



Kithinji & another v China State Construction Engineering Corporation; Kenya Highway Authority (KENHA) (Interested Party) (Constitutional Petition E012 of 2022) [2022] KEHC 11525 (KLR) (Constitutional and Human Rights) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E012 OF 2022**

HI ONG'UDI, J

AUGUST 2, 2022

BETWEEN

ERIC KITHINJI 1ST PETITIONER

KAHONU NJUGUNA 2ND PETITIONER

AND

CHINA STATE CONSTRUCTION ENGINEERING CORPORATION RESPONDENT

AND

KENYA HIGHWAY AUTHORITY (KENHA) INTERESTED PARTY

RULING

1. The Respondent filed a Notice of preliminary objection dated 24th January 2022. It is predicated upon the following grounds: -
 - i. This Honourable court lacks the requisite jurisdiction to take cognizance of, hear and determine the Application and Petition herein which primarily seeks debarment of the respondent. The said jurisdiction is solely conferred upon the Public Procurement Regulatory Board by the provisions of the *Public Procurement and Asset Disposal Act* No. 33 of 2015.
 - ii. The purported application and Petition which amount to exercise of state powers of prosecution by the petitioners herein against the respondents offends the express provisions of article 157(6) (a) of *the constitution*.



- iii. The purported application and petition herein which amount to private prosecution of the respondent by the petitioners through these proceedings offend the express provisions of section 88(1) of the Criminal Procedure Code Cap 75 Laws of Kenya having been lodged in the wrong forum and without leave of the trial court.
 - iv. The purported petition is fatally incompetent and bad in law as it does not meet the threshold for a constitutional petition stipulated in the locus classicus case of Anarita Karimi Njeru v republic (1976-1980) KLR 1272 and civil Appeal No. 290 of 2012; Mumo Matemu v Trusted Society of Human Rights alliance & 5 others (2013) eKLR.
 - v. The purported petition is fatally defective and bad in law for want of compliance with the express and mandatory provisions of rule 10(2) of *the constitution* of Kenya (Protection of Rights and Procedure) Rules 2013 as the petitioner have fatally failed to disclose:
 - a. The constitutional provisions allegedly violated by the respondent and the manner of contravention of the said provisions;
 - b. The nature of injury caused or likely to be caused to the petitioner and/ or the public as a result of alleged violation of constitutional provisions.
 - vi. In the exercise of civil jurisdiction to hear and determine constitutional petitions, this Honourable Court lacks jurisdiction to issue the order sought in the Application and Petition herein which impute findings of criminal conduct against the Respondent.
 - vii. The purported application and petition are hopelessly incompetent and bad in law and this Honourable Court lacks jurisdiction to take cognizance of, hear and determine the said purported application and petition as filed herein.
2. The Interested Party supported the preliminary objection. Subsequently, the Petitioner, Respondent and Interested Party filed their submissions in relation thereto.

Background of the case

3. The Petitioner filed in this Court a petition and application both dated 10th January 2022 and filed on even date. The Petition is predicated upon Articles 2 and 3 of *the constitution*, sections 129, 355, 389, 394 of the Penal Code, Sections 393 and 396 (1) (a) of the *Companies Act*, and sections 66, 176(b), 176(2) (a), 176(3), 176(4)(a), 176(5) and 176 (6) of the Public Procurement & Asset Disposal Act (PPAD). It seeks the following reliefs: -
- a. THAT this Honourable Court do issue conservatory orders to the Respondent Company to cease and desist from conducting, performing and promoting corruption & fraudulent means.
 - b. The Honourable court do issue a declaration that the contract to the respondent to rehabilitate the Thika Magumu Road contract No KeNHA /RD/DEV 2899/2020 and Tender No. KeNHA /2350/2020 and 2351/2020 were obtained irregularly, corruptly and fraudulently and same be nullified.
 - c. The Respondent be ordered to refund all public funds earned by or through their corrupt acts to the Government of Kenya and its citizenry in all past and current tender engagements and projects.
 - d. The Respondent be declared corrupt personalities and be barred from tendering for any public projects in the Republic of Kenya



- e. THAT the Respondent Company be condemned to bear the costs of these proceedings
 - f. Any other order that the court deems fit to grant.
4. The application is brought pursuant to Articles 3, 73, 74, 75, 76, 77, 78, 225 and 227 of [the constitution](#) and seeks the following orders: -
- i. Spent
 - ii. That pending the inter parties hearing and determination of this Application, a conservatory order be and is hereby issued prohibiting the Respondent Company whether by themselves or through their agents, officers, servant, employees and/ or whosoever from continuing with fraudulent dealings and related activities within the court and that all their contracts and travel documents are withheld until this Notice of Motion herein is heard and determined.
 - iii. That pending the hearing and determination in this petition, a conservatory order be issued and is hereby issued prohibiting the Respondent Company whether by themselves or through their agents, officers, servants, employees and/ or whosoever from continuing with fraudulent dealings and related activities within the country and that all their contracts and travel documents are withheld until the petition herein is heard and determined.
 - iv. That the respondent directors, representatives, managers, agents or any other person working or acting on their behalf who is a foreigner, be restrained from exiting the country of Kenya or resigning from their designations, job descriptions or doing anything that is prejudicial to this matter pending hearing and determination of this Notice of Motion.
 - v. The Respondent directors, representatives, managers, agents or any other person working or acting on their behalf who is a foreigner, be restrained from exiting the country of Kenya or resigning from their designations, job descriptions or doing anything that is prejudicial to this matter pending hearing and determination of this petition.
 - vi. Pending the hearing of this application the interested party be restrained for awarding or processing or paying or in anyway dealing by way of tender or with the respondents and the current awarded tenders be terminated.
 - vii. Any other order and/ or directions as this Honourable Court deems fit and just to grant.
 - viii. That the costs of this application be provided for.
5. Their case as presented in the said pleadings is that, they are concerned as to how the Respondent Company had previously managed to be awarded a tender by committing multiple fraudulent practices by knowingly giving false information about their qualifications in order to win the tender. The said fraudulent practices were the reasons the respondent was found to be in breach of the contract with the interested party.
6. Fraudulent practices and poor performance are offences and grounds of debarment as stipulated in the [Public Procurement and Asset Disposal Act](#) (PPADA) and they are apprehensive that the Public Procurement Regulatory Board failed in its mandate. Further that the respondents committed multiple offences under section 66(2) of PPADA and should be debarred and stopped from bidding.
7. They question the award of the following;
- i. Tender Number KENHA/2350/2020 upgrading Isiolo- Kamwe road associated with installing fiber optic cable along the road



- ii. Tender Number KENHA/2351/2020 upgrading the Kulamawe-Mogodashe road and Gabartula Spur road with fiber optics installation which is ten times the size and cost of rehabilitating the Thika-Magumu road. This had been previously terminated for fraudulent acts and poor performance by the Respondent.
8. They are disturbed by a letter dated 4th January 2022, a Notification of intention to award issued by the interested party from a project namely Horn of Africa Gateway Development Project and out of 21 bidders the respondent was the only one who was successful. They urged this court to debar the respondents from continuing to flout Kenyan Laws and from working in Kenya.

The respondent's case

9. The respondent filed replying affidavit by Gu Guagyong sworn on 24th January 2022 and at paragraph 7 they reiterate the contents of the Notice of Preliminary Objection.

The interested party's case

10. The Interested party filed a replying affidavit by Engineer Paul Omondi sworn on 21st February 2022. Therein they have raised the issue of the petition and application not meeting the constitutional threshold as in the cases of Anarita Karimi Njeru (1976-1980) KLR 1272 and the Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013 eKLR. It has also raised the issue of this court's jurisdiction to debar the respondent from public procurement as the same ought to be raised with the Public Procurement Regulatory Board.

The petitioner's submissions

11. The petitioners filed submissions dated 20th July 2022 by Gikunda Miriti advocate. Counsel seeking refuted the claim that the petitioners were seeking a review of the procurement procedure or to debar the respondent from participating in procurement process. On the contrary, their case is (i) seeking to have the respondents declared corrupt and that their corrupt nature won them the contract; (ii) that the Court finds that the respondent failed to perform the contract they won and they misused or corruptly used public funds which they should account for.
12. They submitted that this court has jurisdiction since they are in court on the grounds that their rights have been infringed as Kenyan citizens and taxpayers who have an interest in the tax payers' money and development generally.
13. They relied on Mukisa Biscuits Manufacturing Co. Ltd vs. Westend Distributors Ltd (1969) E.A. 696 and Republic vs. Eldoret Water & Sanitation Co. Ltd Ex parte Booker Onyango & 2 others [2007] eKLR, for the argument that a preliminary objection only raises issues of law or must be anchored on points of law. Counsel contended that the objection raised herein is not a point of law but is on matters of fact. Further, relying on Avtar Singh Bhamra & Another vs Oriental Commercial Bank HCC No. 53 of 2004, he submitted that the preliminary objection relies on facts to be ascertained on whether it amounts to private prosecution and whether there are rights infringed. According to him the grounds of allegations raised in the preliminary objection require ascertainment thus do not meet the threshold of a preliminary objection.
14. He urged this Court to dismiss the preliminary objection and in so doing be guided by the cases of NBI High Court (Civil Division) civil case No. 102 of 2012- Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another ; Daykio Plantations Limited vs National Bank of Kenya Limited & 2 others [2019] eKLR; and, Kennedy Wambua Mulwa vs Kitui Chief Officer- Health and Sanitation & 2 others; Richard Muthoka (Contemnor)[2021] eKLR.



The respondent's submissions

15. The respondent filed submissions dated 9th June 2022 by Sigano & Omollo advocates. They relied on Owners of Motor vessel Lillian "S" v Caltex Oil (Kenya) Limited [1989] KLR 1 and Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 others, Application No. 2 of 2011 [2012] eKLR and In the matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional application No. 2 of 2011 for the argument that a court of law can only exercise jurisdiction conferred upon it by *the constitution* or by statute. Further, that the jurisdiction of this Court under Article 165 (3) of *the Constitution* is to determine a question on whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.
16. Counsel submitted that sections 320, 347, 348, 353, 355, 389, 394 and 393 of the Penal Code establish various criminal offences which this honourable Court cannot hear and determine in exercise of a civil jurisdiction to hear and determine constitutional petitions. Further that, the criminal process is regulated by the Criminal Procedure Code and the *Evidence Act* which are also constitutional safeguards stipulated in Article 50. That pursuant to section 3(1) of the CPC all offences under the Penal Code shall be inquired into, tried and otherwise dealt with in accordance with the Code. They relied on Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR for this position.
17. Pursuant to section 41 of the *Public Procurement and Asset Disposal Act* and Regulation 22 of the Public Procurement and asset Disposal Regulations 2020, counsel argued that this court lacks the jurisdiction to debar the respondent from tendering for any public project in Kenya. He relied on Auto Terminal Japan Limited v auditor General & 5 others [2022] eKLR; Diana Kethi Kilonzo vs IEBC and 2 others, Constitutional Petition Ni. 359 of 2013; and John Kakindu Makau v County Government of Makueni & 6 others [2018] eKLR.
18. Further relying on Anarita Karimi Njeru v republic (1976-1980) KLR 1272 ; Civil appeal No. 290 of 2012; Mumo Matemu v Trusted Society of Human Rights Alliance & 5others (2013) eKLR; In Grays Jepkemoi Chepkoga Cheruiyot [2021]eKLR; and Francis James Ndegwa v Tetu Dairy Co-operative Society Limited [2016]eKLR he argued that the petitioner has not met the threshold for a constitutional petition and that not all breaches of law pave way for a constitutional petition.
19. More reliance was placed on Geoffrey K. Sang v Director of Public Prosecution & 4 others [2020] eKLR, and it was argued that the petition and application amount to exercise of state powers of prosecution by the petitioners against the respondent contrary to Article 157(6) (a) of *the Constitution*.
20. Counsel argued that the petition and application amounts to private prosecution which is an affront of section 88(1) of the Criminal Procedure Code. He supported this by the cases of; Jenifer C. Tele v Director of Public Prosecution & 3 others [2021] eKLR and Taj Mall Limited v Siesta Investment & 3 others [2019] eKLR

The interested party's submissions

21. The interested party filed submissions dated 13th June 2022 by Tripple OkLaw LLP. Counsel submitted that this Court has no jurisdiction to review a decision of a procurement entity to award a tender to a bidder. It also lacks jurisdiction to debar a bidder from public procurement.
22. Counsel submitted further that pursuant to section 167 of the PPADA, the request for administrative review of a decision to award a tender can only be made to the Public Procurement Administrative Review Board and by a candidate or tenderer and within 14 days of such award or notification. No



such request has been made. Further pursuant to section 41(5) of the PPADA and regulation 22 of the Public Procurement and Asset Disposal Regulation, 2020 only the Public Procurement Regulatory Board may debar a person upon invocation. He relied on *Diana Kethi Kilonzo vs IEBC* cited in *NK Brother vs David Mullei* and *Auto Terminal Japan Ltd vs Auditor General (2022) eKLR* in support.

23. He further submitted that the proceedings herein are not criminal in nature and to the extent that the petitioner seeks to invoke various sections of the penal code, this court lacks jurisdiction to determine such allegations. Further that pursuant to Article 165(3) of *the Constitution*, this court can only determine whether or not there is breach of fundamental rights or denial, violation, infringement or threat of the rights under the Bill of rights.

Analysis and determination

24. Having carefully considered the parties pleadings, submissions, cited authorities and the law, I find the following issues to arise for determination: -
- i. Whether the preliminary objection herein meets the threshold in the *Mukisa Biscuits* case.
 - ii. Whether this court has jurisdiction.
 - i. Whether the preliminary objection herein meets the threshold in the *Mukisa Biscuits* case.
25. The petitioners have refuted that this is a preliminary objection. According to them, one must ascertain the facts and therefore the Notice of preliminary objection does not meet the threshold for preliminary objection.
26. What constitutes a preliminary objection was ably examined in the case of *Mukisa Biscuit (supra)* which was emphasized by the Supreme Court of Kenya in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR* as follows at paragraph 31:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696*:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

27. The Supreme Court further pronounced itself on the purpose of a preliminary objection in the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR* as follows:

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary



objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” (Emphasis added).

28. Based on the above cited authorities, this preliminary objection meets the threshold for a preliminary objection on three grounds namely; (i) on jurisdiction that this court does not have the jurisdiction to debar the respondents from tendering, (ii) on whether this Court cannot review the decision of a procuring entity (iii) whether this Court cannot deal with matters that border on criminal offences.
29. To my mind this speaks to the issues of the doctrine of exhaustion that there is body put in place to speak to the issues of debarment and review. Secondly is the doctrine of constitutional avoidance, that the issues raised on corruption by the respondent are supposed to be handled by a totally different department and the criminal courts. All these are points of law and are well within the threshold set out in the Mukisa biscuits case (supra).
30. The issue of private prosecution and whether the petition meets the threshold of the Anarita Karimi case forces this court to look into the facts of the case. Hence are not points of law. In arriving at this decision am guided by this court’s decision in Auto Terminal Japan Limited v Directorate of Criminal Investigations & another [2021] eKLR where this court held as follows;

...As ably guided by the authorities set out above, a preliminary objection speaks to a question of law not facts. It is reasonable to deduce from the actualities of this case that the preliminary objection raised by the respondents falls squarely in the category of questions of points of law as defined in the classic case of Mukisa Biscuit (supra). This is because it challenges this court’s jurisdiction to hear the instant application owing to the doctrine of sub judice. It is my considered view contrary to the petitioner’s contention that the preliminary objection as raised by the respondents is sustainable. This is because it raises a point of law as is expected

ii. Whether this court has jurisdiction
31. The respondent supported by the interested party argued that this court lacks jurisdiction to hear this petition. The reasons being, that; this court cannot debar the respondent from tendering for public projects in Kenya; that this court will be usurping the Director of Public Prosecution’s mandate; that the petition and application are an attempt at private prosecution against the respondent which offends section 88(1) of the Criminal Procedure Code for failing to seek leave from the trial Court and that lastly this court’s jurisdiction is for determination whether a right has been infringed, violated or threatened.
32. The interested party submitted that this Court pursuant to section 41(5) of the PPADA does not have the jurisdiction to order for debarment against the respondent, secondly that a look at the petition and the provisions of the penal code cited ousts this court’s jurisdiction and lastly that this Court does not have the jurisdiction to review the decision of a procurement entity to award a tender to a bidder.
33. From the arguments by the parties, it is evident that the Preliminary Objection has challenged the jurisdiction of this court to, firstly bar the respondent from tendering, secondly conduct criminal proceedings and lastly, review the decision of the interested party to award the tenders to the respondent.
34. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (2022) eKLR, a decision rendered on 8th February, 2022 discussed the issue of jurisdiction and stated as follows: -



36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

35. The locus classicus on jurisdiction is the case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. held as follows:

..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.

36. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

37. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court held as follows:

(68). A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

38. Article 165(3) grants jurisdiction to this Court in the following terms: -

“(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

39. Section 41 of the PPADA provides for debarment as follows;

41. (1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person —
- (a) has committed an offence under this Act;
 - (b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;
 - (c) has breached a contract for a procurement by a public entity including poor performance;
 - (d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;
 - (e) has refused to enter into a written contract as required under section 135 of this Act;
 - (f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;
 - (g) has defaulted on his or her tax obligations;
 - (h) is guilty of corrupt or fraudulent practices; or
 - (i) is guilty of a serious violation of fair employment laws and practices.



- (2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—
 - (a) has breached the requirements of the tender securing declaration form in the tender documents; or
 - (b) has not performed according to professionally regulated procedures.
 - (3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—
 - (a) on the recommendation of a law enforcement organ with an investigative mandate;
 - (b) on grounds prescribed by the Authority in Regulations.
 - (4) A debarment under this section shall be for a specified period of time of not less than three years.
 - (5) The procedure for debarment shall be prescribed by Regulations.
40. The procedure for debarment is prescribed by Public Procurement and Asset Disposal Regulations 2020 and in particular Regulation No.22 which provides:
- 22.(1) A request for debarment may be initiated—
- (a) by the accounting officer of a procuring entity, or any other person with knowledge of facts that may support one or more grounds for debarment;
 - (b) by the Director-General on his or her own motion based on findings from investigations, inspections, or reviews; or
 - (c) on the recommendation of a law enforcement agency with an investigative mandate.
41. In the case of *Auto Terminal Japan Ltd vs Auditor General (2022) eKLR*, faced with a similar situation this court held as follows;
32. What the petitioner wants this court to do is what should be done by the 3rd respondent's board in the first instance. Based on the above observations I do find that this matter was prematurely filed before this court. The petitioner should appear before the Public Procurement Regulatory Authority Board for the debarment proceedings where it will be given an opportunity to contest the process and any other issues. On those reasons, I hereby strike out and dismiss petition No.E191/2021 dated 27th May, 2021 together with the notice of motion of even date. The conservatory orders issued on 2nd June, 2021 are hereby vacated.
42. I do agree with the respondent and interested party that this court based on the provisions of the PPADA does not have the jurisdiction to debar the respondent from participating in tenders in Kenya. Although the petitioners submit that this petition is not for debarment and review, looking at their prayers in the petition, prayer (d) is on debarment. The petitioners want this Court to restrain the awarding or processing or paying or dealing in anyway by way of tender with the respondent and termination of the current award. This is therefore a clear call for this Court to review the decision of the interested party which should have first been dealt with by the Public Procurement Administrative Review Board.



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

QUOTE{startQuote “}

art 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.

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

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.”

44. Similarly, this petition offends the doctrine of exhaustion. The 5- bench judge in the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR had this to say on where the question of exhaustion of administrative remedies arises. It stated;

“ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

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

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

43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

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



45. In the case of *Musyoka v Agriculture and Food Authority & another* (Constitutional Petition E262 of 2020) [2022] KEHC 525 (KLR) (Constitutional and Human Rights) (31 May 2022) the Court held;

“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.”

The petitioners sought to have exhausted the process under the PPADA.

46. The other issue of jurisdiction raised by the respondent and interested party is that this court does not have the mandate or jurisdiction to inquire into the criminal conduct of the respondent. I have looked at the pleadings by the petitioners and I note that the petitioners want this court to declare that the contract awarded to the respondent was obtained, corruptly and fraudulently and that they be declared corrupt personalities and be barred from tendering for any public projects in the Republic of Kenya. The petitioners have also cited a number of provisions from the penal code. I agree with the respondent and interested party that this Court cannot inquire into the criminal conduct of the respondent and make the declarations sought.
47. Even if this Court were to hear them which is not the case as stated, the respondents have the right to be heard, before a competent Court, adduce evidence and put on a defence before they can be declared corrupt. This can only take place through a trial process conducted by the prosecution and where a charge sheet has been drawn.
48. Asking this Court to declare the respondents corrupt or fraudulent amounts to usurping the powers of the Police, Director of Criminal Investigations and lastly the Director of Public Prosecution. Should the petitioner have an issue with them then the correct forum is the criminal courts, where prosecution will take place and they will have a chance to be heard, adduce evidence and defend themselves. This leads me to the issue of constitutional avoidance.
49. In the case of *Jackson Maina Ngamau v Ethics & Anti-Corruption Commission & 3 others* [2015] eKLR 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 a 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.”

50. My finding is that, the petitioners have 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. The jurisdiction to debar is vested with



the Public Procurement Regulatory Board. One can only challenge the Board's decision by way of judicial review or appeal in the High Court. This petition offends the doctrines of exhaustion and constitutional avoidance. This court therefore lacks the jurisdiction to handle this matter, and hereby downs its tools.

51. The upshot is that the preliminary objection has merit and is allowed. The petition is struck out with costs to the respondents and interested party.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 2ND DAY OF AUGUST 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

