the Request for Review (hereinafter referred to as "*the Request for Review*") before the Public Procurement Administrative Review Board (hereinafter referred to as "*the Board*"). They challenged the reason its bid was declared unsuccessful. That was under PPARB Application No. 18 of 2021.

13. The contract was signed between the 3rd Respondent and the Accounting Officer of the 1st Respondent on 9th February, 2021. The 1st Respondent was thereafter served with the Request for Review filed on 8th February, 2021.

14. The Board heard the Request for Review. It rendered its ruling on 1st March, 2021 where the Request for Review was struck out on account of lack of jurisdiction on the part of the Board. The Board *inter alia* stated that '*... the Request for Review application was not properly filed before this Board, noting that there was no evidence provided of authorization to file the Request for Review on behalf of the Applicant, this being, M/s ADK Technologies Limited in consortium with Transnational Computer Technology Limited and thus the Request for Review Application is fatally defective*'.

15. The Board made the following final orders: -

a. The Request for Review filed on 8th February 2021 with respect to Tender No. TNT/049/2019-2020 for Provision of Onsite Support for IFMIS E-Procurement & Independent Integrated Financial Management System for Semi-Autonomous Government Agency (SAGA) be and is hereby struck out.

b. Each party shall bear its own costs in the Request for Review.

16. Aggrieved by the decision of the Board, Transnational Computer Technology Limited filed judicial review proceedings before the High Court under HCJR Case No. E027 of 2021 with ADK Technologies Limited in consortium with Transnational Technology Computer Limited named as the Ex-parte Applicant. The Ex-parte Applicant questioned the propriety of the Board's decision-making process.

17. The High Court heard the judicial review application and delivered its Judgement on 9th April, 2021. The Court struck out the application for being bad in law and an abuse of the court process.

18. On 29th April, 2021 Transnational Computer Technology Limited, expressed its intention to file an appeal at the Court of Appeal through Civil Application No. E134 of 2021, wherein it sought orders for extension of time for lodging its Notice of Appeal in the intended appeal arising out of the Judgement of the High Court in HCJR E027 of 2021 and that the Notice of Appeal lodged on 28th April, 2021 be deemed as properly filed.
19. The Court of Appeal rendered its Ruling on 9th July, 2021 wherein it extended time for filing of the Notice of Appeal and stated that the Notice of Appeal lodged with the Deputy Registrar on 28th April, 2021 be deemed as having been duly filed within time.
20. It was submitted that following the ruling by the Court of Appeal, the Appellant has so far taken further steps such as requesting the Deputy Registrar for typed and certified proceedings and for a copy of a decree for purposes of the Appeal. It is, hence, submitted that at the moment, there exists an appeal at the Court of Appeal since Section 2 of the Court of Appeal Rules defines an appeal to include ‘an intended appeal’.
21. The Respondents reiterated that in all the matters before the Board, the High Court and the Court of Appeal, the Applicant is listed as “ADK Technologies Limited in consortium with Transnational Computer Technology Limited”, even though in actual fact, the Applicant/Litigant is Transnational Computer Technology Limited.
22. ADK Technologies Limited opposed the cases on the basis that it did not authorize the filing of the cases and it was not interested in being involved in litigation, having already accepted the outcome of the procurement process.
23. It is on the basis of the foregoing that the Petitioner contended that the provisions of Part XV of the Act do not apply to the Petition before Court since the Petitioner was not a party in the procurement process and that he filed the Petition in public interest.
24. The Petitioner specifically rendered the following response in his supplementary submissions: -
- 18. Under this section it is clear that only a candidate or a tenderer has the locus to institute a request for review before the Review Board*
- 19. Since the petitioner was neither a candidate nor a tenderer, he has no standing before the PPARB.*
- 20. Section 170(d) does not confer jurisdiction on the PPARB to allow third parties to move the Review Board.*
- 21. Section 170 is subtitled “Parties to review” and 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.*
- 22. The Interested Party argues erroneously that the expression “such other persons as the Review Board may determine” in clause (d) above vests jurisdiction in the PPARB to admit third parties to institute proceedings before the Board. Nothing could be further from the truth given the fact that Section 7(a) distinguishes “the person who requested the review” from the other three categories of parties to review.*
- 23. Consequentially, “such other persons as the Review Board may determine” cannot be the “the person who requested the review.” The “person who requested the review” is predetermined by law under Section 167(1) of the Act, which provides:*
- 167. Request for a review*
- (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.*
- 24. The PPARB has no capacity under any law including Section 170(d), to override the very clear and express provisions of Sections 167(1) and 170(a) and vest standing in any party who was not a candidate or a tenderer to institute proceedings before it.*
- 25. Hence, having not been a candidate or a tenderer, the Petitioner submits that he does NOT have standing to institute proceedings before the PPARB under any circumstances, and the Review Board has no jurisdiction to vest him with locus standi to move it.*
- 26. The Petition raises weighty grounds of gross violation of the Constitution and the Public Procurement and Asset Disposal Act by the Respondents and therefore the High Court has competent jurisdiction to address those issues.*

27. As rightly put by the Interested Party and supported by the holding in the Kenya Pipeline Company Limited case the PPARB is equipped to handle disputes relating to breach of duty by procurement entity. It is our submission that PPARB is not vested with powers to look into Constitutional violations as alleged by the Interested Party and as such the High Court is vested with such jurisdiction to address constitutional violations.

28. Contrary to the Interested Party's assertion in paragraph 31-34, it is our position that the interested party herein has an identifiable stake in the petition.

29. The interested party's position taken in this petition clearly indicates that they are in bed with the Respondents. They are prosecuting and aiding the Respondents more than it should. Their involvement in the tendering process traces back to their letter dated 2nd February, 2021 and produced as exhibit DB3 and which letter the National Treasury placed reliance and formed an opinion that the Kingsway consortium met the mandatory tender requirements under Instruction to Tenderers No. 2.20.1 of the Tender.

25. Having captured the parties' submissions on the issue, I will now deal with the legal position of the doctrine of exhaustion and its applicability in this matter.

26. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a)...

(b)...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

27. Clause 3 is on traditional dispute resolution mechanisms.

28. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:

*52. 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 and was aptly elucidated by the High Court in **R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, where the Court opined thus:*

*42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in the following oft-repeated words:*

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.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

*This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:*

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.

29. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

*59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In **R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra)**, after exhaustively*

reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

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. 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. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. **Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion . This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.**

30. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 **Kenya Ports Authority v William Odhiambo Ramogi & 8 others** [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

31. Further, in Civil Appeal 158 of 2017, **Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. 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.

32. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

33. In this matter, the Petitioner contended that the alternative process provided for under Part XV of the Act was not applicable to him on account of not having been a party to the procurement process. He also contended that it is only this Court that can remedy the violations of the Constitution.

34. I will now consider whether the exceptions to the doctrine of exhaustion apply to the Petitioner and in the circumstances of this matter.

35. First in line is whether the Petitioner had audience before the Board. For ease of this discussion, I will reproduce Part XV of the Act, and as under: -

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(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.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) 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.

168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

169. Rejection of requests by Review Board Secretariat

The Review Board Secretariat shall reject a request for a review where no appeal fees were paid within the prescribed time.

170. Parties to review-

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.

171. Completion of review

(1) The Review Board shall complete its review within twenty one days after receiving the request for the review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process.

174. Right to review is additional right

The right to request a review under this Part is in addition to any other legal remedy a person may have.

175. Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
- (2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
- (3) The High Court shall determine the judicial review application within forty- five days after such application.
- (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
- (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
- (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
- (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

36. There is no doubt that Part XV deals with dispute resolution mechanisms within the Act. But, what is the Act all about? The Preamble to the Act states as follows: -

AN ACT of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes

37. Article 227 of the Constitution provides as under: -

Procurement of public goods and services

- (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 and may provide for all or any of the following—
 - (a) categories of preference in the allocation of contracts
 - (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
 - (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

38. Section 3 of the Act provides the values and principles that ought to guide public procurement and asset disposal. The provision states as follows: -

3. Guiding principles

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.*

39. It is, therefore, clear that the Act fuses the relevant aspects of the Constitution such that whenever the Act is applied, that can only be within the confines of the Constitution. It, hence, means that the Board, being a creature of the Act must, in discharging its mandate, uphold and defend the Constitution. Of course that calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in Article 260 of the Constitution, has an obligation to respect, uphold and defend the Constitution.

40. Putting it more succinctly, the Board has the jurisdiction to determine whether the Constitution and the law were violated by a procuring public entity in respect to public procurement and assets disposal proceedings.

41. Having so found, I return to the germane question as to whether the Petitioner had audience before the Board.

42. Section 170 of the Act provides for the parties to a review. The parties are as follows: -

- (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.

43. There is no doubt that the Petitioner did not fall within the first three categories of the parties. That is because the Petitioner is not the person who requested for the review, the Petitioner is not the accounting officer of the National Treasury and he is not the tenderer notified as successful by the National Treasury.

44. In order to ascertain if the Petitioner falls under the persons contemplated under the category of '*such other persons as the Review Board may determine*', suffice to note that the impugned procurement of the services was public in nature. The system of procurement was, hence, called upon to attain the constitutional muster of being fair, equitable, transparent, competitive and cost-effective.

45. In order to understand the context in which the term '*such other persons as the Review Board may determine*' is used in Section 170 of the Act, there is need to look at one of the rules of interpretation. That is the ***ejus dem generis rule***.

46. The *ejus dem generis* rule is an interpretational principle in law. It is a rule of construction that guides Court in reconciling any incompatibility between specific and general words.

47. *Stroud's Judicial Dictionary* 3rd Edition, defines the principle as follows:

Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such

enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as *ejus dem generis* with, and not of a quality superior to, or different from, those specifically enumerated.

48. The *Black's Law Dictionary*, Garner A. Bryan, 9th Edition, Thomson Reuters 2009 at page 594 defines the doctrine in the following manner: -

A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals –despite its seeming breadth- would probably be held to include only four-legged, hooped mammals typically found on farms, and thus would exclude chickens.

49. Therefore, where general words follow specific words in an enumeration describing the legal subject, *ejus dem generis* principle requires that the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.

50. The rule, therefore, accomplishes the purpose of giving effect to both the specific and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.

51. In his treatise titled *Sutherland Statutory Construction* 3rd Edition, 1984, Horrack Sutherland states at paragraph 4910 that for the doctrine to apply, the following conditions must exist: -

(i) That statute contains an enumeration by specific words;

(ii) The members of the enumeration constitute a class;

(iii) The class is not exhausted by the enumeration;

(iv) A general term follows the enumeration; and

(v) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

52. The Court of Appeal in Nairobi Civil Appeal 351 of 2012 **Commissioner for the Implementation of the Constitution -vs- Attorney General & 2 others [2013] eKLR** clearly brought out the application of the doctrine. Before it was the question whether 'the marginalized' fell within the category of persons named in Article 97(1)(c) of the Constitution. The said Article is in respect of Membership of the National Assembly and states as follows: -

97. (1) The National Assembly consists of-

(b) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

53. The Learned Judges of Appeal spoke to *ejus dem generis* in reference to the High Court decision in *Rangal Lemeguran & Others -vs- Attorney General & 2006 eKLR*, where in interpreting the term special interests the High Court observed as follows: -

Although the Constitution does not define special interests contemplated by Section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent.

54. The Judges then agreed with the proposition that 'the marginalized' fell into the group anticipated by the Article 97(1)(c) of the Constitution. The Judges had the following to say on the doctrine: -

... there are some clear categories of people that qualify to be viewed as representing special interests, namely:

(i) ethnic minorities

(ii) the youth;

(iii) the blind;

(iv) the deaf;

(v) the physically disabled.

We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the Constitution has also in the wisdom of the framers and the people of Kenya made inclusion of “workers” as a special interest group.

From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both Section 34(9) of the Elections Act and Article 97(1) (c) of the Constitution.

That being our view of the matter, we agree with the appellant that an interpretation of Article 97(1)(c) of the Constitution invites the application of the *ejus dem generis* rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them.

55. From the foregoing, the category of persons contemplated as ‘such other persons as the Review Board may determine’, in Section 170 of the Act could only mean such persons who are in a way interested in the outcome of a certain procurement or disposal process. I say so because if a person has no interest in an outcome of a procurement or disposal process, then such a person has no business appearing before the Board.

56. A person considering himself, herself or itself, as having sufficient interest in a procurement or disposal process and who is not among the person who requested for the review, or is not the accounting officer of the procuring entity and is not the tenderer notified as successful by the procuring entity, has the right to seek audience and demonstrate its interest before the Board. It, however, remains the discretion of the Board to either allow such a person to participate in the proceedings before it or not. The only exception to this requirement is when such a party demonstrates that the exceptions to the doctrine of exhaustion apply in his/her/its favour.

57. In this matter, there is no contention in the manner in which the tender was advertised. As such, this Court finds that the tender was sufficiently advertised and the Petitioner is deemed to have had sufficient notice of the procurement process.

58. According to the Petitioner, his contention is summed up in his supplementary submissions at paragraph 13 as follows: -

As a consequence of the foregoing, the Interested Party’s consortium failed to comply with the requirement of a minimum of two (2) Oracle Partner Specialization or Advanced Specialization for the requested products aforesaid as required by the said Technical Mandatory Criteria No. 8 under Instruction to Tenderers No. 2.20.1.

59. The Petitioner was, therefore, interested in the outcome of the procurement process. The extent to which the Petitioner was aggrieved by the said process related to the alleged failure by the consortium to comply with the requirements in the tender.

60. I have perused the Request for Review filed before the Board against the award. The request variously challenged the award of the tender and eventually sought the following orders: -

- i) An order setting aside the 2nd Respondent's decision as communicated to the Applicant in the letter dated 25th January 2021;*
- ii) An order declaring the tender/bid presented by the Interested Party, Kingsway Business Systems Limited in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited non-responsive;*
- iii) An order nullifying the letter of award with respect to Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS Enhancement of Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA) issued by the Procuring Entity to Kingsway Business Systems Limited in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited.*
- iv) An order directing the 2nd Respondent to award the subject tender to the Applicant following a review by the Board of the procurement proceedings leading to the decision by the 2nd Respondent to award Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA);*
- v) An order directing the 2nd Respondent to conduct a re-evaluation of Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) in a manner that complies with the provisions of both the law and the Tender Document and award the subject tender to ADK Technologies Limited in Transnational Computer Technology Ltd; consortium with*
- vi) An order directing the Respondents to pay the costs of and incidental to these proceedings;*
- vii) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders*

61. In the Petition before this Court, the Petitioner also challenged the procurement process alleging that the process contravened several

provisions of the Constitution and the Act and as a result the tender was non-responsive. The challenge was, therefore, squarely on the manner in which the procurement process was undertaken by the 1st Respondent.

62. In the end, the Petitioner sought for the following prayers: -

i) A declaration that Kingsway Business Systems Consortium or its individual members did not meet the mandatory minimum qualification number 8 sought in the Tender document, which requirement stated that the bidder must have a MINIMUM OF TWO (2 No.) Oracle Partner Specialization or Advanced Specialization for the requested products i.e. Oracle EBS Financial, Oracle EBS Supply Chain, Oracle SOA, Oracle Hyperion, Oracle BI and Oracle Database & Options and, therefore, were ineligible for award in Tender No. TNT/049/2019-2020 for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA).

ii) A declaration that the award by the National Treasury & Planning to Kingsway Business Systems Consortium of Tender No. TNT/049/2019-2020 for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA) was unlawful and unconstitutional and, therefore, invalid null and void ab initio.

iii) An order annulling and quashing the award by the National Treasury & Planning to Kingsway Business Systems Consortium of Tender No. TNT/049/2019 2020 for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA).

iv) An order compelling the National Treasury & Planning to, strictly according to the law, re-evaluate and award Tender No. TNT/049/2019-2020 for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA)

v) An order compelling the respondents to bear the costs of this suit.

vi) Any other relief the court may deem just to grant.

63. In his submissions against the applicability of the doctrine of exhaustion, the Petitioner raised two issues. They are that the Board has no jurisdiction to grant the remedies sought and that the Petitioner was not a party in the procurement process.

64. The said issues have been addressed above. For emphasis, Section 173 of the Act accords the Board wide powers when dealing with a Request for Review. For instance, the Board may annul anything the accounting officer of a procuring entity has done in the procurement or disposal proceedings, including annulling the procurement or disposal proceedings in their entirety; give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings or it may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.

65. The Board may also order the payment of costs as between parties to the review in accordance with the scale as prescribed and may also order termination of the procurement process and commencement of a new procurement process.

66. Looking at the prayers sought in the Petition and the remedies which the Board may grant upon handling a request for review, there is no doubt that it is within the Board's jurisdiction to grant any of the prayers sought in the Petition once a Request for Review is successful.

67. The Act further provides for elaborate appellate avenues in the event a party is dissatisfied with the outcome of the Board in handling a Request for Review.

68. Having said so, it is the finding and holding of this Court that the current dispute could have been competently lodged before the Board and that the remedies sought by the Petitioner in the current proceedings were all available before the Board.

69. This Court has also dealt with the issue of the Petitioner's audience before the Board. Given the nature of the Petition and the remedies sought, it is the finding and the holding of this Court that the Petitioner was an appropriate party to seek audience before the Board. However, the Petitioner failed to do so.

70. The foregoing discussion is, therefore, sufficient to dispose of the first issue. This Court now finds that the Petitioner failed to discharge the burden in not demonstrating that the Petition herein fell within any of the exceptions to the doctrine of exhaustion. For clarity, the two exceptions are, first, when it is proved that the alternative dispute resolution mechanism will not serve the values enshrined in the Constitution or law. The second exception is when a party lacks adequate audience before the alternative forum created by a statute, or may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in the suit.

71. As said, the Petitioner has failed to demonstrate that at least one of the exceptions apply in the circumstances of the case.

72. Consequently, this Court answers the first issue in the affirmative.

73. With the foregoing finding, it is the position of this Court that the consideration of the other issues will not aid the Petitioner in any way whatsoever. The Court, hence, opts to end the matter here.

74. In sum, this Court hereby makes the following final orders: -

(a) This Court lacks jurisdiction to entertain the Petition on account of the doctrine of exhaustion.

(b) The Petition and the Notice of Motion dated 11th June, 2021 are hereby struck out.

(c) Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 27th day of January, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Okiya Omtatah Okoiti, the Petitioner in person.

Miss Waiganjo, Counsel for the 3rd Respondent.

Miss. Akal, Counsel for the Interested Party.

Elizabeth Wanjohi – Court Assistant.