musyoki v Agriculture and Food Authority & another (Constitutional Petition E 262 of 2020) [2022] KEHC 525 (KLR) (Constitutional and Human Rights) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 525 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E 262 OF 2020

HI ONG'UDI, J

MAY 31, 2022

IN THE MATTER OF ARTICLES 10(2), 22(1) (2)(B), (C), 23(1), 27, 201(A), 227, 232 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF VIOLATION OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10(2), 27, 201(A), AND 232 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 AND IN THE MATTER OF PRIVATIZATION ACT, 2005 AND IN THE MATTER FOR INTERNATIONAL EXPRESSION OF INTEREST OF (IEOI) FOR LEASING AND OPERATING OF CHEMILIL SUGAR COMPANY LIMITED, MIWANI SUGAR COMPANY LIMITED (UNDER RECEIVERSHIP), MUHORINI SUGAR COMPANY LIMITED (UNDER RECEIVERSHIP), NZOIA SUGAR COMPANY LIMITED AND SOUTH NYANZA SUGAR COMPANY LIMITED

BETWEEN

NZUKI MUSYOKI ..... PETITIONER

AND

AGRICULTURE AND FOOD AUTHORITY ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1. The genesis of this suit is the 1st respondent's advertisement calling for International Expression of Interest (IEOI) in the Daily Nation, the Standard newspapers of 10th July 2020, the 1st respondent's website as well as the Public Procurement Information Portal. The petitioner invoked this court's jurisdiction by filing the undated Petition filed on 2nd September 2020.

2. The petition is founded upon articles 22 (1), 23(1), 19(1), 19 (2) (a) (c), 19 (3) (a), 20(1), 20(3) (b), 21(1), 24(1), 27, 27(4), 227(1), 201(1), 10 and 232 of *the Constitution*; sections 3(a) & (b) of the *Public*

Procurement and Asset Disposal Act, 2015. The petitioner avers that the respondents contravened section 4 and 6 of the *Agriculture and Food Authority Act* No 13 of 2013, articles 10 (2) (a), 201(a) and 232 (d) of *the Constitution* 232 (1) (f), 10(2) (c), 27, 227(1) and sections 60(3) and 70(3) of the *Public Procurement and Asset Disposal Act*, 2015.

3. The petitioner therefore prays for the following reliefs:-

   i. A declaration that the privatization process/ leasing of the five public sugar companies: Chemilil Sugar Company Limited; Miwani Sugar Company Limited (under receivership); Muhoroni Sugar Company Limited (under receivership); Nzoia Sugar Company Limited; and South Sugar Company Limited to private entities must conform to *the Constitution* and all the relevant statutes in terms of its implementation including the tendering process and failure to comply renders the said process invalid and void ab initio.

   ii. A declaration that the process of advertisement by the 1st respondent to the Daily Nation and the Standard newspapers of 10th July 2020 and on the authority's website as well as on the public procurement Information Portal, advertised and calling for international Expression of Interest (IEOI) for leasing and operating of the five public sugar companies: Chemilil Sugar Company Limited; Miwani Sugar Company Limited (under receivership); Muhoroni Sugar Company Limited (Under receivership); Nzoia Sugar Company Limited; and South Sugar Company Limited to private entities was undertaken in a manner inconsistent with Articles 10(2), 22(1), (2) (b), (c), 23(1), 201(a), 227 and 232 of *the Constitution* as well the provisions of the *Privatization Act*, 2005 and the *Public Procurement and Asset Disposal Act*, 2015.

   iii. An order of Certiorari to bring to this honourable Court for purposes of quashing the decision of the 1st respondent for international Expression of Interest (IEOI) for leasing and operating of the five public sugar companies: Chemilil Sugar Company Limited; Miwani Sugar Company Limited (under receivership); Muhoroni Sugar Company Limited (under receivership); Nzoia Sugar Company Limited; and South Sugar Company Limited as advertised in the Daily Nation and the Standard newspapers of 10th July, 2020 and on the authority's website as well as on the Public Procurement information Portal.

   iv. An order of prohibition directed at the 1st respondent or its servants, agents, employees or any other person whomsoever from undertaking the leasing of the five public sugar companies namely: Chemilil Sugar Company Limited; Miwani Sugar Company Limited (under receivership); Muhoroni Sugar Company Limited (under receivership); Nzoia Sugar Company Limited; and South Sugar Company Limited to private entities until they undertake qualitative and meaningful consultations/ public participation with all the relevant stakeholders including the Lake Region Economic Bloc, affected county governments and the local residents within the locality of the said sugar companies.

   v. The cost of this petition be borne by the respondents.

   vi. Interest in (e) above.

   vii. Any further orders that this Honourable Court shall deem just to grant.

The Petitioner's case

4. The petitioner's case is set out in his supporting affidavit sworn on 1st September 2020. He avers that the 1st respondent vide an advertisement in the Daily Nation and the Standard newspaper of 10th July 2020 and on the 1st respondent's website as well as on the Public Procurement Information Portal, advertised

and called for IEOI for leasing and operating five state owned sugar factories in Kenya: Chemilil Sugar Company Limited; Miwani Sugar Company Limited (under receivership); Muhoroni Sugar Company Limited (under receivership); Nzoia Sugar Company Limited; and South Sugar Company Limited.

5. The said exercise amounted to usurpation of power and authority by the 1st respondent as it had no legal mandate to lease the said public companies. Further, the said companies were duly incorporated under the company laws of Kenya and accordingly enjoyed separate legal entity which entailed the ability to make its own decision through the company's internal making decision organ. There was no public notice nor documentation indicating that any of the five factories had through a board/ special general resolution, authorized the said purported leasing.

6. He depones that the IEOI disregarded various constitutional principles including public participation, fairness and non- discrimination and it was intentionally designed to lock out qualified and competent international bidders. To wit, the advertisement required bidders to submit their expression of interest by 3rd of August 2020, considering the COVID – 19 pandemic situation this was impossible for international bidders to competitively participate in the bidding, due to the travel restrictions globally, it was practically impossible for international bidders to arrange a site visit for the said companies, for purposes of conducting due diligence and appraisals. This discriminatively locked out qualified international investors in contravention of the provisions of *the Constitution* as well as the *Public Procurement and Asset Disposal Act*.

7. The 1st respondent also failed to avail necessary information to potential bidders addressing issues such as debts owed to the Kenya Revenue Authority, secured and unsecured Debts, workers dues as well as other legal impediments that would affect the proposed leasing arrangement. Also the IEOI scantly addressed the issue of restructuring of the balance sheets of each of the said sugar companies and failed to provide sufficient information.

8. It's his further averment that the Government had committed to write off the public debt of the said five companies which would mean that Miwani Sugar Company and Muhoroni Sugar Company ltd would no longer be in receivership consequently altering their legal status. Hence the role of the receiver would be rendered functus officio. The 1st respondent also failed to consult the necessary and relevant stakeholders as evidenced by the Lake Region Economic Bloc press statement issued on 22nd July 2020, the County Government of Kisumu vide letter dated 29th July 2020 and the sugarcane farmers were also not involved prior to the advertisement of the IEOI which was mandatory requirement under *the Constitution* of Kenya, 2010.

9. He depones that the 1st respondent failed to consider the relevant provisions of the Crops (Sugar Imports, Exports and By Products) Regulations 2020, the Recommendations of the Sugar Taskforce Committee and the views submitted by some stakeholders in the sugar sector.

10. In his supplementary affidavit sworn on 22nd October 2020 he deposed that the ELRC Petition Number 29 of 2020 in Kisumu differed substantially from the instant petition. The petition therein is a labour dispute involving employees of the state owned sugar companies relating to labour disputes while the petition herein raises constitutional issues. Further, this court has the original jurisdiction to hear and determine matters relating to the interpretation of *the constitution* while the employment and labour relations court deals exclusively with matters concerned with employment and labour related disputes. Lastly, this court has territorial jurisdiction.

11. He deposed that contrary to the respondents' assertion, he had the locus standi to institute the suit pursuant to article 22(1) of *the Constitution*. Further, that under the *Public Procurement and Asset Disposal Act*, procurement disputes are reviewed at the administrative Review Board strictly by a

candidate or a tenderer who has suffered or risks suffering loss of damage due to a breach by the procuring entity. He was neither a tenderer nor a candidate. The Administrative Review Board did not also have the jurisdiction to interpret *the Constitution*.

12. He maintained his averments concerning the timelines set for submitting the IEOI in light of the pandemic and asserted that the *Public Procurement and Asset Disposal Act* and its regulations prescribed a minimum period of time which the 1st respondent ought to have enlarged in view of the restrictions in place at the time and therefore ought to have exercised that discretion.

13. He averred that the 1st respondent contrary to section 60(3) and 70(3) of the *Public Procurement and Asset Disposal Act*, 2015 failed to disclose all material information concerning the state owned sugar companies. Further that while the Sugar Stakeholders task force was established to make a report and give recommendations on ways of assisting the sugar industry in Kenya, the recommendation to privatize the sugar companies was abandoned by the 1st respondent. The leasing model for the said companies was not a recommendation of the Sugar Industry stakeholders' taskforce and was thus not resultant of public participation as claimed.

14. He further depend that a cabinet decision cannot be invoked to purportedly oust the requirement for public participation and consultation by all relevant stakeholders before the policy decision is made. The Cabinet disregarded the parliamentary approved privatization in favour or leasing which was arrived at without consultation with the relevant stakeholders or public participation by those likely to be most affected by the decision.

15. He further averred reiterating the contents of the state owned sugar companies on the issue of being companies and the law of company law being complied with according to the Companies Act, 2015. Further, that in order to by-pass the role of companies decision making organs the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives illegally appointed an interim management committee on the leasing of the five state-owned sugar companies which was foreign as far the internal affairs of the companies was concerned.

16. Reiterating the issue on the authority of the 1st respondent, he deposed that he had established a prima facie case and urged the court to grant the orders and prayers sought in the Application and petition.

The Respondents' response

17. The respondents filed a replying affidavit sworn on 4th October 220 by Rosemary A Owino the interim head of sugar directorate of the 1st respondent. She deposed that there was pending litigation before Kisumu; ELRC Constitution Petition No 29 of 2009; *Kenya Union of Sugar & Allied Workers v The Cabinet Secretary Ministry of Agriculture, AFA , The County Government of Kisumu & The Office of the Attorney General* wherein the issues in the instant petition are directly and substantively in issue in the said petition and an order had been issued therein halting the impugned tendering process. She thus urged this court to stay this suit and or be transferred to Kisumu for hearing and determination.

18. Regarding conservatory orders, she deposed that the application had not met the judicially set criteria for the grant of the said orders and if the court granted the orders sought, it would have entered into the arena of conflict and unlawfully taken over the statutory functions of the 1st respondent as outlined in *the Constitution*, *Public Procurement and Asset Disposal Act*, 2015 and regulations 83 and 114(1) *Agriculture and Food Authority Act*, No 13 of 2013 and section 8(q) of the *Crops Act*, No 16 of 2013.

19. She deposed that the jurisdiction of this court had been prematurely invoked by the petitioner as there is a process for challenging a procurement process. The same starts with the Public Procurement

Administrative Review Board and the High Court only exercises an appellate jurisdiction against the decisions emanating therefrom.

20. She averred that the petitioner lacked the locus standi to institute the suit and neither had he demonstrated any violation of *the Constitution*, the *Public Procurement and Asset Disposal Act*, 2015 and the Public Procurement and Asset Disposal Regulations, 2020 or any other law. Further, that none of the international bidders had lodged any complaints whatsoever and neither had the petitioner demonstrated his position of interest that may be damaged by the impugned tendering process.

21. She deponed that the advertisement of the IEOI was issued in accordance with the requirements of section 89 of the *Public procurement and Asset Disposal Act*, 2015 and Regulation 83 and 114(1) of the *Public Procurement and Asset Disposal Regulations 2020*. In any event the applicable law did not require a procuring entity to provide for the site visit and due diligence at that stage of submissions on the IEOI.

22. She avers that contrary to the Petitioner's assertion, the IEOI was not designed to obstruct international bidders, but to identify bidders with the commercial and technical capacity to redevelop and operate each of the five factories on the lease terms; the IEOI asked for minimum qualifications and relevant documents as applied to various countries; no local bidder was advantaged by providing additional information or allowed site visits; and the list of bidders included West Kenya Sugar Company and Sukari Industries, China CAMC Engineering Company Limited, Shenzhen Start Instruments, Mehta Group, Kibos Sugar, Butali Sugar Mills, Mini Bakeries and Kuguru Food Complex.

23. She depones that in preparing the impugned tender document, the respondent acted with transparency and provided to the public timely and accurate information as provided by article 232(1)(f) of *the Constitution* of Kenya as read with the relevant provisions of the *Public Procurement and Asset Disposal Act*, 2015. Further, the IEOI was advertised and prepared and published as required by the PPAD Act, 2015. Hence no violation of sections 60 (3) and 70(3) of the PPADA, 2015.

24. Regarding the issue of public participation, she deposed, that there was public participation;

    i. The process of privatization of state owned sugar factories had begun earlier before the government approved the first model of privatization under the Privatization Commissions

    ii. Subsequently there had been extensive public consultation with member of the said institutions

    iii. The sugar taskforce was duly constituted by the government and had all the enlisted representatives and Chaired by representatives from County Government of Kisumu and Lake Region Economic Bloc and report clearly stated the desire by the industry to privatize the state owned mills

    iv. The report was presented to the President and authorized the implementation on 24th February 2020

    v. The communication from the Head of Public Service vide letter of Ref. CAB/ GEN 3/1/1VOL XVI (54) dated 24th April 2020 indicated that the President had considered the Cabinet Memorandum on Improving Competitiveness of the public Sector Owned Sugar Companies and among others; vacated the privatization model approved by Parliament in 2015; approved the leasing model for the five public owned sugar mills.

    vi. Prior to the Cabinet approval of the leasing model of privatization, consensus had been reached.

25. She further deponed that the petitioner ignored the fact that the 1st respondent was a state corporation under the Ministry of Agriculture, Livestock, Fisheries and Cooperatives and as such the government had the prerogative to implement its policies through any of its state corporations. Further

    Section 6 of the *Agriculture and food Authority Act*, 2013 gave the 1st respondent wide powers including the power to undertake any activity necessary for the fulfilment of any of its functions.

26. She deposed that the 1st respondent acted as an agent from the majority shareholder/ debenture holder in leasing the Assets within the government approved program without altering the structure of ownership of the subject companies or their legal status. All management changes were gazetted vide Gazette No. 5473 of 7th August 2020. Further, that the intended leasing is in compliance with legally binding Cabinet Decision of 24th April 2020.

27. She deponed that in the request for the IEOI the 1st respondent obtained delegated authority and acted within the requirement of the law. That the form of leasing being sought was an operating lease where the property was leased on an as is where is basis through transfer of Rights of Use (ROU); the assets shall remain with the Government and there is no transferring of ownership; and the EIOI as described fell within the *Public Procurement and Asset Disposal Act*, 2015 model the government adopted in leasing all of assets. She urged the court to dismiss the petition and application with costs.

The Petitioner's submissions

28. The petitioner filed skeleton submissions dated 10th September 2020 through Otieno Ogolla & Co Advocates. Counsel while relying on the cases of: *Muslims For Human Rights (MUHURI) & 2 others v Attorney General & 2 others* High Court Petition no 7 of 2011; Petition No 16 of 2011, *Nairobi Centre For Rights Education and Awareness (CREAW) & 7 others; The Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others* Eldoret Petition No 11 of 2012; and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014 eKLR, argued that this was a proper case for the grant of the conservatory orders.

29. He submitted that he had demonstrated that the impugned act by the 1st respondent threatened to violate fundamental rights and infringed on the principles of *the constitution*. He had demonstrated manifest illegalities in the manner in which the process of leasing of the public sugar companies was undertaken. That it was therefore necessary for the process to be stopped.

30. Reiterating his case, he argued that if the orders sought in the application were not granted and the respondents let to proceed with the process of leasing the five state owned sugar companies, the process would result in a mega scandal and ridicule well established and acclaimed constitutional values and principles.

31. He contended that the respondents grossly disregarded the national values and principles envisaged in *the constitution* despite being made aware of the violations by the applicant and other key stakeholders, continued to violate them. That despite the key stakeholders raising issues in the failure by the 1st respondent to consult them prior to publishing the advertisement the respondent intentionally refused to stop the process and engage the stakeholders. Hence it was important for this court to grant the conservatory orders.

32. He maintained that the 1st respondent had disregarded the provision of the Companies Act and relied on *Re matter of an application by Peter Anyang' Nyong'o, James Omingo Magara and Mwendawiro Mghanga for leave to commence Judicial Review Proceedings for orders of certiorari, prohibition and mandamus in respect to the decision of the Government of Kenya through the Ministry of Finance to*

offer to the Public 25% of Safaricom Shares (2007) eKLR to argue that no resolution by the said public companies was made approving the intended leasing or privatization of the companies as required.

33. According to him, the 1st respondent acted ultravires, its powers and functions stipulated under the *Agriculture and Food Authority Act*, No. 13 of 2013. He relied on *Daniel Ingida Aluvaala and another v Council of Legal Education & another* and argued that the conservatory orders would prevent further violation of *the constitution* by the respondents and preserve the subject matter. Hence they had met the threshold for granting the said orders so sought.

34. Regarding the declaratory orders sought in the petition, and while relying on *Bitange Ndemo v Director of Public Prosecutions* (2016) eKLR on the principles guiding the grant of declaratory orders, he submitted that there was real and actual legal controversy on whether the respondents' actions amounted to a contravention of *the constitution* and whether the 1st respondent had the power to commence and/or conduct the purported leasing of the state owned sugar companies.

35. He further relied on the Court of Appeal decision in *Johana Nyokwoyo Buti v Walter Rasugu Omariba & others* Civil Appeal No 182 of 2006 and urged the court to grant the declaratory orders sought and the writs of judicial review.

The Respondents' submissions

36. The respondents filed submissions dated 6th November 2020 together with list of documents and authorities, date by learned Senior State counsel Mr Michael Maurice Ogosso. The respondents reiterated the contents of their replying affidavit. Regarding the instant petition and the doctrine of sub judice, they submitted that petitions Kisumu ELRC Petition No 29 of 2020; *Kenya Union of Sugar & Allied Workers v The Cabinet Secretary Ministry of Agriculture, AFA, The County Government of Kisumu & The Office of the Attorney General*; Kisumu ELC Petition No 5 of 2020; *Linus Rotich Tum v The Cabinet Secretary, Ministry of Agriculture and Food Authority, County Government of Kisumu, County Government of Nandi & The National Land Commission*; Kisumu ELC Petition No 6 of 2020; *Crossley Holdings v The Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries, Agriculture and Food Authority, The County Government of Kisumu and the Hon Attorney General*, pending for hearing and determination raised issues that were directly and substantially in issue in this petition. That in the said Petitions an order had been issued effectively halting the impugned process and an injunction had been issued stopping the leasing of the said companies or conducting further business in relation to leasing of the said factories.

37. Counsel submitted that being that the ELRC and the ELC matters were filed first in time against the same respondents herein, save for the County Government of Kisumu, and the same being a public interest litigation, it would be in order that this matter be transferred to Kisumu for hearing and determination. He relied on Advisory Opinion Reference No 1 of 2017 *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Interested Parties) [2020]eKLR and, *Mek Sacco Limited v County Cooperative Officer – Kisumu & 3 others* [2019] eKLR, in support of this submission.

38. According to counsel and as averred in the replying affidavit, the application for conservatory orders did not meet the judicially set criteria for the grant of the orders sought therein. Further, that this being a procurement process, the jurisdiction of this court had been prematurely invoked by the petitioner as envisaged under sections 168 to 175 of the Public Review and Asset Disposal Act 2015. He relied on Jackson Maina Ngamau v Ethics and Anti- Corruption Commission & 3 others [2015] eKLR Mombasa High Court Constitutional Petition No 61 of 2012.

39. The respondents reiterated their position on their compliance with *the Constitution*, *Public Procurement and Asset Disposal Act*, 2015 and the Public Procurement and Asset Disposal Regulations 2020 on the issue of public participation, the issue on locus standi, the issue of the applicable law not requiring a procuring entity to provide for site visits and due diligence at that stage of submissions of the IEOI and, the issue of the 1st respondent locking out international bidders.

40. They maintained that in preparing the impugned tender document, they acted with transparency and provided to the public a timely and accurate information as provided by article 232 (1) (f) of *the Constitution* as read with the relevant provisions of the *Public Procurement and Asset Disposal Act*,2015 (PPAD Act). That the impugned IEOI advertisement was prepared and published as required by the PPAD Act 2015. Hence there was no violation of sections 60(3) and 70(3) of the PPAD Act 2015.

41. Relying on *Law Society of Kenya v Attorney General*, Nairobi High Court Petition No. 318 of 2012 (Unreported) they argued that it was not for the petitioner or any special interest group to impugn a process that had met the requirements of public participation. They further reiterated their position on the Agriculture and Food Authority to lease a public asset and that all the management changes were gazetted vide Gazette Notice No 5473 of 7th August 2020 by the concerned Cabinet Secretary. That the actual leasing process and all contract negotiations would be conducted by a multi-agency group drawn from all relevant sectors and agencies. Further, the intended leasing of the five public companies was in compliance with a legally binding Cabinet decision of 24th April 2020.

42. They maintained that the 1st respondent had always acted within the confines of the applicable law; sections 3 and 6 (e) of the *Agriculture and Food Authority Act*, No 13 of 2013 and section 8(q) of the *Crops Act* No 16 of 2013. That the call for IEOI was in conformity with *the Constitution* of Kenya, *Privatization Act* 2005 and the *Public Procurement and Asset Disposal Act* 2015. Counsel urged the Court not to stop the respondents proceeding with the shortlisting and invitation for request for proposals for leasing of public sugar factories.

43. Regarding judicial review orders sought, the respondents relied on the cases of *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR; *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* civil Appeal No 185 of 2001; and *Pastoli v Kabale District Local Government Council and others* [2008] 2EA 300 for the argument that the petitioner had not met the judicial threshold for the grant of any of the judicial review orders sought.

44. Counsel submitted that no reasons had been urged by the petitioner to warrant the declaratory orders sought in the petition. He urged the court to dismiss the petition.

Analysis and determination

45. Having considered the parties pleadings, rival submissions, cited authorities and the law, I find the following issues to arise for determination;

    i. Whether the petition offends the doctrine of sub judice

    ii. Whether the jurisdiction of this court has been prematurely invoked

    iii. Whether the petitioner had the locus standi to institute this suit

    iv. Whether the 1st respondent contravened the provisions of *the Constitution*, *Agriculture Food and Authority Act*, 2013, and the *Public Procurement and Asset Disposal Act*, 2015

v. Whether the reliefs sought should be granted.

46. I wish to point out that I did not handle this matter from the start. The file came before me when directions had long been given and submissions filed. I only gave a date for Judgment as both counsel elected not to highlight their submissions. In the process of acquainting myself with the file I have noted that there are other similar matters pending before the ELC & ELRC Kisumu. It would have been best to have the matters handled by the same court to avoid contradictory findings. Since the matter was not transferred or stayed I will proceed to write the Judgment. Whereas my decision is not binding on my brothers/sister Judges in Kisumu, I will all the same direct that this Judgment be brought to their attention, for information only.

47. Secondly I wish to clarify that I will not be addressing the issue of conservatory orders largely submitted on by the Petitioner's counsel. The reason is that conservatory orders were already granted in the petitions before the ELC and ELRC at Kisumu, and so is not an issue here. The judgment is therefore in respect of the petition.

Issue No 1 Whether the petition offends the doctrine of sub -judice

48. Section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya provides for when a matter can be declared as offending the doctrine of sub-judice. It provides:-

> 6. Stay of suit
>
> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
>
> Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."

49. The rationale for the doctrine of sub-judice was discussed in *David Ndii & others v Attorney General & others* [2021] eKLR as follows:

> 508. The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts and the Court will, if necessary, stay one of the claims."

50. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Interested Parties) [2020] eKLR had this to say in regard to sub-judice:-

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the

same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

51. In the case of *William Odhiambo Ramogi & 2 others v Attorney General & 6 others* [2018] eKLR it was observed that:-

> 56. purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In Standard Chartered Bank Limited v Jenipher Atieno Odok, HCCC No 120 of 2003, Warsame J (as he then was), had the following to say about the doctrine of sub judice:
>
> It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time."

52. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR Mativo J, stated the following with regards to sub-judice:-

> 24. The sub-judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub-judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.[11]
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> 25. In a fairly recent decision of this court, namely JR No. 146 of 2020, which incidentally involved the Law Society of Kenya, I stated that the words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue.", sub-judice would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.
>
> 26. Paraphrasing what I said in the above case, the key words in applying sub-judice rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the sub-judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.
>
> 28. At the risk of repeating myself, for the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The mere fact that the applicant in the earlier suit is a

> Branch of the Law Society of Kenya, while the applicant in the instant suit is the main body does not change the situation. The Branch is suing on behalf of its members. As stated earlier, should the court determine the earlier suit either way, it will render the issues in the instant suit res judicata. Put differently, the outcome of the earlier suit will apply to the entire membership of the Law Society."

52. This court has also pronounced itself recently with regards to sub-judice in *Auto Terminal Japan Limited v Directorate of Criminal Investigations & another* [2021] eKLR that:-

> "Basically, for the doctrine of sub-judice to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya."

53. The respondents invited this court to find that the petition herein offends the doctrine of sub-judice in relation to several petitions outlined at paragraph 37 of this Judgment. They have urged this court to stay this suit or direct that the same be transferred and be heard with the other said petitions.

54. The petitioner on the other hand in his supplementary affidavit stated that the ELRC Petition Number 29 of 2020 in Kisumu differs substantially from the instant petition. That the petition in Kisumu is a Labour dispute involving employees of the state owned sugar companies relating to labour disputes while the petition herein raises constitutional issues. Further, that this court has the original jurisdiction to hear and determine matters relating to the interpretation of *the Constitution* while the Employment and Labour Relations Court deals exclusively with matters concerning employment and labour related disputes. Lastly that this court has territorial jurisdiction.

55. The assertion by the respondents calls for this court to examine the other cases vis a vis this petition to determine whether the same offends the doctrine of sub-judice.

i. Are parties similar?

a. In Kisumu ELC Petition No. 5 of 2020, parties are; Linus Rotich Tum (petitioner), The Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries & Cooperatives, Agriculture and Food Authority (Respondents), and County Government of Kisumu, County Government of Nandi and National Land Commission (Interested Parties).

b. In the instant, Petition No. E262 of 2020; Nzuki Musyoki (petitioner) and Agriculture and Food Authority and the Hon. Attorney General (Respondents)

c. In Kisumu ELRC No 29 of 2020; Kenya Union of Sugar Plantation and Allied Workers (petitioner), Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries & Cooperatives, Agriculture and Food Authority, County Government of Kisumu and The Attorney General (respondents)

d. In Kisumu ELC Petition No 6 of 2020; Crossley Holdings (petitioner) and the Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries & Cooperatives, Agriculture and Food Authority, County Government of Kisumu and the Attorney General (respondents)

56. It is clear that the petitioners are not similar, the matters are filed before different forums and the only common parties are majority of the respondents in the said petitions.

ii. Are the issues herein substantially the same as those raised in the other petitions

a. The petition stems from the 1st respondent's advertisement inviting bids by way of IEOI to have state owned sugar companies leased out to successful bidders for long term basis;

b. There was no public participation;

c. There was no compliance with Part VII of the *Public Private Partnership Act*, 2013;

d. There was no Environment Impact Assessment done in line with the provisions of the *Environment Management and Coordination Act*, 1999;

e. The 1st respondent acted ultravires on the issue of being granted managerial duties over the sugar factories contrary to its mandate under the Agriculture and Food Act, 2013;

f. The issue of the Cabinet Secretary Ministry of Agriculture Livestock, Fisheries and Cooperatives revoking of the Management Board of Nzoia Sugar Company Limited, Chemelil Company Limited and South Nyanza Sugar Company Limited and publishing of Gazette Notice No. 5473 in the Kenya Gazette of 7th August 2020 appointing an Interim Management Committee to run the affairs of the five sugar companies;

g. The advertisement, the revocation and appointment of the Interim Management Committee did not take into account the decision of the High Court in Kisumu High Court Petition No. 4 of 2019; *The County Government of Kisumu v the National Land Commission & 3 others (Suing as Trustees of Nyando Valley Association)*; in the said case, 3 persons named as trustees of the Nyando Valley Association were claiming a portion of all that parcel of land knowns as LR No 11840 currently registered in the name of Chemelil Sugar Company Ltd; and

h. The Cabinet Secretary Ministry of Agriculture Livestock, Fisheries and Cooperatives violated the rights of the persons claiming ownership in the above mentioned parcel of land.

In petition Kisumu No E262 of 2020 the issues are;

a. The genesis is the 1st respondent's advertisement calling for the IEOI for leasing and operating five state owned sugar companies;

b. The said advertisement amounted to the usurpation of the power and authority by the 1st respondent as it had no power to lease the said public companies;

c. The company law requirements were not adhered to;

d. There was no public participation, fairness and non- Discrimination and the advertisement was designed to lock out international bidders due to the limited timelines for submitting the IEOI and that contravened *the Constitution* as well as the *Public Procurement and Asset Disposal Act*;

e. The advertisement failed to disclose all the material information;

f. The 1st respondent failed to consult all the relevant stake holders prior to the advertisement and also failed to consider the relevant provisions of the *Crops (Sugar Imports, Exports and Products) Regulations* 2020, the recommendations of the sugar taskforce committee, and the views of some of the stakeholders in the sugar company.

In kisumu ELC Pet No 6 of 2020;

a. The genesis is the invitation by the Agriculture and Food Authority of the IEOI for leasing and operating some of the state owned sugar factories in Kenya including the Miwani Sugar Company (1989) Ltd (in receivership) which included both the plants and the land;

b. The petitioner is the owner of the registered proprietor of the parcel land known as LR 7543/3 CI R No 21038) which was acquired through a public auction as a result of a decree in favour of the decree holder in Kisumu High Court Civil Suit No 225 of 1993; *Nagenara Saxena vs Miwani Sugar Mills Ltd*;

c. The respondents therein contravened *the constitution* and the law against the petitioner as the petitioner's rights and interests.

In Kisumu ELRC Petition No 29 of 2020;

a. The petition has not been attached by both parties however the petitioner in the instant suit has categorically stated that the suit relates to a labour dispute involving employees of the state owned sugar companies. I have also read through the notice of motion application in the this suit, and I agree with the petitioner that a look at the prayers sought and the grounds for seeking the said orders, it is clear that the same is in relation to employees of the 5 sugar factories and their plight which had not been addressed. They have also raised an issue of public participation.

57. From the foregoing it is undisputed that the genesis of all the petitions is the advertisement by the Agriculture and Food Authority inviting IEOI for the leasing of the sugar companies herein before mentioned. It is also clear that some of the issues herein are also mentioned in some of the other petitions. For instance the mandate of the Agriculture and Food Authority to undertake managerial duties over the sugar companies and the issue of public participation. However, it can be deduced that there are certain major issues that are common in three of the petitions.

iii. Are the reliefs sought similar

58. I have perused the reliefs sought in all above petitions. Kisumu ELC Petition Nos 5/2020 & 6/2020 show that the Petitioners are challenging the process of the advertisement for the privatization process/ leasing of the named sugar companies. It is the same issues that are raised here. In fact once that is addressed the others will be sub issues. In the Kisumu Petitions conservatory orders of injunction were issued stopping the leasing of the state owned sugar factories and/or conducting further business in relation to leasing of the said factories. (Annexture RAO – 1) confirms the orders having been issued as follows:-

    a. Kisumu ELRC Pet No. 29/2020 on 13th August 2020

    b. Kisumu ELC Pet No. 5/2020 on 27th August 2020

    c. Kisumu ELC Pet No. 6/2020 on 31st August 2020

59. The Petitioner cannot therefore argue that the ELC & ELRC cannot address constitutional issues especially when they relate to land & Environment & Employment respectively. The matters before the Kisumu ELC & ELRC were filed much earlier than this present Nairobi Petition No. 262 of 2020. The only reason why this Petition cannot be said to be subjudice is that the Petitioners in the maters are not the same. See *MCK Sacco Limited v County Co-operative officer Kisumu & 3 others* [2019] eKLR.

60. The issue of jurisdiction was well dealt with in the case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) ltd* (1989) KLR 1 where Nyarangi JA stated:-

> " ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

61. A decision made by a Court of Law without jurisdiction is a nullity *ab initio*. It cannot stand and has to be set aside. There are many other decisions which have dealt with the issue of jurisdiction. See *Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No.2 of 2011, *Samuel Kamau Macharia & another; Kenya Commercial Bank Limited & 2 others* [20212] eKLR; Application No 2 of 2011. Jurisdiction, in law is the authority of a Court to hear and determine cases. This authority is constitutionally based. See *Mary Wambui Munene v Peer Gichuki Kingara & six others* [2014] eKLR.

62. The subject matter of the present petition involves a procurement process. The said process is clearly covered by the *Public Procurement & Asset Disposal Act* 2015 plus the *Public Procurement & Asset Disposal Regulations* 2020. The issue is whether there is a process in the said Act & Regulations which the petitioner ought to have exhausted before coming to this Court.

63. The doctrine of exhaustion is entrenched in article 159(2)(c) of *the Constitution* which calls for alternative dispute relations. It provides as follows;-

> " Art. 159(2) – In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) .....
>
> (b) .....
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause."

64. Alternative dispute resolution has been upheld in a number of decisions and practices in our country. It saves a lot on judicial time and even resources. Courts have also held that where a dispute resolution mechanism exists the same must be exhausted before parties move to the court. See (i) *Speaker of National Assembly v Karume* [1992] KLR 21; *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR; and *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR.

65. There are however instances where existing circumstances may make it impossible for an Alternative Disputes Resolution to take place. In the case of *Fleur Investments Ltd v. Commissioner of Domestic Taxes & another* [2018] eKLR the Court of Appeal stated as follows:-

> " 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the income Tax Tribunal which called for intervention by way of Judicial Review. Whereas Courts of Law are enjoined to defer to specialised Tribunals & other Alternative Dispute Resolution Statutory bodies created by parliament to resolve certain specific disputes,

the Court, cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably & fairly."

66. The *Public Procurement and Asset Disposal Act* has in place a dispute resolution mechanism. This is provided for under Part XV of the Act which provides as follows:-

" Part XV – Administrative Review of Procurement & Disposal Proceedings

167. Request for a review:

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

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

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

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

168. Notification of review and suspension of proceedings:

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

169. Rejection of requests by Review Board Secretariat:

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

170. Parties to review;

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity; and

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

171. Completion of review:

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

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

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

173. Powers of Review Board upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

174. Right to review is additional right:

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

175. Right to judicial review to procurement:

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the

decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within fortyfive days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party."

67. Section 3 of the said Procurement Act provides as follows:-

3. Guiding principles Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under article 27;

(c) affirmative action programmes provided for under articles 55 and 56;

(d) principles of integrity under the *Leadership and Integrity Act*, 2012 (No. 19 of 2012);

(e) the principles of public finance under article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

68. The said Act was legislated to give effect to Article 227 of *the Constitution*, which provides as follows:-

227.

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices."

69. Counsel for the respondents submitted that the Petitioner had prematurely invoked this court's jurisdiction. The reasons being that a challenge to a procurement process starts at the Public Procurement Administrative Review Board and the High Court only exercises an appellate jurisdiction against decisions emanating from the Review Board.

70. He cited the case of *Jackson Maina Ngamau v Ethics & Anti-Corruption Commission & 3 others* [2015] eKLR where the court held:-

> The principle of 'constitutional avoidance' as discussed by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal medial Services Ltd & 5 others* (2014) eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists an statutory or other remedy. In addition, in accordance with the Rule in *The Speaker of the National Assembly v Karume* (2008) EG&F, it is now accepted as a principle of constitutional adjudication that where *the constitution* or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed."

71. This was not specifically responded to by the Petitioner in his submissions. He however in his supplementary affidavit @ paragraphs 10 and 11 deponed as follows:-

> para 10. That under the *Public Procurement and Asset Disposal Act*, procurement disputes are referred to the Administrative Review Board strictly by a candidate or a tenderer who has suffered or risks suffering loss of damage due to a breach by the Procuring Entity. I am not a candidate nor was I a tenderer and by virtue of Section 167(1) of the Act, I was therefore not a proper party before the Administrative Review Board.
>
> Para 11. That in addition, the Administrative Review Board does not have jurisdiction to interpret *the Constitution* and cannot therefore determine the constitutional issues raised in the petition herein. The Respondents'

contention in an attempt to oust this Honourable Court's jurisdiction are fallacious."

72. It is not correct for the petitioner to state that the Administrative Review Board cannot interpret *the Constitution* and cannot determine the constitutional issues raised in this petition. Section 29 of the Act provides for the composition of the Review Board as follows:-

> "29. Composition of the Review Board
>
> (1) The Review Board shall comprise of the following 15 members who shall be appointed by the Cabinet Secretary taking into account regional and gender balance—
>
> (a) a chairperson whose qualifications and experience shall be as that of a Judge of the High Court;
>
> (b) seven other members whose qualifications and experience shall be as prescribed in the regulations; and
>
> (c) seven other persons appointed by the Cabinet Secretary.
>
> (2) A person appointed as a member under subsection (1) shall be nominated by the following professional bodies from amongst their members as follows—
>
> (a) two persons nominated by the Law Society of Kenya;
>
> (b) one person nominated by the Chartered Institute of Arbitrators, Kenya Chapter;
>
> (c) one person nominated by the Kenya Institute of Supplies Management;
>
> (d) one person nominated by the Institute of Certified Public Accountants of Kenya;
>
> (e) one person nominated by the Institute of Engineers of Kenya; and
>
> (f) one person nominated by the Architectural Association of Kenya."

73. The qualifications of such members is set out in Section 30 of the Act it provides as follows:-

> 30. Qualifications of members of the Review Board
>
> (1) A person shall not be appointed as a member of the Review Board under section 29 unless that person—
>
> (a) possesses a university degree from a university recognised in Kenya;
>
> (b) has knowledge and experience of not less than seven years in the relevant field;
>
> (c) is a professional of good standing in his or her respective professional body; and
>
> (d) meets the requirements of Chapter Six of *the Constitution*.
>
> (2) The Chairperson appointed under this Act shall be a person who qualifies to be a judge of the High Court and shall meet the requirements of Chapter Six of *the Constitution*."

74. Therefore Sections 29 and 30 confirm that the composition of the said board should be of persons with experience in various fields including law. The chair person must be one with qualifications and experiences of a Judge of the High Court. The members are therefore persons with wide experiences. The chair has the knowledge and experience of interpreting *the constitution*.

75. The Petitioner argues that he could not file his matter before the Administrative Review Board because he was not a candidate or tenderer. He picked these words from section 167(1) of the Act thus limiting himself. A further reading of the Act reveals a category of persons who may be parties in a Review before the board. This is at section 170 which provides at subsection (d) the category as follows:- "Such other persons as the Review Board may determine."

76. It can clearly be noted that besides the person who has requested for review, the accounting officer of a procuring entity and the Tenderer notified as successful by the procuring entity, there is another category of persons. These are now the "such other person as the Review Board may determine."

77. It is not just anybody who will go to the Review Board to raise an issue. It must be a person with an identifiable interest in the procurement or disposal interest. At the same time the determination of this category of persons is left to discretion of the Review Board.

78. There is no evidence placed before this Court showing that the Petitioner who falls in the category at Section 170(d) of the Act approached the Review Board with his grievances and was denied a hearing. My interpretation of Section 170(d) is that it makes provision for any other person besides the candidate, tenderer and the accounting officer of the successful entity who is aggrieved to make known their complaint to the Review Board.

79. The provisions under Part XV of the Act must be read holistically and not taking one provision and running with it. The intention of Parliament was to have the initial process handled under the Act by the Review Board before escalating to the High Court. The reasons being that the Board is equipped with people with the required expertise. The Act even allows for investigations to be carried out before the Review is done once a report or complaint is received. This is provided for under Part IV of the Act. No such investigation was requested for by the petitioner.

80. I find that it was never the intention of Parliament to confine the raising of complaints to only the candidate and/or tenderer. Public interest had to be taken care of hence the inclusion of Section 170(d) of the Act. No such investigation was requested for by the petitioner.

81. Mrima J in the case of Stephen Moseto Mirambo & another vs. IEBC & others constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021 while putting Section 170(d) into context stated thus:-

> Para 136: From the foregoing, the category of persons contemplated as 'such other persons as the Review Board may determine', in Section 170 of the Act could only mean such persons who have an identifiable interest or stake in the procurement or disposal process. I say so because if a person has no meaningful interest or stake in a procurement or disposal process, then such a person has no business appearing before the Review Board.
>
> Para137: A person considering himself, herself or itself, as having identifiable interest or stake in a procurement or disposal process and who is not among the person who requested for the review, or is not the accounting officer of the procuring entity and is not the tenderer notified as successful by the procuring entity, has the right to seek audience and demonstrate its interest before the

> Review Board. It, however, remains the discretion of the Review Board to either allow such a person to participate in the proceedings before it or not.

I entirely agree with Mrima J on this interpretation.

82. It is not disputed that the impugned procurement was advertised. The Petitioner has stated at paragraph 18 of his Petition that the international Expression of Interest (IEOI) advert was in the Daily Nation, and The Standard Newspapers of 10th July 2020 and on the Authority's website as well as on the Public Procurement Portal. This was done in line with the requirements of inter alia Section 89 of the *Public Procurement and Asset Disposal Act*, 2015, and Regulations 83 & 114(1) of the Act's Regulations 2020.

83. I have considered the prayers sought in this Petition including costs. The main prayer is for this court to make a declaration that the tendering process was not in compliance with *the constitution* and statutes. Further that the process be stopped and a fresh one be undertaken in line with the law.

84. The main mandate of the Public Procurement & Asset Disposal Act is to ensure that the tendering / procurement process adheres to the law. The Review Board's mandate is to scrutinize any complaint raised against the process and make necessary determination.

85. My finding is that the Petitioner prematurely came to this court by avoiding the set down procedure under the Act hence not conforming with the doctrine of exhaustion. The board has the power to award costs. Therefore there is nothing that the Board would have failed to grant the petitioner if he was successful.

86. Having found as stated above I find that the Petition was filed prematurely before conforming with the doctrine of exhaustion. It was thus filed without jurisdiction and is struck out and dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31*ST*// DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

H. I. ONG'UDI

Judge of the High Court