REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 172 OF 2019

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 2, 10, 20(4)(a), 21(1), 22, 23, 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 22(1), 22(2) (c), AND 258 (1) AND 258 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLE 1, 2, 3(1), 10(1) AND 259 (1) OF THE CONSTITUTION

AND IN THE MATTER OF ARTICLES 27, 35, 47 OF THE CONSTITUTION

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE ALLEGED FRAUDULENT AWARD BY THE MINISTRY OF HEALTH TO SHENZHEN MIDRAY BIO-MEDICAL LTD OF CHINA, ESTEEM INDUSTRIES INC OF INAIC, BELLCO SRL OF ITALY, PHILLIPS MEDICAL SYSTEMS OF NETHERLANDS AND GENERAL ELECTRIC OF USA FOR SALE, SUPPLY AND MAINTENANCE OF MEDICAL EQUIPMENT AND OTHER MACHINES

BETWEEN

DANIEL MUTHAMA MUOKI.. PETITIONER

VERSUS

MINISTRY OF HEALTH...1ST RESPONDENT

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

SHENZHEN MINDRAY BIO-MEDICAL

ELECTRONICS CO. LTD...............................1ST INTERESTED PARTY

ESTEEM INDUSTRIES INC (INDIA) ....2ND INTERESTED PARTY

BELLCO SRL (ITALY) ....3RD INTERESTED PARTY

PHILLIPS MEDICAL SERVICES ....4TH INTERESTED PARTY

GENERAL ELECTRIC (USA)......................5TH INTERESTED PARTY

COUNCIL OF GOVERNORS ....6TH INTERESTED PARTY

RULING

1. Before me are two Notice of Preliminary objections, one dated 31st May 2019 on behalf of the 1st Interested Party setting out 14 grounds of objection and the second one dated 31st May 2019 on behalf of the fourth Interested Party setting out six (6) grounds of objection.

2. The Petitioner in the instant Petition prays for the following orders:-

I) A declaration that :-

a) The ministry of Health, Shenzhen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc (Inia), Bellco SRL (Italy) and Phillips medical Services, General Electric (USA) have variously violated the Constitution of Kenya, 2010

b) The award by the 1st Respondent to Shenzhen Mindray Bio-Medical Electronics Co. ltd, Esteem Industries IN (India) Bellco SRL (Italy) and Phillips Medical Services, General Electric (USA) of the tender for the sale, supply and maintenance of medical equipment under the MES was both unlawful and unconstitutional and, therefore, invalid, null and void.

II) An Order:

a) Annulling in its entirety the award by the Ministry of Health of the tender for the sale, supply and maintenance of medical equipment under the MES.

b) Compelling the 1st Respondent to transparently re-evaluate the bids of all complaint tenders and to award the tender strictly according to the law, including awarding it in the prescribed lots.

c) Alternatively, that the entire procurement proceedings in relation to the award of the tender of sale, supply and maintenance of medical equipment under MES be annulled and the Ministry of Health be ordered to retender afresh for the procurement in full and strict compliance with the law.

d) Barring Shenzhen Mindray Bio-Medical Electronics Co. Ltd, Esteem Industries Inc (India), Bellco SRL (Italy) and Phillips Medical Services, General Electric (USA) from participating in any re-evaluation or re-tender relating to the procurement of CT scan machines.

e) Compelling the Respondents to jointly and severally bear the costs of this suit.

III) Any other relief that this Honourable Court may deem just and fit to grant in the circumstances.

3. In the main Petition, the Petitioner raises issues concerning the devolved functions of Health and alleges lack of consultation between the National government and county governments in respect of the tendering process of the MES project. The Petitioner has therefore moved this court seeking; inter alia, to halt the entire MES project, now in its fourth year out of seven years of operations.

4. On or about February 2019, the 1st Respondent was awarded a tender and entered into a contract ("the contract") for the sale, supply and maintenance of medical equipment through the Managed Service Project ("the MES Project") to the County governments to the 4th Interested Party among others. The project was to run for seven years from the year 2015 and the project is currently in its fourth year. Under the contract the 4th Interested Party was entitled to payment of certain sums. In the instant Petition the assertion has been made by the Petitioner that the 4h Interested Party has failed to adhere to the terms of the contract which would disentitle it to the sums due to it, The 4th Respondent aver that from the Petition it is apparent that the assertion raised by the Petitioner revolve around an alleged lack of consultation between the 1st Respondent and the 6th Interested Party in the procurement process.

5. From the 1st Interested Party's preliminary objection dated 31st May 2019 the issues that arise for consideration and determination by this Court are as follows:

a) What, in essence are the issues raised in the Petition?

b) Are there matters raised in the Petition which amount to contentious issue or dispute, actively or potentially between the national government and the county governments.

c) If the answer to this is in the affirmative

i) What is the legally prescribed procedure of resolution of such contentious issue or dispute?

ii) Have the said contentious issues or disputes been subjected to the legally prescribed procedures above-mentioned?

d) If the answer to the above issue is in the negative, what are the legal implications as for as the competency of the Petition is concerned?

e) Should the Petitioner be permitted to engage in proxy litigation on behalf of a party which can litigate on its own behalf but has failed to do so for some ulterior motive?

f) Does the petition in any event, raise any Constitutional issue?

g) Does the Honourable court have jurisdiction to entertain, hear and determine the petition?

h) What orders should be made with regard to the Petition?

6. The 4th Respondent filed the instant Preliminary Objection dated 31st May 2019 on the following grounds:-

a) Any disputes with respect to the Managed Equipment Service (MES) as between the national and county government have been held ought to have been determined by a separate forum under the inter-governmental disputes by alternative disputes resolution mechanisms.

b) Pursuant to Section 167 and 175 of the public Procurement and Asset Disposal Act No.33 of 2015, this Court does not have jurisdiction to determine the issues or grant the orders sought in the Notice of Motion and Petition dated 7th May 2019.

c) The petitioner does not have locus to seek the orders in the Notice of Motion Application and Petition dated 7th May 2019 herein pursuant to Section 167 and 170 of the Public Procurement and Asset Disposal Act No. 33 of 2015.

d) The prayers sought by the Petitioner with respect to the procurement process in the Notice of Motion Application and Petition dated 7th May 2019 are time-barred by virtue of Section 167(1) and Section 175(1) of the Public Procurement and Asset Disposal Act No.33 of 2015.

e) The Petitioner has no locus standi to bring the instant Notice of Motion Application and Petition dated 7th May 2019. The Petition as the prayers as framed are for the benefit of County Government which have the ability and the legal status to be represented in their own name.

f) The Notice of Motion Application and Petition dated 7th May 2019 are a request for review couched in Constitutional terms and amounts to an abuse of the court process. The same ought to be dismissed with costs to the 4th Interested Party.

7. The Respondents filed grounds of opposition to the Petition dated 3rd May 2019 terming the Petition as an abuse of the Court process. The Respondents further contend the Petitioner is a busy body and has misapprehended and misunderstood the jurisdiction of this court. The Respondents further argue this court has no jurisdiction to consider question of criminal nature as raised by the Petitioner. It is further urged the Petitioner has no locus to litigate on questions of co-operation and co-ordination between the National and County Governments as he is not privy to nor does he represent the interests of other level of government. The petition is further opposed for being vague and for failing to raise issues for constitutional interpretation by the Honourable Court.

8. The 1st Interested Party field submission in support of its preliminary objection on 12th June 2019. The 4th Interested Party filed its submissions in support of its preliminary objection on 11th June 2019. The 3rd interested Party filed its submission in support by the 1stInterested party's preliminary objection on 22nd September 2019, the Respondents did not file submission but argued the matter orally in support of the two preliminary objections. The Petitioner filed submissions dated 18th June 2019 opposing the two preliminary objections whereas the 6th Interested Party filed its submissions opposing the two preliminary objections on 30th September 2019.

9. I now turn to consider the preliminary objection by the 1st Interested Party dated 31st May 2019 issue by issue as raised herein above.

A. WHAT, IN ESSENCE ARE THE ISSUES RAISED IN THE PETITION?

10. For one to be able to appreciate the issues raised in the Petition, one has to go through all the paragraphs of the Petition. One would note amongst the issues raised concern the issue of tendering and procurement process, start and period of contract; project sum, process of

tendering should be fair and transparent, all these issues are not constitutional issues in any ways. This Petition also raises issues of lack of consultation between National Government and County Government, which are issues or disputes between National and County Governments. The alleged lack of requisite infrastructure and support systems for equipment to some counties raised are not constitutional issues either. In brief the issues raised in the Petition range from disputes between National Governments and County Governments, issues under due Public Procurement and Assets Disposal Act No. 33 of 2015; contractual issues which are best ventilated in commercial suits and right to information issue under Article 35 of the Constitution; I find from the Petitioner's pleadings as set out in the Petition, the Petition does not raise constitutional issues for consideration by this Honourable Court. The Petition raises matters for determination in other forums.

B. ARE THERE MATTERS RAISED IN THE PETITION WHICH AMOUNT TO CONTENTIOUS ISSUE OR DISPUTE, ACTIVELY OR POTENTIALLY BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENTS?

11. From the Petitioner's pleadings and as demonstrated by the 1st Interested Party under issue No.1 herein above, the Petition does raise contentious issues between the National Government and the County Government relating to MES project. The issues as are framed relate to inter-governmental relations between the two levels of government.

12. The issues herein raises three key points; that the heart of the dispute is that this is an inter-governmental dispute, which provide for declaration of a dispute under ***Section 33 of Inter-governmental Relations Act No. 2 of 2012***; that a private citizen is attempting to litigate on behalf of County governments which have not declared a dispute. Secondly the Petition raises an issue on public procurement process as per paragraph 12 of the Petition admitting he has no locus standi to move the Public Procurement Administrative Review Board (PPARB) for redress to both ***Section 167(1) of the Public Procurement and Asset Disposal Act*** and ***Section 93(1) the repealed 2005 Act*** because the Jurisdiction of the PPARB is limited to review, hear and determine tendering and Asset disposal between a candidate or tenderer and a procuring entity. This Court has no jurisdiction to grant even orders sought as Public Procurement and Asset Disposal Act has specific process that has to be followed. Thirdly the court in exercise of its judicial authority under ***Article 159(2) (c) of the Constitution*** is allowed to promote alternative Dispute Resolution Mechanism and in doing so interprete the Constitution in a manner that promotes its purposes, values and principles as set out under ***Article 259 of the Constitution of Kenya 2010***.

13. The Court focus in dealing with this issue should therefore be on the true nature of issues before it, not necessary the party, that has raised the issue. I find the issues raised in this petition concern disputes between the National and County Governments; therefore the proper cause is to allow compliance with the Alternative Dispute Resolution Mechanism provided for under IGR Act, noting that the issues have been raised by the Petitioner in these proceedings.

14. On co-operation between National and County Governments ***Article 189(3) and (4) of the Constitution*** it is provided:

> ***"189. Cooperation between national and county governments***
>
> ***(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.***
>
> ***(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."***

15. From the pleadings herein and from counsel rival submissions and considering the provisions of the Constitution, I find that in matters involving disputes between governments, there is need of involving Alternative Dispute Resolution mechanism to settle the dispute including any means of procedures provided under national legislation.

C. IF THE ANSWER TO THIS IS IN THE AFFIRMATIVE:

i. WHAT IS THE LEGALLY PRESCRIBED PROCEDURE OF RESOLUTION OF SUCH CONTENTIOUS ISSUE OR DISPUTE?

16. The matters raised in the Petition herein either actively or potentially indispute between the national government and County government relate to the devolved function of health care services. Such services are clearly devolved to the County governments as provided for under the ***Fourth Schedule of the Constitution of Kenya, 2010*** as stipulated under ***Part 2(2) of the said schedule***.

> ***Under Part 2 – County Governments*** the functions and powers of the County are:-
>
> *2. County Health Services, incharge in particular:-*
>
> > *a) County Health facility and pharmacies*
> >
> > *b) ambulance services*
> >
> > *c) promotion of privacy healthcare*
> >
> > *d) licencing and control of undertakings that sell food to the public*
> >
> > *e) veterinary services*
> >
> > *f) cemeteries, funeral parlous and cremation and*

g) refuse removal, refuse dumps and solid waste disposal.

17. The Petitioner's supporting affidavit reiterates that the inter-governmental issues raised in the petition. The purported evidence relied upon by the Petitioner is drawn from internet articles by local media. I find such materials cannot be relied as an authentic source of information to discharge the burden of proof as required in a Constitutional Petition. The matters raised concern other bodies but not the Petitioner herein as he is raising matters for which he has no tangible evidence. He can be said to be on a fishing expedition, and raising non-constitutional issue that do not warrant this court's intervention.

18. It should no doubt be noted that the Petition mainly raises issues to do with the distribution of functions between the National Government and the County Government. The inter- connection between the two levels of government is well captured in ***Article 6(2), of the Constitution*** which provided thus:-

> ***"the government at the national and county levels are distinct and inter-dependent and shall conduct their mutual relation on the basis of consultation and cooperation."***

19. ***Article 189 of the Constitution*** provides for cooperation between the national and county governments. It further provides as to how disputes between the two levels of government should be dealt with. ***Article 189 (3) and (4) of the Constitution*** provides:-

> ***"In as dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation***
>
> ***(4) National Legislation shall provide procedure for settling inter-governmental disputes by alternative dispute resolution mechanism, including negotiations, mediations and arbitration."***

20. The National Legislation with regard to in ***Article 189(3) of the Constitution*** lead us to the ***Inter-governmental Relations Act No. 2 of 2012, which in Part IV*** provides for Disputes Resolution Mechanism whenever a dispute arises between the national and county governments.

(See Section 30 – 35 of IGR Act)

21. It is clear from the provision of ***IGR Act Part IV Sections 30 – 35 of the Act*** that the procedure presented in the ***IGR Act*** is mandatory and the same must be followed whenever the is a dispute between the national and county governments. The said procedure stipulates; inter alia; that:-

a) *The National and County Governments must first attempt an amicable settlement of their dispute*

b) *The parties must exhaust alternative dispute resolution mechanism.*

c) *Section 34 provides for the procedure after formal declarations of a dispute.*

d) *It is only where all efforts at resolving a dispute under part IV of IGR Act fails that a party may resort to judicial proceedings under section 30 of IGR Act, which states:-*

> *"where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings."*

C. IF THE ANSWER TO THIS IS IN THE AFFIRMATIVE:

ii) HAVE THE SAID CONTENTIOUS ISSUES OR DISPUTES BEEN SUBJECTED TO THE LEGALLY PRESCRIBED PROCEDURES ABOVE-MENTIONED?

22. The answer to this issue is in the negative. There is no evidence in its Petition that contentious issues or disputes for that matter (active or potential) have been subjected to the mandatory statutory mechanism of dispute resolution. It is clear that the petition was instead filed in total disregard of the provisions of ***Article 187 (3) and (4) of the Constitution*** and ***Section 30 to 35 of the IGR Act No. 2 of 2012***.

D. IF THE ANSWER TO THE ABOVE ISSUE IS IN THE NEGATIVE, WHAT ARE THE LEGAL IMPLICATIONS AS FAR AS THE COMPETENCY OF THE PETITION IS CONCERNED?

23. The Courts in myrands of decisions have been constant in holding that where a statutory dispute resolution mechanism has been proscribed the same must be complied with strictly before any proceedings are instituted in the court. In the case of ***Council of County Governors v. Attorney General & 12 others [2018] eKLR*** addressing the issue of the appropriate dispute resolution mechanisms as far as Inter-governmental dispute are concerned, the court had the following to say:-

> *"What one gathers from the petition is that all that took place were consultative meetings but there was no declaration of a dispute or attempt to resolve it. Section 33 of the Act (Intergovernmental Relations Act, 2012) is clear that before formally declaring a dispute, parties should make every reasonable effort in good faith and take all necessary steps to resolve the matter by initiating direct negotiations with each other or through an intermediary and where the negotiations fail, a party may formally declare a*

dispute by referring the matter to the **Summit, the council or any other intergovernmental structure established under the Act, as may be appropriate.**

It is after declaration of a dispute and having referred it to the summit, Council of Governors or any other intergovernmental structure for resolution that the process in section 34 of the Act kicks in. The organ to deal with the dispute has to convene a meeting within twenty one days to identify issues, available mechanisms other than judicial proceedings and generally how to resolve the dispute amicably. Only when the process in Section 34 fails should a party invoke section 35 to go for arbitration or to court.

The petitioner has not demonstrated that indeed the process of identifying, declaring and resolving the dispute had been exhausted before turning to this court for intervention. I therefore find and hold that the statutory mechanisms for resolving intergovernmental disputes was not complied with or exhausted before filing this petition. The constitution in Article 189(3) and (4) as read with Article 6(2) is clear that the governments at both levels are distinct and inter depended and have to conduct their affairs in consultation and cooperation and as such, they must resolve their disputes amicably applying the laid down disputes resolution mechanisms and in this respect, the statutory dispute resolution mechanism must be complied with before court action.

It has also been established as a general principal of law that where there is a procedure established under the constitution or statute for resolving disputes, that procedure should be followed to conclusion and parties should only resort to court in exceptional circumstances. In this regard, the Court of Appeal stated in ***Speaker of the National Assembly v. James Njenga Karume [1992] eKLR)*** *that* ***"where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*** *This position has been followed in many other and is now embedded in statutory provisions.*

Flowing from the above authorities, the law is plain that only after exhausting alternative statutory mechanisms provided for, should a party move to court. In the present case the petitioner had to first to exhaust the mechanism provided for in Part IV of the Intergovernmental Relations Act, before institution court proceedings."

24. Further in ***International Legal Consultancy Group & another v Ministry of Health & 9 Others (2016) eKLR***, Hon. Lady Justice Mumbi stated:-

"The Constitution thus contemplates, indeed ordains, that whenever any disputes arises between the national and county governments, the two levels should make every reasonable effort to settle the dispute, **"including by means of procedures provided under national legislation."**

…"The Inter ***Inter-Governmental Relations Act 2012*** *was enacted as an Act of Parliament to* ***"establish a framework for consultation and co-operation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes."***

It is, my view, apparent that the constitutional and legislative intent was to have all disputes between the two levels of government resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through process such as arbitration rather than an adversarial court system. As a result, a separate dispute resolution mechanism for dealing with any disputes arising between the national and county governments, or between county governments, has been established.

Before a dispute arising between these parties can be placed before the courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. Indeed, if there was any doubt about this, section 35 of the Act clears it away with specific words. It provides as follows:

"Where all efforts or resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings."

The legislative intention was therefore that judicial proceedings would only be resorted to once efforts at resolving the dispute between the two levels of government failed. The question is whether any attempt was made in this instance to resolve the matter in accordance with the Intergovernmental Relations Act before this Petition was filed."

25. It should be noted that the 1st Interested Party submissions have not been controverted by the Petitioner, who filed submissions in response against the 4th Interested Party's Preliminary Objections and did not bother to respond to any of the 1st Interested Party's Preliminary Objection by way of submissions. From the aforesaid, I find that there is no evidence whatever that the inter-governmental issues being discussed in the Petition herein were even subjected to the mandatory procedure stipulated in the ***IGR Act*** which is underpinned by ***Article 189(3) of the Constitution***. I find there was need to adhere strictly to the procedures laid out in the national legislation for redress of any particular grievance. The Petitioner herein is in total contravention of the provisions of IGR Act requiring the matter to have been subjected to alternative dispute resolution mechanism before its filing. To say the least, this matter is not only premature but also not ripe for determination through judicial proceedings. In the case of ***Mark Ndumia vs. The Law Society of Kenya & 20 Others, Petition No. 94 of 2019,***consolidated with ***Kimani Waswa & another vs. Law Society of Kenya & 7 Others, Petition No. 93 of 2019*** the Court stated:-

*"It is settled principle that "**Ripeness"** of a case is a matter, that must be ventured into before a Court proceed to analyse and determine a matter before it on merits; and more so, where there exists available, efficient and effective internal dispute resolution mechanism with the Respondent Society, which the Petitioners could have had recourse to before invoking the court's jurisdiction.*

Regulation 2 of the Law Society of Kenya (Arbitration) Regulation 1997 provide for mandatory arbitration of disputes between the Petitioners, Respondents and interested parties herein. The Petitioners were bound to exhaust the existing dispute resolution mechanisms with the Respondent society before moving the court for orders sought in the petitions.

…The Petitioners have not sought exemption and having not met the conditions under the Fair Administrable Actions Act, 2015 for exemption from obligation to exhaust alternative dispute resolution mechanisms have come to court ***prematurely.***

The court went on further to state:

…I find, that the Petitioners' Petitions are premature for having not complied with the provisions of the Law Society Act and the Law Society of Kenya (Arbitration) Regulations, 1997. …I find that the jurisdiction of this court is as such barred by virtue of existence of alternative mechanisms of resolution of the dispute."

26. From the facts of this Petition I have no hesitation to find and hold that this matter is unripe to be determined by this Court and the same is also premature for its failure to have the issues addressed therein under the procedures set for disputes resolution as clearly and mandatorily laid out in ***IGR Act***.

27. Further to the above it should be noted that the Courts have also developed the doctrine of avoidance and applied the same to dismiss premature petitions. In this ***Council of County Governors v Attorney General & 12 Others [2018] eKLR*** the court held that:

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanisms through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal media Services Ltd & 5 Others (supra) (at para 256) that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

…, the law is plain that only after exhausting alternative statutory mechanisms provided for, should a party move to court In the present case the petitioner had to first to exhaust the mechanisms provided for in Part IV of the Intergovernmental Relations Act, before instituting court proceedings.

Having carefully considered this petition, responses submissions and the relevant authorities and applied my mind to the constitution and applicable law, the conclusion I come to is that the petitioner skipped a vital constitutional and legal step and field this petition prematurely hence it is unsustainable. Consequently, the petition dated 11th December 2015 is hereby struck out. This being an intergovernmental dispute, I make no order with regard to costs. *(Emphasis provided)."*

28. The Petitioner in this petition did not seek for exemption from compliance with the alternative dispute resolution mechanisms as required by law. ***Section 9(4) of the Fair Administrative Actions Act, No. 4 of 2015*** stipulates:

"(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such persons from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

It was this Court's decision in ***Mark Ndungu Ndumia v The Law Society of Kenya & 20 others, Petition 94 of 2019 Consolidated with Kimani Waweru & Another v. Law Society of Kenya & 7 Others, petition No. 93 of 2019*** that:

…The Petitioners have not sought exemption and having not met the conditions under the Fair Administrative Actions Act, 2015 for exemption from obligation to exhaust alternative dispute resolution mechanism have come to court prematurely."

29. I find that as submitted by the 1st Interested Party, that the Petition herein is insufficient of material evidence required to prove why the Petitioner is before this Court. This Court in this matter is faced with inter-governmental dispute. There is no evidence to confirm that the dispute had been adequately been addressed under the alternative dispute resolution mechanisms. In a situation where the provision of ***IGR Act*** as regards complying with alternative Dispute Resolution Mechanism has not been met, then the Court may refer the matter for redress under such mechanisms as prescribed by law, under ***Article 189(3) and (4) of the Constitution*** as well as ***Part IV of the IGR Act***.

E. SHOULD THE PETITIONER BE PERMITTED TO ENGAGE IN PROXY LITIGATION ON BEHALF OF A PARTY WHICH CAN LITIGATE ON ITS OWN BEHALF BUT HAS FAILED TO DO SO FOR SOME ULTERIOR MOTIVE?

30. The 1st Interested Party avers that real question that begs answer is why the Petitioner after 4 years since MES was initiated, down the line has decided to Institute this Petition? The 1st Interested Party contend the answer to its question is to be found in the case of ***International Legal Consultancy Group & another vs. Ministry of Health & 9 Others (2016) eKLR***, in which similar issues relating to the MES had been raised. The Council of Governors (the 6th Interested Party), was a Petitioner in the said Petition. Hon. Lady Justice Mumbi Ngugi declined to entertain the Petition, held the dispute Resolution Mechanism under IGR Act should have been exhausted first.

31. It is 1st Respondent's averment the present Petition relies on the same issues as those raised before Hon. Lady Justice Ngugi. That the Petitioner seeks to circumvent that Court's decision, in that the Petitioner has delved to take in the same issues on behalf of the Council of Governors in proxy litigation. The 1st Respondent submit that this is affront to the court decision aforesaid.

32. It is instructive to note what Lady Justice Ngugi had to say about the Council of Governors in her aforesaid judgment:-

> ***"Two observations are necessary at this point. First, it was the 1st Petitioner, a non-governmental organization, that first lodged this petition. The governors of the counties were joined in the petition as interested parties. It was only several months later that the 2nd Petitioner, the Council of Governors, was joined to the proceedings."***

33. Looking at the present petition and what Hon. Lady Justice Ngugi, observed and stated it is clear in my mind that the above scenario seems to have been replicated in the instant petition where both the petitioner and the council of governors (the 6th Interested Party) are on the same side as demonstrated during the interpartes hearing on 3rd June 2019. It would be right and proper that if the subject dispute ever returns to court, the council of governors should be enjoined as a Petitioner to address the issue of the proxy litigation brought by the Petitioner.

34. It is noted that courts have observed recently that constitutional petitions are at risk of abuse through proxy litigation disguised as public interest litigation, as practice which amounts to waste of court's value time as well as an abuse of the court's process. In ***Brian Asin & 2 Others v. Wafula W. Chebukati & 9 Others [2017] eKLR*** this court held:

> *"while dealing with the question of "bona fides" of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of Ashok Kumar Pandey vs. State of West Bengal held as hereunder:-*

> ***"Public interest litigation is a weapon which has to be used with grate care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. <u>It should be aimed at redressal of genuine public wrong or public injury and to publicity oriented or founded on personal vendetta.</u> As indicated above, <u>Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration.</u> The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or form improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."*** *(Emphasis mine)*

35. Further, where it is established that proxy litigation has been instituted for persons who can litigate themselves, then the court ought to find an ulterior motive and punish a Petitioner. This was held in the case of ***Republic v. IEBC & 2 Others Ex-parte Alinoor Derow Abdullahi & Others [2017] eKLR***

> ***"However this right to instate such <u>(public interest)</u> proceedings ought not to be abused in order to achieve collateral purposes such as to in effect <u>litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation."</u>*** *(Emphasis provided)*

36. The Petitioner has averred that he is not engaged on proxy litigation urging that he has approached this court in a public interest matter under ***Articles 22, 23 and 258 of the Constitution***. He urged that under ***Article 43 of the Constitution*** he is entitled to the highest attainable standard of Health pointing out he is at the right form to ventilate the issues. He further averred the Petition has been brought in good faith.

37. I have considered the submissions on the issue of whether the Petitioner is engaged in proxy litigation. I have considered the fact that the Petitioner has filed the Petition under ***Article258 of the Constitution***. In the Petition he joined the 6th Interested Party M/s Council of Governors. The present Petition as urged relates to the same issues as those raised before Court in the ***International Legal consultancy Group & another v. Ministry of Health & 9 Others (2016) eKLR.*** The present Petition follows the same path that was in the case before Hon. Justice Ngugi, in that the 1st Petitioner, a non-governmental organisation, lodged the Petition and the Council of Governors were joined in the Petition as Interested Party, the Council of Governors lost in the matter. It appears in this petition, the Petitioner is doing proxy litigation to circumvent the Courts decision in the earlier case. It appears therefore the Petitioner has taken up the same issues on behalf of the Council of Governors in proxy litigation. I therefore find that the Petitioner herein is engaging in a proxy litigation, and this Petition is a blatant abuse of the Court process.

F. DOES THE PETITION IN ANY EVENT, RAISE ANY CONSTITUTIONAL ISSUE?

38. From consideration of the Petitioner's pleadings and summary on the issues raised under issue No. 1, hereinabove and as earlier on observed, there are no constitutional issues that have been raises in their Petition. The Petition raises contractual and commercial issues which are best dealt in commercial suit or through the statutory framework relating to public procurement. It is evidently clear that the Petitioner should have raised any of such grievances with the Public Procurement Authority as prescribed under ***Section 9 (h) (m) and 35(2) of the Public Procurement and Assets Disposal Act No. 33 of 2015***.

39. Further the Petitioner should have made a formal request to the Authority to conduct an investigation on tender process. Under Sections 9(h), (m) and 35(2) of the Public Procurement Assets Disposal Act No. 33 of 2015. The Petitioner could have complied with the tender process. The said provisions stipulate that:-

> ***"Functions of Authority***

…………………………

(h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenders, contractors or the general public that are not subject of administrative review;

Investigation

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceedings or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) maybe initiated by the authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority." *(Emphasis provided)*

40. In view of the above this court pursuant to the doctrine of avoidance, will decline to deal with such matter as it could have been redressed through other Courts or statutorily prescribed bodies.

41. Further as to the claim raised under paragraph 50 & 56 on access to information under ***Article 35 of the Constitution***, the Petitioner failed to follow the procedure required for access to public information as provided under ***Section 8 of the Access to Information Act No. 13 of 2016***. There is no evidence of an application to access to information made in writing and compliance with the aforesaid Sections. No evidence of exhausting all means available in law to access acquiring the said information nor is there allegation that the said information was denied upon request. The Petitioner has failed to demonstrate he complied with the Constitutional requirements in seeking the information.

42. The Petitioner has not demonstrated that he met the threshold of pleading as required in a constitutional petition. The threshold was set in the celebrated case of ***Anarita Karimi v. Republic (1979) eKLR*** where the court stated:-

> ***"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complaints, the provisions said to be infringed, and the manner in which they are alleged to be infringed."***

43. It is evident, that the Petitioners Petition relies solely on internet articles from local media houses. Time and against the courts have held such material to be hearsay evidence and thus inadmissible. I find that the Petition ought to fail for lack of sufficient materials. It is clear even on merits the Petition falls far short of meeting the constitutional threshold of both the pleadings and proof.

44. The last two issues in the 1st Interested Party's preliminary objection are raised in the 4th Interested Party's objection and I propose to first deal with the 4th Interested Party's primary preliminary objection that deal with the issue of jurisdiction before I deal with the last two issues raised by the 1st Interested Party.

45. The 4th Interested Party submissions are dated 11th June 2019. The Petitioner filed submissions in response to the 4th Interested Party's Preliminary Objections, dated 18th June 2019.

G. Previous determination on the MES project in Petition no. 99 of 2015 International Legal Consultancy Group & Another v Ministry of Health & 9 Others.

46. The 4th Interested Party's contention is that ***Petition No. 99 of 2015 International Legal Consultancy Group and another v. Ministry of Health & 9 others*** as filed by the Petitioner therein, and the 6th Interested Party herein applied for and was granted leave to be joined as a party to the Petition. The Petition generally related to the alleged failure by the 1st Respondent therein and others to consult the 6th Interested Party on the issue and award of the tender and supposed encroachment by the National Government into the functions of the County Government. The 4th Interested Party state that the above issues are for all intentions and purpose identical to the issues raised in the instant Petition.

47. Hon. Lady Justice Mumbi Ngugi in a Judgment dated 16th March 2016 in addressing the alleged lack of consultation noted at paragraph 71 of the Judgment that:-

> ***"On the material before me ….county governments had accepted the medical equipment and entered into MOUs with the national governments with respect thereto…"***

48. The court's finding clearly settled the matter with respect to consultation between the 1st Respondent and 6th Interested Party. Further the Court went on to find that any perceived dispute between the 1st Respondent and the 6th Interested Party ought to have been determined by the set out dispute resolution mechanism preserved in the Constriction and in Statute.

49. The Petitioner a private individual urges the 4th Interested Party is keen on locking him out from the seat of justice, him not being a national or county government or an agent of either. He urges further what this means is that if the court was to adopt this reasoning, it would mean that the constitutional issues arising from the MES Project would be incapable of resolution even instances where they grossly affected the enjoyment of fundamental rights of individual and the public at large.

50. It is further Petitioner's case that even through all these issues formed the subjects of disputation under Petition 99 of 2015, the issues have withstood the sands of time and fundamental fears that formed the judgment of Petition 99 of 2015 aforesaid here now came full circle in so far as they impede and continue to so impede, an engagement of fundamental rights and freedoms.

51. The Petitioner herein urges by virtue of Article 22, and 258 of the Constitution he has locus standi to bring up this Petition contesting any contravention of the Bill of rights or constitution in general. It is urged the Petition involve constitutional questions which are public in nature. "Public Interest" is defined in Black Law Dictionary, 9th Edition (page 1350) as "general welfare of the public that warrants recognition and protection" or "something in which the public as a whole has a stake, specially an interest that justifies governmental regulation."

52. In the case of ***John Wekesa Khaoya v. Attorney General, High Court at Pet 60 of 2012*** set out parameters to guide the filing of case in Public Interest. These include:-

i. The intended suit must be brought in good faith and must be in public interest and

ii. The suit should not be aimed at giving any personal gain to the applicant.

53. The 6th Interested Party avers that this matter is not a dispute between the two levels of government but rather, the petitioner who is a Kenyan citizen challenges financial transactions in relation to the sale, supply and maintenance of medical equipment acquired through MES project for country governments through Ministry of Health.

54. It should be noted that the issues raised in the instance Petition, in so far as they amount to contentious issues or dispute arising between the National Government and the County Governments, are in my view identical to the issues dealt with in ***Petition No. 99 of 2015; International Legal Consultancy Group & another vs. Ministry of Health & 9 Others (2016) eKLR***. It should also be borne in mind that Petition No. 99 of 2015, the Petition predominantly raises substantial inter-governmental issues putting county governments against the National Government. The resolution of which should be subjected to the dispute resolution mechanisms provided for under the constitution and in the Statute.

55. I had earlier on in this Petition considered the nature of the Petition and still all I have reconsidered the same and I have no doubt to state that this Petition does not raise any Constitutional issue that would justify the supplanting of a Constitutionality and Statutory established dispute resolution mechanism. I find further if any constitutional issue was to be gleaned from this petition (which I find utterly inconceivable) the same would be peripheral and incidental to the substantial intergovernmental issues that form the substratum of the petition.

56. In ***John Wekesa Khaoya v. Attorney General*** *(supra)* the Court held that as a sign of good faith, the Petitioner must satisfy the court that the Intended suit is not aimed at giving personal gain to the applicant. This requirement, according to the Court:-

> ***"…gives effect to unhindered access to justice and legitimate efforts to protect public interest, but also prevents abuse by private litigants who may wish to take advantage of the Article for selfish, parochial and private gains. The court reckons that not all suits filed and styled as constitutional applications are public interest litigation."***

57. The Petitioner herein fails the test of public interest laid out in the case of ***John Wekesa Khaoya v. Attorney General (supra)*** as he has not demonstrated the efforts to protect public interest and that the Petition is not for personal gain.

58. The Petitioner is a private citizen and may claim the Inter-governmental Relations Act does not apply to him. The critical point to consider and the reason for filing the Preliminary Objections is that the grounds cited by the Petitioner do not relate at all to him as a private Kenyan citizen, but rather to the difficulties faced by the County in making requisite payments under the MES. It is of great significant to note that it is claimed that counties were not involved in the procurement and therefore it is claimed the process was opaque.

59. A party in a Petition, I find should not ground an action on alleged grievances that do not relate to him at all but rather to some disclosed third party. The issue of great concern is whether the petitioner in such circumstances is clothed with any locus standi to make complaints on behalf of the County governments. If not, then this remains a clear case of proxy litigation and or abuse of the court's process.

H. Lack of jurisdiction of the court and locus standi of the Petitioner pursuant to the public Procurement and Asset Disposal Act, No. 33 of 2015 ("the Act") (grounds b, c, d and f)

60. The issue of jurisdiction is raised in the preliminary objections of both the 1st Interested Party and the 4th Interested Party. I propose to deal with this issue together under this heading.

61. The 1st Interested Party's contention is that the Petition herein is not ripe for this court's consideration, as the same is premature and that on the basis of the principle of avoidance, the same therefore ought to be dismissed outright with costs. It is further submitted that there exists an elaborate alternative dispute Resolution Mechanism that Petitioner ought to have employed before engaging in the proxy litigation. The 1st Interested Party therefore contends that the court lacks jurisdiction in this matter.

62. The 1st Interested Party in support of the above proposition relies on the case of ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya Ltd (1989) KLR 1*** relied in ***International Legal Consultancy Group & Another vs. Ministry of Health & 9 Others [2016] eKLR*** where Mumbi J. quoted the famous words of Nyarangi JA that, ***"jurisdiction is everything. Without it, a court has no power to make one step."***

63. Likewise, in the Advisory Opinion Reference No. 2 of 2013, ***Speaker of Senate and Another vs The Attorney General and Others*** the highest Court of the land established that:

> *"(4) jurisdiction, in any matter up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates. The position is clear from the words of Nyarangi, J.A. in Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR1 at page 14."*
>
> ***"Without jurisdiction 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

64. Further it was this Court's decision in ***Mark Ndungu Ndumia v The Law Society of Kenya & 20 others, Petition 94 of 2019*** Consolidated with ***Kimani Waweru & Another v. Law Society of Kenya & 7 Others, Petition No. 93 of 2019*** that:

"I find that this court is mandated whenever an issue of jurisdiction is raised to deal with the same first, before venturing on the other issues, for once a court finds it has jurisdiction, it has to proceed to consider the other issues but if the court finds it lacks jurisdiction, it has to down its tools and leave the matter at that point without making any finding on the other raised issues."

65. The 3rd Interested Party supports the 1st and 4th Interested Party's preliminary objections and urges that the matter before the court is subject to the provisions of Inter-governmental Relations Act where clearly advocates for Alternative Disputes Resolution Mechanisms in settling of such dispute. The 1st and 2nd Respondents and 5th Interested Party are of the same view and support the 1st and 4th Interested Parties Preliminary Objections.

66. The 4th Interested Party aver that as regards prayers sought by the Petitioner in his Petition are wholly and substantially with respect to the procurement process. Its 4th Interested Party's submission that the issues in the Petition relate to Public Procurement, which is governed by the relevant Act pursuant to ***Section 165 and 172 of the Act*** which clearly set out the remedy available to those aggrieved by a public tender process, who may exercise these remedies and within which time limits those remedies available.

67. ***Section 167 of the Act*** provides that an aggrieved candidate or tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of alleged breach at any stage of the procurement process or disposal process as in such manner as may be prescribed.

68. ***Section 175 of the Act*** further provides that:

"***Section 175 of the Act-***

> ***(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."***

69. The Petitioner's contention is that under ***Article 258(1) of the Constitution of Kenya 2010***, it takes away the notion of "locus standi", which mean that an aggrieved party, demonstrating damage or harm can approach the Court seeking legal remedy. It is further urged that public interest cases encompass more than just the parties to a matter since public interest litigation is meant to benefit the wider public and not just the individual directly affected. It is therefore contended that this petition was filed in public interest with a view to respect, uphold and defend the constitution and the law. It is further stated under ***Article 22(1) and (2) of the Constitution,*** the Petitioner has "locus standi" to institute these proceedings. It is Petitioner's averment that the petition is filed in good faith to ***Article 3(1) of the Constitution*** to respect, uphold and defend the Constitution, that the Petition has by met the tests of bona fide public litigation since the facts relied in the petition are prima facie true and correct in the sense, that the Respondents and Interested parties have violated clear provisions of the Constitution and statutes.

70. The petitioner assert that this Honourable Court has original and exclusive jurisdiction, arising from ***Article 22(1) & (2), 23, 165 (3) (d) (ii) (6), & (7) and 258 (1) (2) c of the Constitution*** and ***Section 5(a) of the High Court (Organization and Administration) Act, 2015*** to determine whether the award of the tender in the manner complained about herein violated provisions of the constitution.

71. The Petitioner further contend that the Public Procurement Administrative Review Board, (PPARB's) mandate and powers are derived from ***Section 28(1)(a) and 167(1) of the Public Procurement and Asset Disposal Act, 2015 (in PPADA)*** and its jurisdiction is limited to "review, hear and determine tendering and asset disposal disputes" between "a candidate or a tenderer and a procuring entity". This therefore is urged automatically eliminates the Petitioner as an aggrieved party entitled to have audience before the PPARB. He therefore does not have the locus standi to move the PPARB for redress pursuant to both ***Section 167(1) of the PPADA and Section 93(1) of the***

repealed 2005 Act.

72. It is Petitioners case that, the jurisdiction of PARB under ***Section 28(1) (a) and 167(1) of PPADA*** does not oust the High Court's jurisdiction to hear and determine matters in respect of violations of the constitution.

73. The 6th Interested Party urge that this Court has jurisdiction to determine the Petition by virtue of ***Article 165 (3) (d) of the Constitution*** which provides:

"165. High Court

> **(3) Subject to clause (5), the High Court shall have—**
>
> **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…."**

74. It is further urged that the alternative dispute Resolution mechanism is not available remedy for the petitioner as against the Respondents. It is further urged that the matter before this Court involves the interpretation of the constitution, therefore it cannot be resolved through ADR. It is further averred that the dispute envisaged under ***Article 189 of the Constitution and Section 31 of the Intergovernmental Relations Act*** IS on disputes other than the disputes to the Interpretation of the Constitution.

75. The 6th Interested Party avers that the Petition does not raise a procurement dispute but a violation of inter alia, ***Articles 10, 47, 201(d) and 227(1) of the Constitution*** by the Respondents. It is therefore 6th Interested Party's position, that the Petition is not time barred as it relates to a Constitutional violation and not a review of procurement process. It alleges also the present petition is different from Nairobi Civil Appeal No. 101 of 2016 International Legal Consultancy Group & COG Vs. Ministry of Health & 5 Others.

76. The Petitioner's Petition as drawn and filed raises issue related to contractual issues which are issues which should be dealt with under the public procurement and Asset disposal Act No. 33 of 2015. There are not constitutional issues for interpretation in the instant Petition as alleged by the Petitioner and 6th Interested Party. The Petitioner's submission under paragraph 23 to the effect that High Court has original and exclusive jurisdiction to determine whether the award of the tender violated the Constitution, is without basis, for the reason that the statutory bodies under the PPAD Act is bound by the constitution in discharging their mandate. It is the same constitution that requires that all disputes relating to public procurement and Asset Disposal be dealt with under the PPAD Act.

77. The Petitioner at paragraph 12 of the Petition states that he has no locus to move the Court under the procurement Act, in an attempt to distance himself from procurement procedure with respect to challenge procurement process as a constitutional petition pegged on public interest. He states the court has jurisdiction under paragraph 10 of the Petition to entertain the Petition under Article 22 of the Constitution amongst others. ***Article 22 and 258 of the Constitution*** deals with locus standi to bring up a petition but not with jurisdiction of the court.

78. The Court in the ***Truth Justice and Reconciliation Commission v. Chief Justice of the Republic of Kenya & Another (2012) eKLR*** Warsame J (as he then was) stated as follows:-

> *"Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and tormenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice."*

79. In considering the above authorities and in considering the Petitioner's pleadings I find that this Court need not dig deep into the facts of this matter in order to note that the Petitioner has not demonstrated how his rights have been contravened by the Respondents. It is of great interest to note in fact throughout the journey of perusing the Petition, no constitutional issue with respect to the Petitioner directly or other parties are canvased. What is apparent, however from the grounds relied upon and prayers sought in the Petition herein amount to a fresh ventilation of an already determined alleged grievances between the 1st Respondent and the 6th Interested Party couched as a public interest litigation. The above was evidenced by the 6th Interested Party's, support of the Petition herein during the inter partes hearing on 3rd may 2019, when the Counsel for the 6th Interested Party made submission to the effort that there was no adequate consultation with the counties and the issue raised in the petition were of a grave nature affecting the core of the tender and, further that the issues raised involved public interest.

80. It is worthy noting the courts have previously chastised parties that made similar attempts to re-litigate already determined disputes by couching them as constitutional issues and has termed such actions as being akin to an attempt to derogate from the doctrine of res-judicata as in the case of ***Okiya Omtatath Okoiti v. Communications Authority of Kenya & 14 Others (2016) eKLR*** where Lenaola, J (as he then was) stated:-

> ***"In my view, he (the Petitioner) sued the officials of the 1st Respondent and ADN so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine or res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above, I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of the Constitution and that of the Bill of Rights so as to prevaricate the principle of res judicata."***

81. I therefore find that the Petitioner had no justification of filing this Petition, as in the first instance, this dispute should have been resolved by PPARB.

82. The Procurement issues sought to be addressed through the petition can also be raised with the Public Procurement Regulatory Authority Procurement under ***Section 9(h) of PPAD Act*** as read with ***Section 35(2) of the PPAD Act***. It is worthy noting that the Petitioner would not be precluded from raising issue, if any and if need be, in his complaint to the Authority in light of the Court of Appeal's decision in ***Communications Commission of Kenya & 5 Others vs. Royal media Services Limited & 5 Others (2014) eKLR***, where the court stated:-

> ***"The Public Procurement and Disposal Act, indeed, does not preclude parties from raising constitutional issues touching on their complaint. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution."***

83. On the Petitioners' submissions at paragraph 23 that the Court has no power to strike out constitutional petition in limine, I find that is not supported by law and is without any basis. ***Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** expressly allows the Court in the exercise of its inherent powers; to do so. Rule 3(8) provides:-

> ***"Inherent powers;***
>
> ***to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court."***

84. I am alive to the fact that the styling of a suit as a Constitutional Petition with a view to circumventing the mandatory constitutional and statutory process amounts to abuse of the process of the court, and in such circumstances, the court is called upon to exercise its inherent powers by considering striking out such a Petition and subsequently referring the respective issues to appropriate dispute resolution forum.

85. Myrands of judicial precedents are clear that courts will turn away unscrupulous litigants who tend to be unnecessary litigious under the pretence of public interest litigation where their pleadings are found to be unmeritorious as in the case of ***Brian Asin & 2 Others vs. Wafula W. Chebukati & 9 Others (2017 eKLR***.

86. I find therefore that the decision in ***D.T. Dobie & Company (Kenya) Limited v. Joseph Kibaria Muchina & another (1980) eKLR***, in which the Petitioner advanced an argument against striking out of a Constitutional Petition, the same is inconsistent with the constitution of Kenya, 2010 and other decided cases. The Constitution being the Supreme Law of the Republic binds all persons and State agents at both level of government. ***Article 2(4) of the Constitution*** provides:-

> ***"2. Supremacy of this Constitution***
>
> ***4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."***

87. On the other hand while the petitioner correctly relied on the case of ***Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR***, in support of the proposition that any person may file a Constitutional Petition, the Petitioner conveniently omits to mention that the same court was against the abuse of locus standi. In paragraph 27 the Court of Appeal noted that:-

> "*…this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts,* ***except only when such litigation is hypothetical, abstract or is an abuse of the judicial process."*** (Emphasis added).

88. In the case of ***Rashid Odhiambo Allogoh & 245 Others v. Hace Industries Limited (2007) eKLR*** invoked by the Petitioner at paragraph 34, refers to a ruling made in 2004 (prior to the enactment of the current constitution) to the effect that the availability of other lawful causes of action was no bar to a party who alleged contravention of his or her rights under this Constitution. In this regard it is noted that the jurisprudence in the matter shifted after the enactment of the current constitution and that the current position is that the courts should not cross over the areas which Kenyans specifically reserved for other authorities. (See ***International Legal Consultancy Group & Others v. Ministry of Health &9 Others*** *(Supra).*

89. In the decision of ***Republic vs. Independent Electoral & Boundaries commission & another Ex Parte Coalition for Reform and Democracy & 2 Others [2017} eKLR*** invoked by the Petitioner at paragraph 38 limits recourse in the High Court to "…a person who feels that a public procurement does to meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 and who has no other recourse known to law…" In this regard, I reiterate that the Petitioner has recourse under ***Section 9(h) of the PPAD Act*** as read with ***Section 35(2) of the PPAD Act***. Accordingly, the jurisdiction of the Court has not crystalized or ripened.

90. As regards the decision of ***Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others [2017] eKLR***, cited by the Petitioner at paragraph 39, is that disputes relating to the provisions of the PPAD Act must be resolved under the processes established by the PPAD Act whereas those matters outside the scope of the PPAD Act should be determined by the High Court. Removing the procurement issues from the Petition leaves intergovernmental issues between the country governments and the National Government, which issues must be resolved through the processes provided for under Article 189(3) and (4) of the Constitution as read with Part IV of the IGR Act as held by the Court in ***International legal Consultancy Group & another v Ministry of Health & 9 Others*** *(Supra).*

91. While in the decision of ***Timothy Otuya Afubwa & another v. County Government of Trans Nzoia & 3 Others [2016] eKLR*** relied on by the Petitioner at paragraph 40 is distinguishable in the sense that the Petitioners therein were not found to have brought their petition "… with ulterior motive or bad faith." In the particular circumstances of this case, ulterior motive and bad faith on the part of the Petitioner are clearly evident, particularly in light of the decision by Hon. Lady Justice Mumbi Ngugi in Petition No. 99 of 2015 *(supra).*

92. The above decision in the ***Timothy Otuya Afubwa case*** is also relevant on the issue of alternative remedy, with the Court holding as follows:-

> ***"I am also alive to the fact that where there are appropriate legislation any party complaining ought to resort to it as of first instance before thinking of invoking any provisions of the constitution."***

1. Who should bear the costs?

93. The Petitioner aver that the matter is a constitutional one, not involving private interest and, any award of costs would have a negative effect on those who strive to ensure observance of the constitution. The Petitioner referred to a number of authorities in support of the proposition.

94. Courts have had an occasion to consider the question of costs. In ***Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and others, Sup. Ct. Petition No. 5 of 2013; [2013] eKLR***, the Court thus held (paragraph 310)

> *"Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment.* ***Accordingly, we do not see this instance as just another opportunity for the regular professional business undertaking of counsel" (****Emphasis supplied).*

95. In **Jasbir Singh Rai and Three Others v. Estate of Tarlochan Singh Ra and Four others, Petition No. 4 of 2012,** the Supreme Court ordered that each party should bear their own costs, thus (paragraph 27):

> *"Just as in the Presidential election case,* ***Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others,*** *Sup. Court Petition No. 5 of 2013, this matter provides for the Court a suitable occasion to consider further the subject of costs, which will continually feature in its regular decision-making.* ***The public interest of constructing essential paths of jurisprudence, thus, has been served; and on this account, we would attach to either party a diagnosis such as supports an award of costs"*** *(emphasis supplied).*

96. The Petitioner aver that by reason of ***Section 15 (c) of the Health Act No. 21 of 2017***, the national government through the 1st Respondent has the responsibility of implementation of rights to health specified in the Bill of rights and more particularly the progressive realization of the right of all to the highest attainable standard of health including reproductive health care and that the right to emergency treatment. The same operationalizes Article 43 of the Constitution and Article 11 of the International Covenant on Economics Social and Cultural Rights as read with Article 2(5) and (6) of the Constitution.

97. The Respondents, 1st, 2nd, 3rd, and 4th Interested Party's pray for costs. The Petitioner prays for preliminary objections be dismissed with no order as to costs.

98. The 1st Interested Party contend that the Petitioner beside raising intergovernmental issues, the petition also raises contractual issues involving identifiable private parties within significant commercial interest. That the proper forum for resolution of the said contractual issues is clearly stipulated under the PPAD Act. That by circumventing the mechanisms provided for under the PPAD Act the Petitioner has constrained private parties, including the 1st Interested Party, to incur substantial legal costs. It is correct to say the legal costs would have been obviated if the petitioner had adhered to the statutory stipulated process.

99. I am alive to the fact that the award of costs follow the event and is at the discretion of the court. That in exercising the discretion to award costs, the court is required to take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms but this should not be used to circumvent the clearly provided dispute resolution mechanism by any party and cause others incur substantial legal fees. A party on the other hand should not file proxy litigation and expect to get away with a matter as far as costs are concerned. In view of the nature of the petition herein and the issues arising from the Petition, I find the Petitioner and 6 th Interested Party to blame for costs incurred by the parties herein. I find that this is one of the rare matters where costs should follow the event.

100. The upshot is that the 1st and 4th Interested Parties Preliminary Objections are meritorious and are accordingly allowed. I proceed to make the following orders:

a) The Petition as drawn and filed raises intergovernmental issues and contractual issues, respectively, reserved for Alternative Dispute Resolution Mechanism under IGR Act and the PPAD Act. The said issues ought to be variously ventilated in the appropriate fora before the jurisdiction of this Court is invoked.

b) The petitioner's deliberate circumvention of the said process and taking up proxy litigation on behalf of the 6th Interested Party is an abuse of the process of the Court for which the Court has inherent powers to award costs as sanction beside striking out the impugned Petition.

c) The petition is accordingly dismissed with costs to 1st and 4th Interested Parties to be met by Petitioner and 6th Interested Party.

Dated, Signed and Delivered at Nairobi on this **18th** day of **June, 2020.**

……………………….

J. A. MAKAU

JUDGE