



**Okoiti v Kenya Ports Authority & another; Portside Freight Terminals Limited & 8 others  
(Interested Parties) (Petition E045 of 2021) [2022] KEHC 11298 (KLR) (20 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E045 OF 2021  
JN ONYIEGO, J  
APRIL 20, 2022**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF NATIONAL TREASURY &  
PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PORTSIDE FREIGHT TERMINALS LIMITED ..... INTERESTED PARTY**

**PARTY KILINDINI TERMINALS LIMITED ..... INTERESTED PARTY**

**PARTY MOMBASA GRAIN TERMINAL LIMITED ..... INTERESTED PARTY**

**PARTY KAPA OIL REFINERY ..... INTERESTED PARTY**

**PARTY AFRICA PORTS AND TERMINALS ..... INTERESTED PARTY**

**PARTY MULTISHIP INTERNATIONAL ..... INTERESTED PARTY**

**PARTY KIPEVU INLAND CONTAINER EPZ LIMITED .. INTERESTED PARTY**

**PARTY DOCK WORKERS UNION ..... INTERESTED PARTY**

**PARTY KATIBA INSTITUTE ..... INTERESTED PARTY**

**RULING**

**Background**

1. On 16<sup>th</sup> August, 2021, the Petitioner, Okiya Omtatah Okoiti, who describes himself at paragraph 1 of the Petition, as a law-abiding citizen and a human rights defender, lodged a Petition dated 12<sup>th</sup>



August 2021 in which he alleged contravention of fundamental rights and freedoms under Articles 10, 27, 47, 201 and 227 of the [Constitution of Kenya 2010](#). He named the following as Respondents and Interested Parties respectively: 1) Kenya Ports Authority (1st Respondent); Cabinet Secretary, Ministry of National Treasury and Planning (2nd Respondent); Portside Freight Terminals Limited (1st Interested Party); Kilindini Terminal Limited;(2nd Interested Party); Mombasa Grain Terminal Limited (3rd Interested Party); Kapa Oil Refinery (4th Interested Party); Africa Port and Terminal (5th Interested Party); Multiship International(6th Interested Party); Kipevu Inland Container EPZ Limited(7th Interested Party), Dock Workers Union (8th Interested Party) and Katiba institute(9th interested party).

2. The Petitioner questions the 1<sup>st</sup> Respondent's decision undertaken to award the 1<sup>st</sup> Interested Party the contract and license of development of a second grain bulk handling facility by use of Specially Permitted Procurement Procedure in contravention of regulation 107(3) of the Regulations thus violating the fundamental rights enshrined under Article 47 of the [Constitution](#) and the underlying provisions of the [Fair Administrative Action Act](#).
3. The Petitioner seeks the following substantive orders;
  - a) A declaration that the decision of the 1<sup>st</sup> Respondent's Board of Directors contained in the letter dated 11<sup>th</sup> March 2021 to approve the grant of license for the operation of the second bulk grain facility rests with the management and is not a decision of the Board.
  - b) A declaration that the 1<sup>st</sup> Respondent's Board of Directors acted ultra vires, without jurisdiction and usurped the powers conferred to the management and the accounting officer with respect to the tendering process in purporting to approve and grant the 1st Interested Party a license to operate a second bulk grain handling facility.
  - c. A declaration that the 1<sup>st</sup> Respondent took into account irrelevant factors and consideration that the 1st Interested Party's proposal was attractive due its "uniqueness and creativity deployed" thus meriting the consideration.
  - d. A declaration that the 1<sup>st</sup> Respondent's Board of Director's decision dated 11<sup>th</sup> March 2021 purporting to approve a proposal that sought to construct a facility outside the approved location under the Master Plan is excessive, abuse of power and irrational.
  - e. A declaration that the decision dated 11<sup>th</sup> March 2021 to invoke the use of Specially Permitted Procurement Procedure under Section 114A of the [PPAD](#) is in violation of the [Constitution](#) and does not lie with the Board of Directors but with the Accounting Officer who initiates and undertakes the entire procurement process for a state corporation.
  - f. A declaration that the decisions and /or action of the 1<sup>st</sup> & 2nd Respondents dated 11<sup>th</sup> March 2021 and 28<sup>th</sup> June 2021 in so far as they purport to use Specifically Permitted Procurement Procedures in favour of the interested Party, is unconstitutional, illegal and/or irregular as it contravenes the provisions of the [Constitution](#) and regulation 107(3) of the [Procurement Regulations](#).
  - g. A declaration that the Respondents' decision to solely consider the 1<sup>st</sup> Interested Party's proposal, despite the same being in conflict with the Master Plan, proceed to approve the same and adopt the use of Specially Permitted Procurement Procedure in its favor is unlawful, illegal, irrational and ultra vires.
  - h. A declaration that that its wrongful and un-procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by the 1<sup>st</sup> Respondent's



Port Master Plan, which Master Plan is yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.

- i. A declaration that the 1<sup>st</sup> Respondent's intended award of contract and license to the 1<sup>st</sup> Interested Party for the development of the Second bulk grain handling facility gravely violates Articles 10, 201 and 227 of the [Constitution of Kenya 2010](#).
  - j. A declaration that the procurement and license for development of a second bulk grain handling facility has to be procured through competitive bidding as required by the [Constitution](#) and the laws of Kenya.
  - k. An order of certiorari to remove into this Court and quashing the decision of the 2<sup>nd</sup> Respondent contained in the letter dated 28<sup>th</sup> June 2021 granting the 1<sup>st</sup> Respondent's approval to use Specially Permitted Procurement Procedure for the Procurement of a second bulk grain handler facility in favor of the 1<sup>st</sup> Interested Party be and is hereby issued.
  - l. A mandatory Order be and is hereby issued compelling the Respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa must be undertaken strictly in accordance with the law, including through competitive bidding.
  - m. An Order of Prohibition to restrain the Respondents from implementing the decision contained in the letter dated 28<sup>th</sup> June 2021 approving the use of Specially Permitted Procurement procedure to award the 1<sup>st</sup> Interested Party the contract for development of the second bulk grain handling facility be and is hereby issued.
  - n. An Order of Prohibition to restrain the Respondents from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the public procurement laws be and is hereby issued.
  - o. That the costs of petition be provided for.
  - p. That such further and other reliefs that this Honourable Court may deem just and expedient to grant in the circumstances.
4. Filed under Certificate of Urgency, together with the Petition is an Application dated 12<sup>th</sup> August 2021 seeking for interim measures and or orders. The main orders sought in the Application are;
- a. Spent.
  - b. That pending the inter partes hearing and determination of this Application, this Honourable Court be pleased to grant a temporary conservatory order staying the implementation, procurement and award of a licence by the 1<sup>st</sup> Respondent to the 1<sup>st</sup> Interested Party for the development of a second bulk grain handling facility, pursuant to the 2<sup>nd</sup> Respondent's approval dated 28<sup>th</sup> June 2021 granting the 1<sup>st</sup> Respondent authority for the use of Specially Permitted Procurement Procedures.
  - c. That pending the inter partes hearing and determination of this Petition this Honourable Court be pleased to grant a temporary conservatory order staying the implementation, procurement and award of a licence by the 1<sup>st</sup> Respondent to the 1<sup>st</sup> Interested Party for the development of a second bulk grain handling facility, pursuant to the 2<sup>nd</sup> Respondent's



approval dated 28<sup>th</sup> June 2021 granting the 1<sup>st</sup> Respondent authority for the use of Specially Permitted Procurement Procedures for this purpose.

- d. That the court gives any other directions as it may deem just and fit to grant.
  - e. That the cost of the Application be borne by the Respondents.
5. The above Application was argued ex parte by the Petitioner on 16<sup>th</sup> August 2021, and a temporary conservatory order was issued staying the implementation, procurement and award of a licence by the 1<sup>st</sup> Respondent for the development of a second bulk grain handling facility, pursuant to the 2<sup>nd</sup> Respondent's approval dated 28<sup>th</sup> June 2021 granting the 1<sup>st</sup> Respondent authority for the use of Specially Permitted Procurement Procedures.
6. In response and in opposition to the Petition, the 1<sup>st</sup> Respondent filed a Notice of Motion dated 24<sup>th</sup> August, 2021 seeking to strike out the petition or, alternatively, to expunge some twelve documents relied on by the Petitioner, while the 1<sup>st</sup> Interested Party filed a Notice of Motion dated 26<sup>th</sup> August 2021 contending that it is the ELC which has jurisdiction to entertain the petition.

### **Application Dated 24<sup>th</sup> August 2021**

7. The Application by the 1<sup>st</sup> Respondent seeks the following orders:
- a. The petition dated 12<sup>th</sup> August 2021 be struck out for being an abuse of the Constitutional jurisdiction of the High Court.
  - b. Without prejudice to (1) above, the documents filed in support of the petition, as particularized in the Schedule filed herewith, be struck out for having been illegally obtained.
  - c. The costs of the struck-out Petition and of this application be awarded to the 1<sup>st</sup> Respondent against the Petitioner.
8. The application is premised on the grounds set out on the face of it and the affidavit sworn on 25<sup>th</sup> August, 2021 by Turasha Kinyanjui, the 1<sup>st</sup> Respondent's Acting General Manager –Board and Legal Services. He averred that the Petitioner did not make any request to access the confidential documents and internal communications it seeks to rely on, from the 1<sup>st</sup> Respondent and/or any relevant public body. That the said documents having been obtained in violation of Article 31 and Section 8 of the [Access to Information Act](#), the same must be expunged from the record.
9. The deponent deposed that the petition as a whole and particularly at paragraphs 50, 60, 61, & 62 demonstrates that the complaint is a private interest litigated under the guise of a public interest litigation and that the Petitioner has been used as a vessel through which the 2<sup>nd</sup> to the 7<sup>th</sup> Interested Parties are waging a war against the 1<sup>st</sup> Interested party.
10. The deponent further deposed that the question of non-compliance with Section 114A of the [PPAD](#) 2015 and Regulation 107(3) of the [PPAD Regulations](#) or any Section of the [PPAD](#) 2015, is ordinarily a civil dispute, and such a complaint ought to be referred to the statutory dispute resolution mechanism conferred upon the Public Procurement Regulatory Authority by virtue of Sections 9(1) (h) and/or 35 of the [PPAD](#) 2015 in the first instance.
11. In urging the court to strike out the petition, it was averred that the direct access to the High Court as done by the Petitioner denies the 1<sup>st</sup> Respondent the benefit of the inbuilt statutory protections in the [PPAD](#) 2015 as well as the benefit of the expertise the Public Procurement Regulatory Authority has in procurement matters.



12. On 17<sup>th</sup> September 2021, the 2<sup>nd</sup> Respondent through the Attorney General filed grounds in support of the application dated 24<sup>th</sup> August, 2021 thus stating as follows:
  - a. That the documents detailed in the application are illegally obtained and interfere with the right to a fair trial under Article 50 (4) of the Constitution and that, the admission of such documents would be in furtherance of violation of the Constitution.
  - b. That the petition is bad in law for violating the doctrine of exhaustion of available remedies considering that the dispute is purely a commercial dispute within the jurisdiction of the Public Procurement Administrative Review Board established under Section 25 of the PPADA and as empowered under Section 93 of the PPADA.
  - c. That the Petitioner is purely addressing commercial interests of the 2<sup>nd</sup> to 7<sup>th</sup> Interested party thinly veiled as public interest litigation. That the Petitioner has not stated sufficiently the Constitutional violation leading to contravention of the rule laid down in Anarita Karimi case.
  - d. There is no legal contradictions between Article 227 of the Constitution, Section 114 of PPADA and regulation 107 (3) as set out in the petition and as such the Petitioner should have approached the court for a Constitutional interpretation and set out the particular contradictions therein if they held a contrary opinion.
  - e. That the Petitioner should have filed a suit challenging Section 114A of PPAD A and regulation 107(3) rather than impugning the motive of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in using laid down statutory procedures.
13. In response to the instant application by the 1<sup>st</sup> Respondent, the 8<sup>th</sup> Interested Party filed a Replying Affidavit sworn on 3<sup>rd</sup> September, 2021 and filed on 14<sup>th</sup> September 2021 by Simon Sang, the General Secretary of the 8<sup>th</sup> Interested Party. He averred that without the authority, which Mr. Kinyanjui relies on, forming part of the record, then the averred authority by Mr. Kinyanjui lacks in law.
14. It was further averred that since the 1<sup>st</sup> Respondent is a public body that is subject to Article 10 of the Constitution, then the people by operation of Article 1(3) of the Constitution and in exercise of their sovereign powers under Article 10, (1) (c) and 10(2) (c) of the Constitution, are not subject to Article 31 of the Constitution, and that the Respondent should not be worried when their policy decisions are being interrogated by the court.
15. The deponent stated that the allegations by the 1<sup>st</sup> Respondent on access to confidential documents illegally fails to meet the Constitutional threshold on what constitutes classified or confidential information.
16. It was further averred that under Article 50(4) of the Constitution, any evidence obtained in a manner that violates any right and/or fundamental freedom in the bill of rights shall only be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. However, he deposed that the 1<sup>st</sup> Respondent has not demonstrated any prejudice it is likely to suffer if the filed documents are allowed by the court in a public interest litigation.
17. The deponent deposed that save for the letter marked Annexure “10”, he has never supplied the Petitioner with any of the alleged documents and that he is not privy to any confidential document.
18. He stated that the Petitioner’s right to institute court proceeding claiming violation of Article 227 and the PPAD 2015 is guaranteed under Article 22 and 258 of the Constitution. He went further to state that, since the Petitioner was not a party which sought a contract of services with the 1<sup>st</sup> Respondent in



respect to the tender awarded to the 1<sup>st</sup> Interested Party, the provision of disputes resolution before the Public Procurement Regulatory Authority was not available as jurisdiction of the Public Procurement Regulatory Authority arises where procurement has been undertaken which is not the case herein given that there was only initiation of the procurement process.

19. It was the deponent's position that striking out of a petition is a draconian step which must be resorted to as a last resort and only employed in the clearest of cases when it is evident that the suit is beyond redemption. That upholding the preliminary objection will amount to putting to an end the life of the petition before it is heard on merit thus driving the Petitioner and the Interested Parties away from the seat of justice.
20. The Petitioner on the other hand opposed the instant application vide a replying affidavit sworn on 26<sup>th</sup> August 2021 and filed on 16<sup>th</sup> September 2021 by the Petitioner. He averred that the allegation that he never made a request to access the documents in question is misleading, since he wrote two letters on 11<sup>th</sup> December, 2021 and 20<sup>th</sup> January, 2021 to the 1<sup>st</sup> Respondent requesting for information and documents from Eng. Rashid Salim the then acting Managing Director to the 1<sup>st</sup> Respondent. That the said letters were both dispatched by courier which was not returned as undelivered through an email (at rsalim@kpa.co.ke).
21. The Petitioner averred that the documents outlined in the 1<sup>st</sup> Respondent's schedule are public documents and as a result, the issue of violation of Article 31 of the Constitution is a non-starter. He further averred that the said documents are available in parliament the same having been produced during the hearing of the National Assembly's Departmental Committee on Finance and Planning on the optimisation of revenue in grain handling services at the port of Mombasa and that no prejudice has been demonstrated by the 1<sup>st</sup> Respondent in the admissibility of the said documents.
22. He argued that it has not been demonstrated that the said documents were generated from the 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties. The Petitioner further stated that the impugned procurement of the second grain bulk handling facility has been a subject of investigations by the National Assembly's Departmental Committee on Finance AND National Planning hence the subject documents readily available.
23. The Petitioner deponed that the instant petition raises critical Constitutional issues against the Respondents rather than private issues and as such, he has the right to institute the present proceedings by virtue of Article 22 and 258 of the Constitution on his own behalf and public interest. He denied that he was instructed by the 2<sup>nd</sup>- 7<sup>th</sup> Interested Parties to represent them.
24. He described the decision by the 1<sup>st</sup> Respondent as being in excess of their jurisdiction on grounds that; the accounting officer had abdicated his duties; the board of directors usurped their powers and made an illegal decision in contravention of Article 227 of the Constitution thus divesting jurisdiction from the Public Procurement Regulatory authority.
25. The Petitioner also averred that the statutory dispute resolution mechanism under the PPAD Act 2015 does not oust the jurisdiction of this court as the court of first instance because Section 40 of the PPAD Act 2015 allows eligible parties to by-pass the Public Procurement Regulatory Authority and lodge an appeal directly with the Public Procurement Administrative Review Board. He however deposed that, such an option is not available to third parties like him who have no locus before the Public Procurement Administrative Review Board to exercise their right guaranteed under Article 50(1) of the Constitution hence it will be discriminatory and against Article 27 of the Constitution to deny an aggrieved third party audience before the High Court.



26. In response to the 1<sup>st</sup> Respondent's Notice of Motion dated 24<sup>th</sup> August 2021, the 9<sup>th</sup> Interested Party Opposed the same by filing grounds of opposition dated 28<sup>th</sup> September 2021 in support of the petition thus stating as follows; there is no proof of abuse of office on the part of the petitioner; the public procurement regulatory authority has no jurisdiction over the subject matter as its role is investigatory and monitoring complaints that do not fall under the realm of the administrative review board; Section 9(1) does not provide any avenue for the petitioner to raise his complaint hence no relief could be available there; administrative review proceedings were not applicable as the petitioner was not a tenderer hence public interest litigation; this court should be left to hear the petition and make a decision on merit; the question of admissibility of evidence should be a subject of the substantive hearing; that KPA is a state organ which must prove the specific rights that have been violated to their detriment and whether the trial will be unjust and lastly, the impugned documents are public documents hence not confidential and therefore KPA is duty bound to make full disclosure pursuant to section 16 of the [access to information Act](#).
27. In its rejoinder, the 1<sup>st</sup> Respondent filed a Supplementary affidavit sworn on 21<sup>st</sup> September, 2021, wherein it was averred that the 1<sup>st</sup> Respondent had perused the documents it received from the Petitioner but they have not come across any of the letters dated 11<sup>th</sup> December 2020 and 20<sup>th</sup> January 2021 authored by KEJUDE Trust. That assuming the said letters were delivered to the 1<sup>st</sup> Respondent and not responded to, the Petitioner herein is not entitled to illegally obtained information sought through the said letters and that under Section 9(6) of the [Access to Information Act](#), the request is deemed to have been rejected.
28. It was further stated that under Section 14(1) (a) of the [Access to Information Act](#), refusal for information is appealable to the Commission on Administrative Justice and whose decision is ultimately appealable to the High Court under Section 23(3) of the Act.
29. It was also averred that Kejude Trust is an unincorporated body which is distinct from the Petitioner and therefore, the Petitioner has not made any request for information to the 1<sup>st</sup> Respondent. In response to the allegation that the documents being objected to are held by parliament, the deponent averred that; the said documents have never been presented to parliament; the Petitioner would still need to make an application to parliament to access the said documents which is not the case; some of the documents being referred to were made as between March and June 2021 yet the report to the parliamentary committee was made in November 2020 and that the letter dated 11<sup>th</sup> December 2020 and 20<sup>th</sup> January 2021 would not have been necessary if the said information was obtained from parliament.

#### **Application Dated 26<sup>th</sup> August 2021**

30. This particular application was filed by the 1<sup>st</sup> Interested Party on the 26<sup>th</sup> August, 2021. The interested party sought the following orders:
- a. The petition together with the accompanying Notice of Motion filed herein in the Constitutional & Human Rights Division of the High Court being Petition No. E045 of 2021 dated 12<sup>th</sup> August 2021 and filed in court on 16<sup>th</sup> August 2021 be struck out.
  - b. In the alternative and without prejudice to prayer (a) above, the said Petition and its accompanying Notice of Motion filed herein on the 16<sup>th</sup> August 2021 and bearing the number Petition No. E045 of 2021, be transferred to the Environment and land court for hearing and determination, once all the interim Orders that are in existence in this petition in this court



have all been expunged or vacated, so as not to be an unnecessary burden to the court to which the petition is transferred,

- c. Costs of this application be met by the Petitioner.
31. The application is premised on the grounds on the face of it wherein he deposed that the Petitioner in ground (f) of his Certificate of Urgency filed herein states that “pursuant to Gazette Notice No 5632 the Environment & Land Court commenced their recess on 1st, August 2021, and the same will terminate on 15. September 2021. He then concludes that the Petitioner’s matter be certified urgent in the Court where it has been filed”
32. That in the Petitioner’s Chamber Summons filed herein, at ground 1 he states as follows: 1. “That pursuant to Gazette Notice No 5632 the Environment & Land Court commenced their recess on 1<sup>st</sup> August 2021 and the same will terminate on 15th September 2021. The Petitioner then concludes that “it is in the interests of justice that the application be allowed”.
33. It was further contended that the Petition falls for determination in the Land Court following averments made by the Petitioner in the application at paragraph 17 of the Petition to the extent that he introduces the issue of wayleaves when he states that “the 2<sup>nd</sup> Interested Party had been approved and granted wayleaves to operate at Berth 11 subject to the conformation to the Standard Gauge Railway (SGR; port relief line operations, the Respondent’s Berth 11-14 rehabilitation design, and development.
34. It was averred that the instant petition ought to have been filed in the Environment and Land Court hence these proceedings were filed in a court devoid of jurisdiction.
35. The 8<sup>th</sup> Respondent through a replying affidavit sworn on the 3<sup>rd</sup> September 2021 by its Secretary General Simon Sang’ averred that pursuant to Gazette Notice Number 5632 dated 4<sup>th</sup> June 2021, the Presiding Judge of the High Court notified the public of the August Recess of the High Court and Courts of Equal Status which was to commence on 1<sup>st</sup> August, 2021 and terminate on 15<sup>th</sup> September, 2021, both days inclusive, applied to the High Court, Environment and Land Court (ELC) and Employment and Labour Relations Court (ELRC). That the court was properly moved despite the Petitioner in his pleadings referring to the ELC.
36. The deponent further averred that the reference to the ELC is an inadvertent mistake which does not oust the Court’s jurisdiction. That in any event, the certificate of urgency is already spent and discharged upon issuance of conservatory orders issued hence the only remedy which is available to the 1<sup>st</sup> Interested Party is to file a review application and not this type of an application.
37. It was further stated that the text of the pleadings as contained in the certificate of urgency from the look of the whole pleading can only be seen as a typographical error which can be cured by amendment and not to make a suit to suffer from such a draconian approach as the 1<sup>st</sup> Interested Party has prayed.
38. The deponent further averred that the 1<sup>st</sup> Interested Party is actually challenging the form of the petition which can be cured by Article 159 of the Constitution. That Rule 3 (8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 confers the Honourable Court with the inherent power to make such orders as may be necessary for ends of justice to meet.
39. On his part, the petitioner filed a replying affidavit sworn on 3<sup>rd</sup> September 2021 by the petitioner in which he averred that the Petitioner’s case was not about the purchase of land or transfer of the port’s land to anyone but rather the process initiated in contracting (procurement of ) the 1<sup>st</sup> Interested Party to carry the functions of the 1<sup>st</sup> Respondent and whether the same meets the threshold of Article 227



of the Constitution hence a high court matter to which ELC has no jurisdiction to entertain the issues raised therein.

40. The deponent also deponed that the jurisdiction of the ELC under Section 13 of the Environment and Land Court Act is limited and does not include issues of procurement.
41. He averred that the Gazette Notice relied on applied to the High Court, Environment and Land Court (ELC) and Employment and Labour Relations Court (ELRC), and that he inadvertently referred to the Environment and Land Court (ELC) instead of High Court in moving the court to have the matter heard during recess. He stated that the inadvertent mistake of making reference to the Environment and Land Court (ELC) instead of High Court is a trivial one that does not affect the jurisdiction of the Honourable Court.
42. He deposed that striking out pleadings is a draconian step, which must be used as a last step and employed in the clearest of cases and where it is evident that the suit is beyond redemption. Therefore, the Petitioner implored the court to note that before striking out the suit, it ought to consider that the same is a draconian, drastic, and discretionary preserve which if exercised against the Petitioner, it has the power to put to an end to the life of the suit before hearing its merit.
43. In the petitioner's view, the high is the appropriate forum to interrogate the impugned decision on procurement that was in contravention of the Constitution, failed to accord all the Interested Parties an opportunity of equal treatment before the law, was undertaken in excess of power, took into account irrational considerations and was ultra vires to be challenged as the aforementioned matters do not fall under the jurisdiction of the ELC under Section 13 of the Environment and Land Court Act, which is limited and does not include issues of procurement.
44. Concerning Portside Freight (the 1<sup>st</sup> Interested Party)'s Notice of Motion dated 26<sup>th</sup> August 2021, Katiba Institute (the 9<sup>th</sup> Interested Party) relied on the same grounds advanced in opposition to the notice of motion dated 24<sup>th</sup> August 2021. They basically urged that it is only the high court which has jurisdiction over the subject under Article 165 of the constitution.

### **Submissions.**

45. The two applications were canvassed by way of written submissions. Counsel for the 1<sup>st</sup> Respondent filed their submissions on 18<sup>th</sup> October 2021 through the firm of Muriu Mungai and Co.LLP advocates while the A.G appearing for the 2<sup>nd</sup> Respondent filed his on 23<sup>rd</sup> September, 2021. For the 8<sup>th</sup> Interested Party they filed their submissions on 17<sup>th</sup> November, 2021 through the firm of Marende and Nyaundi advocates while the firm of Christine Nkonge for the 9<sup>th</sup> Interested Party filed their submissions on 16<sup>th</sup> November, 2021. The Petitioner appearing in person filed his submissions on 23<sup>rd</sup> November, 2021, while Counsel for the 1<sup>st</sup> Interested Party A.B.Partel and Patel filed their submissions on 7<sup>th</sup> February 2022.
46. Mr. Kongere learned Counsel appearing together with S.C. professor Githu Muigai for the 1<sup>st</sup> Respondent indicated that his client did not oppose the application dated 26<sup>th</sup> August, 2021 filed by the 1<sup>st</sup> interested party. Counsel went ahead to submit that the said petition herein is agitating issues which properly fall for agitation by the 2<sup>nd</sup> – 7<sup>th</sup> Interested Parties. To amplify this assertion, counsel referred the court to the petitioner's averment at paragraph 28 of the supporting affidavit wherein the Petitioner avers that "the Respondents' decision is biased in favour of the 1<sup>st</sup> Interested Party and against the 2<sup>nd</sup>-7<sup>th</sup> Interested Parties who had legitimate expectations that prior to the making of the decision they would have been considered or called upon to submit fresh proposals."



47. In support of the submission that the Petitioner was the 2<sup>nd</sup> -7<sup>th</sup> Interested Parties' proxy, counsel cited the case of *Daniel Muthama Muoki v Ministry of Health & Another; Shenzen Mindray Bio- Medical Electronics Co. Ltd & 5 others (Interested Parties)* [2020] eKLR, where it was held that where proxy litigation has been instituted for persons who can litigate themselves, then the court ought to find an ulterior motive and punish a Petitioner.
48. Counsel further argued that the locus standi under Article 22 and 258 of the *Constitution* is no licence for all and sundry to present claims on behalf of others who are able and choose not to because of ulterior motives.
49. On the issue of whether the petition clothes statutory issues as Constitutional, counsel submitted that the mere mention of Article 227 or any other provision of the *Constitution* does not ordain an ordinary civil dispute into a Constitutional issue. Counsel cited the finding in *Kenya Builders & Concrete Company Limited v National Government Constituency Development Fund Committee Embakasi South & another* [2017] eKLR, where the court held that most if not all disputes before a court of law will necessarily involve some form of Constitutional infractions directly or indirectly however remote...as such where an alternative forum lies such as enforcement mechanism under statute, a Constitutional petition will most likely not be admitted.
50. On whether the petition offends the exhaustion doctrine, counsel submitted that Section 9 (1) (h) of the *PPAD* 2015 permits the Petitioner to lodge a complaint. That once lodged, an investigator is appointed under Section 35 of the *PPAD* 2015, who will then submit a report for consideration by the Director General (Section 37 of *PPAD* 2015) and when considering that report, the Director General is required to hear certain people and it is those people that are entitled to be heard by the Director General who have the right to access court. Consequently, counsel submitted that there was no way in which the exception to the doctrine of exhaustion could apply. To buttress this submission, Counsel referred to the case of *Daniel Muthama Muoki v Ministry of Health & Another (supra)* where the court reiterated and confirmed the position on Section 9(1) (h) and 35 of the *PPAD* 2015.
51. On expunging of the Petitioner's documents, Counsel submitted that the Petitioner does not suggest that he is a whistle-blower, rather, he is the recipient of information. Nevertheless, counsel opined that Section 16(2) of the *Access to Information Act* extends the protection if the disclosure is made to a law enforcement agency or to an appropriate public entity and the Petitioner is neither of those.
52. Counsel further submitted that the Petitioner is prepared to commit perjury to hide his sins, reason being that the Report of the parliamentary Committee was made in November 2020 yet the documents sought to be expunged were generated between March- June 2021. Counsel further submitted that the documents to be expunged are not public records which should be readily available and their disclosure indeed prejudiced by the Petitioner's action. Counsel cited *Okiya Omtatab Okoiti & 2 Others v Attorney General & 4 others* [2020] eKLR, to express the proposition that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the *Constitution* to in effect countenance illicit actions by admission of irregularly obtained documents.
53. Mr. Nguyo learned counsel for the 2<sup>nd</sup> Respondent principally supported the application/ preliminary objection and submissions by counsel for the 1<sup>st</sup> respondent. Learned counsel contended that the documents detailed in the 1<sup>st</sup> Respondents application dated 24th August 2021 as being illegally obtained should be expunged to conform with the principles on the right to a fair hearing under Article 50 of the *Constitution*.
54. In support of his submission regarding the right to fair hearing, Counsel also cited the Court of Appeal decision in Civil Appeal 13 of 2015 *Okiya Omtatab Okoiti & 2 others v Attorney General & 4*



- others* [supra], where the court held that under Article 50(4) of the constitution if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial.
55. Counsel submitted that the court should uphold the fundamental standing that he who comes to equity must come with clean hands to ensure that litigants do not use courts to launder their unclean deeds. That to circumvent the laid down measures in the Access to information Act by obtaining documentation in an otherwise illegal and unauthorised manner does not only breach the Act but also amounts to an act of contempt against Article 35 of the Constitution.
56. On whether the petition is bad in law for violating the doctrine of exhaustion of available remedies, Counsel submitted that the doctrine of exhaustion is a mechanism of the court to ensure that disputes are solved within already established mechanisms outside the court. Counsel cited the Court of Appeal in the case of the Speaker of National Assembly v Karume Civil Appl. No. Nai. 92 of 1992 where it was stated:
- “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.”
57. Counsel further submitted that this dispute is purely a commercial dispute within the jurisdiction of the Public Procurement Administrative Review Board (PPARB) established under Section 28 of the Public Procurement and Asset Disposal Act (PPADA) pursuant to Section 167 of the PPADA hence the petition ought to be struck out.
58. On whether the petition meets the threshold of a public interest litigation, Mr. Nyaundi learned counsel for the 8<sup>th</sup> interested party submitted that the petition is indeed a public interest litigation. He cited to the Court the case of John Harun Mwau & 3 others v Attorney General & 2 others [2012] where the court expressed itself thus:-
- “In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed”.
59. On the doctrine of exhaustion, Counsel submitted that the instant petition is brought under Article 22 of the Constitution and that it raises Constitutional issues. To counsel, an act that amounts to a Constitutional issue can be discerned from the holding in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR where the court observed that: First, a Constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. That when determining whether an argument raises a Constitutional issue, the court should not be concerned with whether the argument will be successful.
60. On the question whether the Environment and Land Court (ELC) has jurisdiction to hear and determine the matter herein, counsel submitted that despite the Petitioner in his pleadings referring to the ELC, the jurisdiction of the Court was properly moved as the Court was on recess pursuant to the above mentioned Gazette Notice. Further, Counsel submitted that an inadvertent mistake which does not oust the Court’s jurisdiction can be cured by amendment. In counsel’s view, the 1<sup>st</sup> Interested Party



is actually challenging the form of the petition which can be cured by Article 159 of the Constitution if any, given that this is a procedural technicality.

61. On whether the documentary evidence should be struck out, Counsel submitted that the 1st Respondent has not demonstrated any prejudice that it will suffer if the alleged documents are admitted into evidence. Mr. Nyaundi contended that the admission of the documents into evidence will not be detrimental to justice and prejudicial to the 1<sup>st</sup> Respondent but rather will assist the court in determining the questions raised. Counsel also submitted that even if the alleged documents were obtained illegally, the act does not directly prejudice either party hence the same can be admissible. In support of this position, counsel made reference to the holding in the case of Okuya Omutatab Okoiti & 2 others v attorney General & 4 others(2012)eKLR where the court of appeal held that the overriding consideration when considering whether illegally obtained evidence is admissible is the relevance of such evidence in question.
62. Ms. Nkonge learned counsel for the 9<sup>th</sup> Interested party on addressing the issue whether the Petition was validly before this Court submitted that the argument advanced by the Respondents and the 1<sup>st</sup> Interested Party do not justify striking out of the petition which is a drastic and draconian measure, yet the Respondents and the 1<sup>st</sup> Interested Parties have not identified any infirmities that would justify striking out the petition.
63. Counsel further submitted that the petition raises claims that touch on issues within the jurisdictional areas of the court and the suggestion that the Environment and Land Court has jurisdiction ignores the substance of the petition. That this court ought to apply the doctrine of predominant purpose test which will prove that the petition does not relate to the land on which the bulk grain handling facility will be operated on. To support this position, counsel placed reliance on the holding in the case of Suzanne Achieng Buttler & 4 others v Redhill Heights Investments Limited & another(2016) in which the court held that ELC only has jurisdiction if the predominant purpose of the suit is rooted in contests about ownership, deficiency in title, occupation or use of the land.
64. On the doctrine of exhaustion of statutory remedies before filing of the petition, Counsel submitted that Sections of the PPAD 2015 that allow for administrative review proceedings do not apply as that is a preserve for the procurement candidates or tenderers who may have suffered loss due to a breach of a duty imposed on a procuring entity which is not the position in this case as this is a public interest litigation. Counsel contended that the Petitioner herein is a private citizen who has brought a claim in public interest. To further buttress that position, Counsel cited the finding in the case of Republic v Public Procurement Administrative Review Board & another Ex parte Sports, Arts and Social development Fund; Accounting Officer, Sports Arts and Social Fund and Another (Interested Parties [2021] eKLR
65. On striking out the Petitioner's documents, Counsel submitted that the Respondents are state organs and as a result they cannot claim violation of a right or fundamental freedom. Counsel cited the case of Okuya Omtatab Okoiti v Communication Authority of Kenya & 8 Others, High Court Pet 53 of 2018 [2018] eKLR for the proposition that the right to privacy 'protects the inner sphere of the individual from interference' it does not protect the state.
66. Mr.Khagram appearing together with Mr. Buti learned counsel for the 1<sup>st</sup> Interested Party submitted that despite being served with the process and being aware of the proceedings herein, the 2<sup>nd</sup>- 7<sup>th</sup> Interested Parties whose rights are alleged to have been violated have chosen not to participate in these proceedings. Consequently, it is a confirmation that the Petitioner herein is the 2<sup>nd</sup> -7<sup>th</sup> Interested Parties proxy.



67. On jurisdiction, Counsel submitted that under Section 167 of the *PPAD* 2015, the power to adjudicate on infringement of the act and/or its regulations lies with the Public Procurement Administrative Review Board established under Section 27 of the Act and that this court's jurisdiction is limited to Judicial Review of the Review Board's decision hence the court does not have original jurisdiction to entertain the present petition.
68. To advance the submission that the petitioner ought to have exhausted the dispute resolution mechanism provided by statute before approaching the court, counsel made reference to the case of *Mutanga Tea & coffee company Ltd v Shikara Limited & another* (2015) eKLR and *Dew drop enterprises limited v William Muthee Muthami & another* (2019) eKLR
69. On question whether the petition qualifies as a public Interest litigation, the petitioner submitted that as a private citizen, Articles 3(1), 22, 23, and 258 of the *Constitution* gives him the right to file the present petition in tandem with the Supreme Court finding in *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR.
70. The Petitioner further submitted that the petition raises reasonable cause of action under Article 227 of the *Constitution* and the *PPAD* 2015 and as a result, the same ought to be heard on merits. He cited the Court of Appeal in Civil Appeal 110 of 2001 *Rashid Odhiambo Aloggoh & 245 others v Haco Industries Limited* where the Court held that it was undesirable for the High Court to summarily dismiss the petition that seeks enforcement of fundamental rights before determining whether the material facts amount to infringement of a fundamental right or not.
71. On whether the ELC has jurisdiction to entertain the instant petition, the Petitioner submitted that the 1<sup>st</sup> Interested Party and the Respondents are hanging precariously by the skin of its teeth on a clear typographical error and they have failed to make out a case for transferring the instant petition to the Environment and Land Court.
72. On the doctrine of exhaustion of statutory remedies, the Petitioner submitted that Section 9 (1)(h) of the *PPAD* 2015 categorically vests limited jurisdiction in the Authority to act on 'complaints. In his view, the same provision strips the Authority of any jurisdiction to entertain 'disputes' which clearly are reserved for the review board by Section 28(1) (a) of the Act. He opined that he does not have audience before the Review Board and as a result, he can only find redress in the High Court.
73. The Petitioner cited the finding in *Eric Okeyo v County Government of Kisumu & 2 others* [2014] eKLR, where the High Court assumed jurisdiction in a petition filed by a member of the public in a public interest litigation to challenge the procurement process that was inconsistent with Article 10 and 227 of the *Constitution*, having found the statutory mechanism before the Review board to be inadequate for the task.
74. On the question of expunging of documents, the Petitioner submitted that the documents in issue were properly obtained and that the respondents have not proved that the Petitioner did not obtain them from parliament where they were readily available. Further, he contended that the 1<sup>st</sup> Respondent's bill of rights cannot be violated because such rights belong to biological persons as was held in *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR, where the court stated that a state cannot qualify as an individual, since no individual person can deprive the state its life or existence; only another state can deprive the state of Kenya of its right to exist.

### **Analysis and Determination**

75. I have considered the preliminary objections herein filed in the form of applications vis avis the disputed petition. Further, I have considered the responses thereof and detailed rival submissions



by the parties' respective counsel together with well researched authorities. Taking into account the similarities associated with the two applications in terms of their prayers and content, I will endeavour to address them concurrently. Although differently framed by individual parties, Principally, the issues that are discernible for determination are;

- (a) Whether this court has jurisdiction to entertain or hear the petition herein
- (b) Whether this suit is intended to advance the 2<sup>nd</sup> to 7<sup>th</sup> interested parties' private interest
- (c) Whether documents obtained illegally and without the custodian's authority should be expunged from the court record and therefore not admissible
- (d) Who should bear the costs of the suit

76. The petition herein is seeking to challenge the first respondent's act of initiating a tender award in favour of the 1<sup>st</sup> interested party for construction of a second grain bulk handling facility. The contestation is anchored on grounds that; the impugned act is contrary to the 1<sup>st</sup> respondent's master plan which envisaged establishment of the said facility either at Dongo Kundu or Lamu port yet the 1<sup>st</sup> interested party is geared towards erecting the facility at Mombasa port; the impugned decision was made by the 1<sup>st</sup> respondent's Board instead of its accounting officer pursuant to the provisions in the [PPDA](#) 2015; the 1<sup>st</sup> respondent unlawfully invoked the specially permitted procurement method in favour of the 1<sup>st</sup> interested party to avoid competition contrary to section 114A of the [PPDA](#) 2015 and that; the decision is not in the public interest hence discriminatory to the 2<sup>nd</sup> to 7<sup>th</sup> interested parties thus offending Article 227 of the [Constitution](#).
77. In opposing the petition, the 1<sup>st</sup> respondent is arguing that there is nothing constitutional raised in the petition to warrant invocation of the high court jurisdiction. Instead, both objectors are of the view that; the petitioner has no cause of action to institute the suit herein and that even if he had, he should have exhausted the legally provided alternative dispute resolution mechanism under the [PPDA](#) 2015 among them; the public procurement Administrative review board (hereafter the review board) or public procurement regulatory authority( hereafter the authority) ; that the jurisdiction to hear the matter lies with the ELC and that, the petitioner is advancing private interest of the 2<sup>nd</sup> to 7<sup>th</sup> interested parties.
78. It is on the basis of the above elements that jurisdiction of the court has been questioned thus the two preliminary objections. It is trite law that a preliminary objection should be raised only or purely on a point of law which if favourably decided should be able to dispose the matter completely. This position was succinctly stated in the celebrated case of *Mukisa Biscuit Manufacturing Co.Ltd v West End distributors* (1969) EA696.
79. It then follows that, where a court arrives at the conclusion or is of the opinion that it is not seized of the requisite jurisdiction to hear the matter at hand, it should down its tools and not move any further step. This position was clearly set out by Nyarangi JA as he then was in the famous case of *Owners of the Motor vessel "Lillian S" v Caltex oil (Kenya) Ltd* (1989) eKLR.
80. Jurisdiction is not self -made but a creature or product of either the constitution or written law (a statute) hence a court cannot arrogate itself in excess of what the law provides. See *Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others* Supreme Court Civil Appeal No. 2/11(2011) eKLR. Equally, in the case of *Habre international Co.Ltd v Kassam and others*



(1999)1EA125 where the court expressed itself on the need for courts to exercise caution when dismissing a suit for want of jurisdiction. The court had this to say

“I would caution against the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily. Unless the legal provision in question is straight forward and clear, it would be better, in my view, to err in favour of upholding jurisdiction than to turn away a litigant away from the seat of justice without being heard”.

81. Considering that a preliminary objection is the most drastic method of ending litigation without according litigants an opportunity to substantively articulate their case on merit, courts should be slow in upholding such objections unless it is plainly clear on the face of it that the suit is purely hopeless and vexatious with the sole purpose of embarrassing the adverse party hence a waste of precious judicial time. See *D. T. Dobie & company(Kenya)Limited v Joseph Mbaria Muchina & another* (1980) eKLR where the court expressed itself as follows

“No suit ought to be dismissed summarily unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness with the full facts of a case before it”.

82. In the instant case and from the cursory look of pleadings and submissions of all parties, one issue that is clear and which has not been denied is the initiation of a process for the award of a tender for construction of a bulk grain handling facility to the 1<sup>st</sup> interested party through a specially permitted procurement procedure under section 114A of the *PPDA*. The other aspect that stands out clearly is the fact that the petitioner was not a tenderer or participant in the impugned tendering process.
83. The question then pegging an answer is, what interest does the petitioner or public have in the subject tender process and what injury does he or public stand to suffer if the orders sought are not granted? What constitutional violation has he or the public suffered or likely to suffer to warrant this court’s intervention through making a constitutional declaration in his or its favour? The petitioner has come to this court as a private citizen wearing the hat of a litigant representing public interest. One would then ask under what circumstances does one qualify to institute a suit in the public interest?
84. Under Article 22(1) and 258 of the *Constitution*, every person has the right to institute court proceedings claiming that a right of fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. Article 22 Sub-Article 2 goes further to provide that;

In addition to a person acting in their own interest, court proceedings under clause one may be instituted by-

- a. A person acting on behalf of another person who cannot act in their own name;
  - b. A person acting as a member of, or in the interest of, a group or class of persons;
  - c. A person acting in the public interest; or
  - d. An association acting in the interest of one or more of its members.
85. It is incumbent upon the petitioner to prove that he is not a busy body acting as proxy to some people but a champion of public interest. In the case of *Mumo Matemu v Trusted Society of Human Rights*



*Alliance and 5 others* (2014) eKLR the Supreme court illuminated more light on the importance of public litigation as follows;

“public interest litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion, on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259(1), to interpret the constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the rule of law and contributes to good governance”

86. From the pleadings and more particularly, the petition, the petitioner has approached the court under the platform expressing the view that majority of Kenyans who would have otherwise been interested in the subject tender were locked out as there was no competitive tendering process initiated hence discrimination against the public in favour of an individual company.
87. In view of the petitioner’s argument, the court would be required to answer the question whether Article 227 is the necessary midwife whose role was by passed to the detriment of other Kenyans who would reasonably be expected to have reasonable or legitimate expectation that such tender ought to have been drawn to every body’s attention to participate. Article 227 of the *constitution* provides that 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.
88. In the spirit of Article 227 of the *constitution*, prima facie, and subject to proof, there is a constitutional issue requiring substantive interrogation as to the likelihood of Kenyans being deprived of their right to competitively participate in a procurement process involving supply of goods or services to a state organ. By all means, this is a critical constitutional question which cannot be ignored for the sake of safeguarding public interest.
89. Considering that the 1<sup>st</sup> respondent is a public entity whose resources are subject to public scrutiny, the petitioner will properly plead a cause of action in public interest under the platform of a constitutional remedy on account of discrimination to other members of the public. It therefore means, the petitioner will only prove his case fully when given an opportunity to do so.
90. The other aspect under which the petitioner has brought his case is that the initiation of the award of the subject tender was discriminatory to the 2<sup>nd</sup> to 7<sup>th</sup> interested parties. The said interested parties have not taken part in these proceedings. Why would the petitioner plead their private interest in this case? It would appear that the petitioner is advancing two causes in one petition for reasons best known to him.
91. Without speculating, the petitioner has no business advancing the cause of private interest. See *Daniel Muthama Muoki v Ministry of Health & another; Shenzhen Mindray Bio-chemical Electronics Co.Ltd & 5 others(interested parties)*(2020) eKLR where the court castigated litigants who file public interest suits as proxies for personal gain.
92. Although the introduction of the 2<sup>nd</sup> to 7<sup>th</sup> interested parties in this proceedings was not really necessary, in my view, it does not perse dilute the public nature of the suit which supersedes private interest. Therefore, the aspect of the petitioner mixing private interest and public interest alone cannot form a basis to strike out the entire suit at the preliminary stage.



93. Regarding the question that the petitioner ought to have exhausted the alternative dispute resolution mechanism by filing review proceedings before the review board before approaching the high court pursuant to Section 167 of the PPDA, one would have to interrogate that provision and the available case law. Section 167(1) thus provides as follows;
- “Subject to the provisions of this part, a candidate or tenderer, who claims to have suffered or to risk suffering, loss or damage to the breach of a duty imposed on a procuring entity by this act or the regulations, may seek administrative review 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”
94. As stated earlier, there is no proof that the award has been made save for initiation of the specially permitted procurement process geared towards awarding the 1<sup>st</sup> interested party a tender. In the circumstances and considering that the petitioner was not a tenderer nor candidate of the tender process has no locus to institute any review proceedings before the review board pursuant to section 167 of the PPDA 2015.
95. In arriving at the above conclusion, I am guided by the holding in the case of Republic v Independent Electoral and boundaries commission and another Exparte Coalition for Reform and Democracy & 2 others (2017) eKLR where Odunga J held that;
- 173 “with respect to the matters raised in this proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the public procurement and Asset Disposal Act 2015 administrative review is available only to the candidates or tenderers and that the applicant was neither a candidate nor tenderer in the subject procurement. Strictly speaking therefore, it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided under the Act. To that extent I agree that persons who fall within the category of the applicant herein have no locus to commence proceedings before the review board”
- 174... This does not however mean that a person aggrieved by the action of the procuring entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the public procurement and asset Disposal Act...”
96. The above position was upheld by the majority in the case of Al Gburair Printing and publishing LLC v coalition for reforms and democracy and 2 others (2017). Similar position as above was adopted in the case of Republic v public procurement Administrative Review Board & another Exparte Transcend Media Group Limited (2018) eKLR. Whereas it is an indisputable fact that where there is an alternative method in dispute resolution mechanism such process must be exhausted first in terms of the holding in The speaker of the national assembly v Hon. James Njenga Karume (*supra*), the instant case does not fall under that category so far the doctrine of exhaustion is concern under Section 167(1) of PPDA.
97. Having held as above, I will now turn to the question whether the petitioner has recourse to the public procurement regulatory authority. The 1<sup>st</sup> respondent submitted that the petitioner had the alternative of lodging a complaint before the authority pursuant to section 9(1)(h) of the PPDA before approaching the high court. Indeed, I do agree with mr. Kongere that Section 9(1)(h) and 35(2) of the PPDA does provide room for anybody including the petitioner to lodge a complaint to the authority for investigation.



98. Under section 35(1) of the *PPDA*, the authority is not mandatorily duty bound to investigate a complaint; the word used is “the authority may undertake investigations”. The authority has no clear time lines to undertake its role or mandate to forestall any act of abuse of office pending the outcome of such investigation. In the circumstances of this inadequacy, section 174 will come to play as an alternative. For avoidance of doubt, Section 174 provides as follows;
- “The right to request a review under this part is in addition to any other legal remedy a person may have”
99. The word any other remedy presupposes in my view a cause of action in court whether by way of petition or judicial review. This position was held in the case of *Republic v Public Procurement Administrative Review Board and 5 another exparte Transcend Media Group limited* (*supra*) where the court stated that; a person who could otherwise be locked out of invoking the provisions of the Public Procurement and Asset Disposal Act is not barred from seeking alternative remedy under other provisions of the law. In view of the aforesaid precedents above quoted, the petitioner did approach the court properly.
100. Regarding the issue of ELC possessing jurisdiction as advanced by the 1<sup>st</sup> interested party, the same was informed from two perspectives. First, the subject tender award was to facilitate construction of a bulk grain handling facility which requires environmental assessment and acquisition of wayleave. From the onset, the central issue for determination is the alleged specially permitted tender process in awarding the tender.
101. Environmental assessment reports, acquisition of way leave and the like are just but incidentals. They do not form part of the predominant subject of the suit. ELC does derive its mandate from Article 162 which provides that its role is to hear disputes relating to environment and the use and occupation of, and title to, land. The core subject here is procurement under the *PPDA* which disputes fall under the high court. The court is therefore guided by the principle of predominance test as stated in the case of *Suzzane Achieng Butler and 4 others* (*supra*). For those reasons that ground fails.
102. The second aspect is the petitioner’s chamber summons dated 12<sup>th</sup> August 2021 seeking hearing of the petition and notice of motion dated 12<sup>th</sup> August 2021 heard during vacation. In the said application, the applicant made reference to the Gazzete notice number 5632 thus indicating that the ELC was to be on recess. That based on this ground, the petitioner had conceded that ELC had jurisdiction over the matter.
103. The petitioner argued that that was a typing error which arose from the wording of the gazette notice for recess of both high court and ELC hence amendable. Indeed, the petition and the substantive notice of motion have all been filed before the high court and conservatory orders issued by the high court. Any confusion caused by the exparte application seeking hearing during vacation is not fatal nor does it oust high court jurisdiction which is a creature of the constitution and statute. For that reason, that ground fails.
104. Concerning expunging various documents obtained without authorization from the 1<sup>st</sup> respondent, parties put forth strong arguments for or against admissibility. According to the petitioner, he requested vide a letter and through email for the subject documents from the 1<sup>st</sup> respondent’s office but to no avail. He claimed that his requests were ignored but he managed to secure them from parliament where the questioned tender process was the subject of parliamentary inquiry.
105. The 1<sup>st</sup> respondent is of the view that illegally obtained evidence cannot be relied in a court of law. The court was referred to several authorities in support of that position *inter alia*; *Njonjo mue and*



another (*supra*) and *Okiya omutatab Okoiti & 2 others v Attorney General & 4 others* (*supra*) where the respective courts discouraged admission of illicit documents in evidence. The petitioner, 8<sup>th</sup> I/party and 9<sup>th</sup> I/party admitted that the questioned documents were obtained without the 1<sup>st</sup> respondent's authority but hastened to add that their production was not prejudicial.

106. Article 50(4) of the *constitution* provides that any evidence obtained in a manner that violates any right of fundamental freedom in the bill of rights shall only be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Article 35 further guarantees rights to access public information or any information held by any other person but required for the advancement or protection of any right or fundamental freedom.
107. In the case of *Okiya omutatab okoiti & 2 others v Attorney General and 4 others* (*supra*) the court held that what matters in illegally obtained evidence is the relevance of such evidence. Similar position was applied in the case of *John Muriithi & 8 others v Registered Trustees of sisters of Mercy (Kenya) t/a "the matter Miscencordliae hospital & another* (2013) eKLR. Equally, in *Nicholas Randa Ombija v Judges and magistrates vetting board* (2015)eKLR the court relying on the decision in the case of *Karuma son of Kaniu v The queen*(1955)AC197 an appeal to privy counsel upheld admission of illegally procured evidence.
108. In the Njonjo Mue case quoted by the 1<sup>st</sup> respondent, the Supreme Court at paragraph 22 upheld the position that as a general rule, a party claiming violation of a right while obtaining evidence in question, must also prove that such evidence would render the trial unfair or be detrimental to the administration of justice. The only point of divergence between this position was that in the Njonjo Mue case there was a specific and strictly laid down procedure under the IEBC Act and the Elections Act governing the procedure in obtaining the information in question hence *asui generis* case and therefore distinguishable from the general interpretation or application on admissibility of illegally obtained documents.
109. Based on the precedents quoted above including Njonjo Mue case, I do not find any prejudice in the petitioner accessing public information as of right just like every Kenyan is entitled to access unless withheld through ill motive. This is the mischief presidential executive order no.2 of 2018 requiring all public entities to publish tender opportunities and contract awards through the public procurement portal was meant to achieve.
110. I do not see any prejudice or detriment likely to be suffered by the petitioner relying on public documents which are meant to advance transparency and accountability as key values of integrity and good governance in compliance with Article 10 of the *constitution*. In a nutshell, I do not find any basis to deny Kenyans disclosure of information they are entitled to know or have as of right. It is in the interest of the public to know what those documents contain for the sake of transparency.
111. Over all, it is clear from the particulars of the petition and arguments from both sides that the scales of justice tilts in favour of the petition being heard on merit so that each party gets an opportunity to ventilate his or its case. The issues involved in the petition are weighty and of public importance hence cannot be wished away casually. No party will suffer prejudice by the suit proceeding to full hearing. Accordingly, and for the above reasons stated, the applications dated 24<sup>th</sup> and 26<sup>th</sup> August 2021 be and are hereby dismissed. As regards costs, the same shall be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF APRIL 2022**

**J.N.ONYIEGO**

**JUDGE**

