



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 200 OF 2020

CONSOLIDATED WITH PETITION NO. M007 OF 2021

(FORMERLY PETITION NO. 42 OF 2020 (MOMBASA))

LAW SOCIETY OF KENYA.....1ST PETITIONER

WILLIS ODUOR OLUGA.....2ND PETITIONER

-VERSUS -

KENYA PORTS AUTHORITY.....1ST RESPONDENT

PUBLIC PROCUREMENT & REGULATORY AUTHORITY.....2ND RESPONDENT

JUDGMENT

THE 1ST PETITIONER'S PETITION

1. The 1st Petitioner moved this Honourable Court vide petition dated 16th June 2020 and supported by the affidavit of Mercy Wambua of even date. It is the 1st Petitioner's case that the contents of tender KPA/160/2019-20/BLS put up by the 1st Respondent in June 2020 offends **Article 227 of the Constitution, Sections 55, 60 and 70 (3) of the Public Procurement and Asset Disposal Act, 2015(PPAD) and Sections 21(3) (c) (d) (i) of the Competition Act No. 12 of 2012.**

2. The 1st Petitioner in its Petition therefore seeks the following orders:-

a) An order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the KPA/160/2019-20/BLS, June2020.

b) An order of Prohibition be and is hereby issued to prohibit and / or restrain the 1st Respondent from in any manner implementing or seeking to enforce the implementation of, or further implementation of, KPA/160/2019-20/BLS, in June 2020, titled " PREQUALIFICATION OF LAW FIRMS FOR PROVISION OF LEGAL SERVICES TO KENYA PORTS AUTHORITY".

c) That an order do issue directing the 2nd Respondents to consider any further requests for prequalification for legal services by the 1st Respondent and consequently consider, advise and ensure that it complies with requirements of legality in terms of Article 227 of the Constitution and any other applicable law.

d) The costs of the Petition be provided for.

2ND PETITIONER'S PETITION

3. The 2nd Petitioner similarly moved this Honourable Court vide a Petition dated 30th June 2020 and supported by the affidavit of Willis Oduor Oluga of even date and Supplementary affidavit sworn on 21st July 2020. The genesis of this Petition is a **Tender Notice No.**

KPA/160/2019-20BLS-Prequalification of Legal Services put up by the 1st Respondent on 9th June 2020. The Petitioner avers that the said tender notice contravenes **Articles 27 (1), (2), 28, 227(1) of the Constitution** and **Section 60 of the Public Procurement and Asset Disposal Act, 2015 (PPAD)**.

4. Accordingly, the 2nd Petitioner seeks the following reliefs:-

- a) A declaration be and is hereby issued that the mandatory condition imposed by the Respondent in the Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring at least one partner in the bidding law firms to be a certified Arbitrator is illegal, discriminatory, excessive, oppressive, prohibitive, unfair, unjustified, unconstitutional and therefore null and void.*
- b) A declaration be and is hereby issued that the criteria set by the Respondent to evaluate Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring at least one partner to have 20 years post admission experience for Category A and 15 years post admission experience for Category B is oppressive, prohibitive, unconstitutional unfair, unjustified, unreasonable and therefore null and void.*
- c) A declaration be and is hereby issued that the criteria set by the Respondent for evaluating Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring only partners to attain the stated number of years is baseless, discriminatory, unfair, unjustified, unreasonable and therefore null and void.*
- d) An order of prohibition be and is hereby issued to prohibit and restrain the Respondent from receiving, assessing, considering, evaluating and processing bids and tender documents received from law firms in respect of Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services in its current form.*
- e) An order of mandamus be and is hereby issued compelling the Respondent to re-advertise the tender for prequalification of legal services in conformity with the law and just procurement principles and in proper, open and objective manner devoid of the illegal, oppressive, prohibitive and unconstitutional requirements, conditions and evaluation criteria impugned in this case.*
- f) The cost of this petition be paid by the Respondent.*
- g) Any further relief or order that this Honourable Court shall deem just and fit to grant.*

THE 1ST RESPONDENT'S RESPONSE TO THE PETITIONERS' PETITIONS

5. The 1st Respondent responded to the 1st Petitioner's Petition by filing Notice of Preliminary Objection and grounds of opposition dated 24th June 2020 together with replying affidavit sworn by John Turasha Kinyanjui on even date. The Respondent equally filed the said documents in response to the 2nd Petitioner's Petition dated 13th July 2020. The summary of the grounds in the Preliminary Objections are:-

- i. This court is divested of jurisdiction to hear and determine the Petition in the first instance by virtue of doctrine of exhaustion.*
- ii. The issues raised in the Petition emanate from a public procurement process commenced by way of the 1st Respondents tender No. KPA/160/2019-20/BLS therefore Court lacks jurisdiction to hear issues raised therein pursuant to provisions of Article 169 (1) and (2) of the Constitution, Sections 28, 16 , 173, 9, 35 and 38 of the Public Procurement and Asset Disposal Act and Sections 9, 31, 36 and 37 of the Competition Act No. 12 of 2010.*
- iii. The Petition has been filed prematurely without due regard to the express provisions of Section 94(5) of the PPAD Act and Clause 2.5 of the invitation to candidates in the Tender document.*
- iv. The Petition has been filed in absolute disregard of Section 60(1), 70(6) (a) and (c) 93 (4) (b) of the PPAD Act, Regulation 68(3) of Procurement and Asset Disposal Regulations, 2020 and Clause 5 of Appendix to Instructions to Candidates which states the Objectives and the Assignment for purposes of tender.*
- v. The issues raised are not constitutional to warrant the invoking of this court's jurisdiction granted under Article 165 (3) of the Constitution.*
- vi. The Petitions are misconceived, frivolous, vexatious and an abuse of the court process.*

6. In response to the Petitions, the 1st Respondent further avers the tender is compliant with **Articles 227, 55 (b) and (c) of the Constitution** and **Sections 3, 60, 70 and 93 of the PPAD Act** and the attendant regulations as well as the Competition Act. It urges that it has employed 10 lawyers to handle its legal matters hence the tender seeks to prequalify a panel of external lawyers who can provide legal services as and when required only when there is lack of internal capacity.

7. It also contended that the tender is descriptive of its procurement need which it is best placed to determine what its procurement needs for legal services are, and not the Petitioner. It is averred that the 1st Petitioner has also not provided evidence on the allegations of engagement in restrictive trade practices and collusive trading.

8. It is also stated that the petitioners have offended the doctrine of exhaustion by dint of **Article 169 (1) & (2) of the Constitution** and that they should have submitted themselves to the relevant authorities before invoking the jurisdiction of this Court.

9. It also argues that the petitions do not raise constitutional moments and urges the same to be struck out.

ANALYSIS AND DETERMINATION

10. Having carefully considered the petitions, the 1st respondent's response, parties' submissions, and authorities relied upon, I find that the following issues arise for determination: -

a) Whether this court has jurisdiction.

b) Whether the tender is in violation of the Constitution.

A. WHETHER THIS COURT HAS JURISDICTION.

11. Relying on **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696 and Oraro v Mbaja [2005] eKLR and Article 165 (3) (b) and (d) (ii) of the Constitution**, the 1st Petitioner submitted that the preliminary objection is untenable and is for dismissal as it does not meet the criteria for a preliminary objection and affirmed that this court has jurisdiction by virtue of **Article 165(3) (b) and (d) (ii) of the Constitution**. The 1st Petitioner argued that neither the Public Procurement Review Board (PPARB) nor the Public Procurement Regulatory Authority (PPRA) can handle matters on violation of rights; further the 1st Petitioner stated that it was neither a tenderer nor a candidate hence not subject to the said statute; and neither the PPARB nor the PPRA can issue the Judicial Review Orders sought by it.

12. In support of the aforesaid proposition the 1st Petitioner placed reliance in the cases of **AI – Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2others [2017]eKLR and Philip Nyandika (Suing on his behalf and on behalf of the general public) v National Government CDF- Bomachoge Borabu Constituency [2019] eKLR**.

13. The 2nd Petitioner on his part while relying on **Article 165 (3) (b) & (d) (ii) , Section 174 of the PPAD Act**, and the cases of **Okiya Omtatah Okiiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR and Okiya Omtatah v Central Bank of Kenya & 7 others [2018] eKLR**, argued that this Court has the jurisdiction to handle the issues raised in the Petition which the Public Administrative and Review Board does not; have. The 2nd Petitioner in addition urged that they are not subject to the Public Procurement Administrative Review Board (PPARB) as they were neither tenderers nor candidates; and that they are allowed to seek any other remedy. Further, it is 2nd Petitioner's contention that the issues raised in the 1st Respondent's preliminary objection do not qualify as Preliminary objection.

14. The 1st Respondent while invoking the doctrine of exhaustion, argued that the Petitioners have not pursued any of the available statutory mechanisms in this case, thus the Public Procurement Administrative Review Board (PPARB), the Public Procurement Regulatory Authority (PPRA) and the Competition Authority and urges that the Petitions ought to be struck out for such failure.

15. The 1st Respondent placed reliance in support of the aforesaid proposition in **Article 169 (1) (d) of the Constitution, Sections 9, 27, 28, 35, 38 167, 173 of the Public Procurement and Asset Disposal Act, Sections 9, 31, 36 and 37 of the Competition Act No. 12 of 2010** and in the cases of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR; Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR; Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR; and Republic v Public Procurement Administrative Review Board & another; Waso Resource Development agency (Interested Party) Ex Parte: Pastoralists Initiative for Development an Advocacy [2020] eKLR**.

16. It is trite law that jurisdiction is everything and without it a court must down its tools as was enunciated in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

17. As regards preliminary objections, the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696** sets out the criteria for preliminary objection. The case at hand requires the Court to get into the facts of the case before determination. It therefore does not meet the threshold for a preliminary objection. In my view, the doctrine of exhaustion, does not also apply in this matter as the Petitioners were neither candidates nor tenderers. On the issues raised I have considered the same and I am satisfied that they are constitutional issues as clearly pleaded in the Petitions. The Petitioners herein therefore cannot be subject to the bodies cited by the 1st respondent as was held in **Republic vs Independent Electoral and Boundaries Commission & another Ex parte Coalition for Reform and Democracy & 2 others [2017] eKLR and Okiya Omtatah v Central Bank of Kenya & 7 Others [2018] eKLR**.

18. I further note that by dint of **Section 174 of the PPAD Act**, persons such as the Petitioners herein aggrieved by the decision of the 1st Respondent but who cannot subject themselves to the **PPARB** can seek alternative remedy under the provisions of the law as was held in **Elias Mwangi Mugwe vs Public Procurement Administrative Review Board & 5 others [2016] eKLR**. Lastly, by virtue of **Article 165 (3) (b) and (d) (ii) of the Constitution**, this Court has the jurisdiction to handle this matter. I find no merits in the 1st Respondents preliminary objections and the same is dismissed.

B. WHETHER THE TENDER IS IN VIOLATION OF THE CONSTITUTION.

19. The 1st Petitioner submits while relying on **Articles 27(1), (4), & (5) , 260 , 10 (2) (b) of the Constitution** and the case of **Willis v The United Kingdom No. 36042/97; ECHR 2002 –IV ; City Council of Pretoria v Walker [1989] ZACC 1 ; Harksen v Lane NO and others**

[1997] ZACC 12 and *Republic vs Attorney General ; Law of Kenya (Interested Party); Ex Parte: Francis Andrew Moriasi [2019] eKLR*, that the 1st Respondent's actions are both directly and indirectly discriminatory. It is urged that the categorization of law firms in *categories A, B, C & D* in the tender and *clause 2.3.5 of the tender* which states that a law firm shall bid for only one category amounts to differentiation, which has no rationale but is only founded on post admission experience , firm personnel & status factors.

20. On post admission experience, I find that it is discriminatory against young startups and recently admitted advocates with less than 2 years' experience as they cannot bid in categories *A, B & C* but in *category D* and against firms that have qualified associates with the requisite post admission experience but whose partners have not met the post admission experience criteria. The qualification criteria for *category A* is irrational and disproportionate by dint of *Article 166 (3) of the Constitution* on the qualifications of a judge to which no explanation has been offered.

21. On arbitrator certification, I find that the said requirement is irrational, arbitrary and unconnected to the purpose of the tender. The justification by the 1st Respondent for this mandatory term has no basis and cannot be based on the complexity of the work done for the 1st Respondent and further *Section 62 of the Kenya Ports Authority Act* cannot be read in any way to require advocates instructed by it to be Arbitrators.

22. On firm organizational structure, I find that *categories A to C* locks out law firms operating as sole proprietorships and confines them to *category D* without justification notwithstanding their attainment of all other required criteria for eligibility to bidding the categories, therefore discriminating against them.

23. The 2nd Petitioner on arbitration submits that the requirement for arbitration certificate in *Categories A, B, & C* that at least one of the partners be a certified arbitrator contravenes *Article 227 of the Constitution, Section 60(1) of the Public Procurement and Asset Disposal Act, 2015* and *Section 9 of the Advocates Act* and evidences selective appraisal on the part of the 1st Respondent. There is no demonstration by the 1st Respondent that there requirement for one to be certified arbitrator in order to represent the 1st Respondent in arbitration proceedings. I find that there is no basis for the requirement of arbitration certificate to partners only. Further, neither does the *Lloyds Standard Salvage Agreement* nor the provisions of *Section 62 of the Kenya Ports Authority Act* and *Article 159 (2) of the Constitution* cited by the 1st Respondent make it mandatory that counsel / agents representing parties in arbitration proceedings be certified arbitrators.

24. The 2nd Petitioner in addition thereto submits that evaluation criteria is contradictory, skewed, self- defeating, impracticable and is aimed at locking out the 2nd Petitioner and other candidates. It is urged that it contravenes *Article 227(1) of the Constitution* and *Section 60 of the Public Procurement and Asset Disposal Act, 2015*. First, on the technical evaluation, while *Item 2.3.5* makes it mandatory for a minimum number of advocates, *item 4(a)* seeks to evaluate law firms with less than the mandatory minimum yet those with the less than the mandatory could not pass the technical evaluation hence is devoid of transparency and openness.

25. It is further urged that the requirement of post admission in *categories A & B* is discriminatory as it locks out 2nd Petitioner from applying in the said categories not on the basis of ability to deliver but on the basis of years of experience. It is 2nd Petitioners contention that it is excessive, unreasonable and unjustified as there is no justification for requiring partners to be more experienced than judges sitting in the superior courts by dint of *Article 166 of the Constitution* and disqualifies advocates based on their status in the firm either as associate or partner rather than experience.

26. Further it is submitted that on professional indemnity, it contravenes *The Advocates (Professional Indemnity) Regulations, 2004* that sets the minimum value of professional indemnity cover at Kshs.1Million hence too excessive, oppressive, prohibitive, punitive and unreasonable. I note that this requirement negates the requirement that the process must be fair and competitive as it disqualifies the 2nd Petitioner and other bidders who might have the set minimum value of professional indemnity.

27. Additionally, the requirement under *Items 6.6 and 6.7 of the Tender Document* that *categories A and B* to submit at least one commercial law decision emanating from the Supreme Court is oppressive, restrictive, unreasonable, illegal and unconstitutional as the jurisdiction of the Supreme Court does not involve commercial matters but mostly constitutional disputes in addition to presidential Petitions. It is urged it is therefore intended to unreasonably lock out the 2nd Petitioner and other bidding law firms from the prequalification process.

28. The 1st Respondent in its response insists it set the eligibility criteria in the tender that matches nature of briefs that can possibly be outsourced, paying specific attention to the professional qualification, expertise and experience of the prospective service provider as well as the minimum value of professional indemnity to handle the briefs of such magnitude. The 1st Respondent relies on *Section 93 (4) (b) PPAD Act* and *Clause 5 of the Appendix to Instructions to Candidates* in the tender. It is therefore the 1st Respondent's contention that the terms set out are not discriminatory and none of the advocates have invoked *Sections 81 or 94(5) of the PPAD Act* and *Clause 2.5 of the Instructions to Candidates* in the Tender. Reliance in support is placed in *Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR*.

29. In determining this matter guidance should be placed in *Article 227(1) of the Constitution* which provides for a state organ or any other public procuring entity to act in accordance with a system that is fair, equitable, transparent, competitive and cost effective. *Sub-article (2)* provides that parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for 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.*

30. This matter falls squarely within equality and freedom from discrimination. **Article 27 (1) of the Constitution** provides for the right to equality and freedom from discrimination. **Sub-article 4** provides that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth.

31. **Section 3 of the PPAD Act** provides for the values and principles of the Constitution to guide public procurement and asset disposal by State organs and public entities. **Section 60 (1) of the PPAD Act** obligates an accounting officer of a procuring entity to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. **Subsection (2)** provides that the specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured. **Subsection (3)** provides what the technical requirements should conform to, to wit is to conform to design, specification, functionality and performance; be based on national or international standards whichever is superior; factor in the life of the item; factor in the socio-economic impact of the item; be environment-friendly; factor in the cost of disposing the item; and factor in the cost of servicing and maintaining the item.

32. In *James Nyasora Nyarangi & 3others v Attorney General [2008] eKLR* Nyamu J. (as he then was) while discussing discrimination stated:-

“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in Section 82 of the Constitution.

Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:-

(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.

(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”

33. I have carefully considered parties' rival submissions and facts of the case as well as authorities and constitutional and statute provisions relied upon by both parties. I find that based on the above case, it is evident that for the Petitioners to succeed on the issue of discrimination, they must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution. As elucidated above, the Petitioners have argued that the impugned tender has sought to discriminate them on the basis of post admission experience, arbitration certification, status of the law firm, professional indemnity and the structure of the law firm. It is the petitioners' argument that no justification has been advanced by the 1st respondent for such differentiation and discrimination. On the other hand, the 1st respondent has argued that the same has been done to meet its specific procurement need and that to that extent it has not breached any Constitution provisions or statutory law.

34. Upon careful evaluation of the rival submissions, I agree with the sentiments of the petitioners. The Petitioners herein have through their submissions proven that there is unfavourable bias, to wit, the tender requirements in **category A, B, C & D** have given specifications in terms of post admission experience for the partners. This specification not only locks out the 2nd Petitioner from tendering in **categories A, B & C** but also locks out young advocates without such experience to tender. It is also discriminatory as it is only limited to partners. That notwithstanding, I find that the 1st Respondent has not given any justification for such requirement, neither the specific need that the said requirement meets.

35. I find as regards the requirement on arbitration certification that discriminate against advocates who are not certified arbitrators. **Section 9 of the Advocates Act** sets out the requirements for one to become an advocate. It is apparently clear that the said Section does not include having arbitration certification as one of the qualifications. Further, it is a well-known fact that advocates do not need arbitration certification to practice in arbitration matters or to appear in arbitration proceedings. The 1st Respondent has argued that the said requirement is to meet its specific need for its arbitration matters. I find however that the 1st Respondent did not indicate the purpose for recruitment, it is seeking to recruit advocates and not arbitrators. I find the 1st Respondent has failed to lay down the basis for such requirement.

36. **Categories A, B & C** also is discriminating based on firm structure. The **Category A, B & C** are discriminative against sole proprietorship as they are specifically for law firms with partnerships. I find that no justification has been advanced so far by the 1st Respondent for such requirement and what purpose it may end up serving.

37. On the issue of requiring that tenderer to submit at least one commercial law decision from the Supreme Court, I agree with the 2nd

Petitioner that it is discriminatory on the basis, that it is confined to commercial law. There are many advocates who have practiced in the Supreme Court, and it is also in public domain that the Supreme Court handles matters of Presidential Elections and matters of public policy by dint of **Article 163 of the Constitution**. It is not surprising to find that some, if not most of the advocates, have practiced before the Supreme Court but not on commercial law cases. I find as regards this requirement that no justification has been given whatsoever for that requirement and it is thus discriminatory.

38. Lastly the requirement on professional indemnity is discriminatory and oppressive, as far as it seeks to lock out potential bidders who may have met the other requirements but cannot on the basis of the professional indemnity bid for the said tender. I once again find that no justification has been given by the 1st Respondent for such requirement. In as much as the 1st Respondent indicates, that it is to meet its procurement need, it has not stated the procurement need that needs to be met by such professional indemnity. Further, **Section 60(1) of the PPAD Act** provides that tender documents should allow for fair and open competition among those who may wish to participate in the process. This requirement do not assist in ensuring fair and open competition among the tenderers.

39. The second thing that the petitioners need to prove is that the said bias is based on the Constitution and statutory provisions. It is my view that the petitioners have set out the constitutional provisions and statutory provisions that the tender has offended. Based on the foregoing, and looking at the contents of the tender by the 1st Respondent it is clear that it contravenes **Article 227 of the Constitution, Section 60 of the Public Procurement and Asset Disposal Act, 2015 and Section 9 of the Advocates Act, Cap 16 Laws of Kenya**. I therefore find that the tender is discriminatory and has violated Constitutional provisions as well as statutory provisions.

40. The 1st Respondent in opposition of the Petitions has argued that the Petitions do not raise a constitutional moment. The 2nd Petitioner submits that by dint of the issues raised and discussed hereinbefore, the 1st Respondent breached **Articles 27, 227 (1) and 28 of the Constitution** and **Section 60 of the Public Procurement and Asset Disposal Act, 2015**.

41. The 1st Respondent has argued that there is nothing raised to invoke this Court's jurisdiction granted under **Article 165 (3) of the Constitution**. The 1st Respondent sought to place reliance in the case of **Daniel Muthama Muoki v Ministry of Health & Another; Shenzhen Mindray Bio- Medical Electronics Co. Ltd & 5 others (Interested Parties) [2020] eKLR**.

42. I have carefully considered the Petitions and the issues raised therein and I am satisfied that the Petitions are based on the Constitution. The Petitioners have proved discrimination which is provided for in the Constitution. They have also shown how the tender contravenes **Article 227 of the Constitution** and the provisions of the PPAD Act. The Petitions therefore raise constitutional moments and I find no merits in the 1st Respondents arguments to the contrary.

43. **The Petitioners Petitions are meritorious and I proceed to allow them and grant the following orders:-**

a) A declaration be and is hereby issued that the mandatory condition imposed by the 1st Respondent in the Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring at least one partner in the bidding law firms to be a certified Arbitrator is illegal, discriminatory, excessive, oppressive, prohibitive, unfair, unjustified, unconstitutional and therefore null and void.

b) A declaration be and is hereby issued that the criteria set by the 1st Respondent to evaluate Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring at least one partner to have 20 years post admission experience for Category A and 15 years post admission experience for Category B is oppressive, prohibitive, unconstitutional unfair, unjustified, unreasonable and therefore null and void.

c) A declaration be and is hereby issued that the criteria set by the 1st Respondent for evaluating Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services requiring only partners to attain the stated number of years is baseless, discriminatory, unfair, unjustified, unreasonable and therefore null and void.

d) An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the KPA/160/2019-20/BLS, June 2020.

e) An Order of Prohibition be and is hereby issued to prohibit and/or restrain the 1st Respondent from in any manner implementing or seeking to enforce the implementation of, or further implementation of, KPA/160/2019-20/BLS, in June 2020, titled " PREQUALIFICATION OF LAW FIRMS FOR PROVISION OF LEGAL SERVICES TO KENYA PORTS AUTHORITY".

f) An Order of Prohibition be and is hereby issued to prohibit and restrain the Respondent from receiving , assessing , considering, evaluating and processing bids and tender documents received from law firms in respect of Tender No. KPA/160/2019-20BLS- Prequalification of Legal Services in its current form.

g) That an order do issue directing the 2nd Respondents to consider any further requests for prequalification for legal services by the 1st Respondent and consequently consider, advise and ensure that it complies with requirements of legality in terms of Article 227 of the Constitution and any other applicable law

h) An Order of mandamus be and is hereby issued compelling the Respondent to re-advertise the tender for prequalification of legal services in conformity with the law and just procurement principles and in proper, open and objective manner devoid of the illegal, oppressive, prohibitive and unconstitutional requirements, conditions and evaluation criteria impugned in this case.

i) Costs of the Petitions to be borne by 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA