



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 255 OF 2016

IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 47, 48, 50(1), 73, 75, 156, 159, 165, 258, AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 10, 73, 75, 232 AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND THE BANKING ACT (Cap 488)

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE DECISION BY THE NATIONAL TRANSPORT AND SAFETY AUTHORITY TO ALLOW THE NATIONAL BANK OF KENYA TO ISSUE A TENDER SECURITY ON ITSELF IN TENDER NO. NTSA/ICB-014/2014-2015

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

~VERSUS~

NATIONAL TRANSPORT

AND SAFETY AUTHORITY.....1ST RESPONDENT

NATIONAL BANK OF KENYA.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

Petitioners' Case

1. The subject of this ruling is the application dated 16th June, 2016 and the preliminary objection dated 22nd June, 2016.

2. The facts of this petition, according to the petitioners herein, **Okiya Omtatah Okoiti** and **Nyakina Wycliffe Gisebe**, are that on 20th March 2015, The National Transport and Safety Authority (hereinafter referred to as “the NTSA” or “the Authority”) announced and posted the 'Tender for Delivery, Installation and Maintenance of Second Generation Smart-Card Based Driving Licence And Associated Service' Tender No. NTSA/ICB-014/2014-2015 (hereinafter referred to as “the tender”). According to the petitioners, their interest in the tender was informed by their understanding that driving licences are a very important document in the everyday lives of members of the public since not only do the driving licences ensure safety on our roads, they are relied upon as identification documents in many transactions involving the public, including accessing and gaining entry to buildings and secure areas, conducting banking and related services in the financial sector, and general movements across the country. In a nutshell, they allow one to be identified as a Kenyan in almost the same way the National Identification Cards do. In view of their interest stated above, the Petitioners set out to ensure that the laws governing public procurement were strictly followed hence, they decided to closely monitor the tender process which is the subject matter in these proceedings.

3. It was averred that the technical proposals and bid bonds for the tender were opened on 22nd April 2015, where 23 companies responded to the bid. In the public opening of the tenders, it was announced that the **National Bank of Kenya** (hereinafter referred to as “the Bank” or “NBK”), one of the bidders, had submitted a bid bond issued by themselves. However, no other bidder had submitted a bid bond issued by themselves given that the **Banking Act** expressly forbids such action. It was the Petitioners' position that, under the **Banking Act**, the continued participation of the NBK in Tender No. NTSA/ICB-014/2014-2015 was unacceptable, because the document that was submitted by NBK to the tenderer, purporting to be a bid bond, was not one and can never be. To the petitioners, because the purpose of a bond is to shield the respective party to the contract from injury that would be caused by the non-performance of the other party under whatever circumstances, for a document to be considered a bid bond, it must possess two critical characteristics. Firstly, it must be a third party bond and the parties to a contract cannot issue to each other bid bonds drawn on themselves. Secondly, a bid bond must be a surety guarantee in the sense that the third party issuing it must guarantee to assume liability that may accrue to one of the parties to the contract.

4. The petitioners maintained that in the current case, NBK seems to be guaranteeing itself from its own non-performance an act which was also discriminatory to the other bidders who have taken out bid bonds from third parties and amounts to a blatant violation of Article 27 of the Constitution of Kenya 2010, on equality and freedom from discrimination. It was the petitioners' contention that the justification that the Authority, invoking its powers to determine how securities will be provided, allowed the anomaly is baseless as it is bound to act only pursuant to the law and cannot by tender document oust statutes or the Constitution. Despite the petitioners' protests that the decision to allow NBK to issue a bid bond on its own behalf in blatant violation of the law, the Authority has never responded to the letter and it has totally ignored the caution and proceeded to award the Tender to NBK, instead of disqualifying it.

5. The petitioners' case was therefore that the Authority's decision to award the Tender to NBK is untenable, unreasonable, illegal, unlawful and, therefore, unconstitutional, null and void *ab initio*, since it is tantamount to aiding and abetting illegal conduct.

6. The petitioners disclosed that the award of the tender was challenged by one of the bidders to the Public Procurement Administrative Review Board, which dismissed it. The bidder subsequently filed judicial review proceedings in the High Court which the 1st Petitioner joined. Unfortunately, on Monday, 13th June 2016, the bidder made an oral application to abruptly withdraw JR Misc. Civil Application No. 507 of 2015. The application was not opposed by any of the parties except by the 1st Petitioner herein, who asked for time to find out why the same was being withdrawn and what considerations were there for the public interest in the rule of law in the matter. The Court adjourned the matter to Wednesday, 15 June 2016, to allow the 1st Petitioner herein make the inquiries he wished to make. However, having failed to

get any information on why the JR application was being abruptly withdrawn, and how the public interest was protected in the action, the 1st Petitioner herein was left stranded as the stay orders vacated. It is this action that provoked these proceedings in which the petitioners urge this Honourable Court to annul the tender award for being haphazard, irregular, unreasonable, illegal, unlawful, capricious and, therefore, unconstitutional, null and void.

7. The petitioners consequently seek the following orders:

a) A declaration be and is hereby issued that the decision by the National Transport and Safety Authority to allow the National Bank of Kenya to issue a tender security on itself in Tender No. NTSA/ICB-014/2014-2015 was NOT done procedurally and in accordance with the Constitution of Kenya, the Banking Act, and the Fair Administrative Action Act 2015.

b) A declaration be and is hereby issued that the subsequent award of Tender No. NTSA/ICB-014/2014-2015 to the National Bank of Kenya is null and void *ab initio* and of no consequence in law.

c) A declaration be and is hereby issued that the 1st Respondent violated the rights and fundamental freedoms of the 1st and 2nd Petitioners to fair administrative action as enshrined in Article 47 of the Constitution of Kenya 2010, and in the Fair Administrative Action Act 2015, by failing/refusing to respond to their letter of May 26, 2015, titled “*Re: Request for comprehensive information on your discriminatory exemption of the National Bank of Kenya in Tender No. NTSA/ICB-014-2014-2015, from the requirement that bid bonds must be provided by third parties – cautionary notice made under articles 4(2), 10, 35, 22 & 258 of the constitution.*”

d) A declaration be and is hereby issued that the 1st and 2nd Petitioners are entitled to payment of damages and compensation for the violation and contravention of their rights and fundamental freedoms by the 1st Respondent herein as provided for under Article 47 of the Constitution of Kenya, 2010, and the Fair Administrative Action Act 2015.

e) The court to assess the quantum of damages and compensation to be paid by the 1st Respondent.

f) The Honourable Court do issue and hereby issues an order compelling the 1st Respondent to pay *general damages, exemplary damages, and aggrieved damages under Article 23(3) of the constitution of Kenya 2010 for the unconstitutional conduct of the 1st Respondent.*

g) The Honourable Court be pleased to issue and hereby issues a mandatory order quashing the award by the 1st Respondent to the 2nd Respondent of Tender No. NTSA/ICB-014/2014-2015.

h) The Honourable Court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.

8. Arising from an interlocutory application for conservatory order made herein, this Court in a Ruling delivered on 13th July 2016, issued the following orders:

1. THAT the project be and is hereby permitted to continue on condition that the Bank secures a bond for half the sum of the award from a reputable third party financial institution to be done within the next thirty days.

2. THAT in default of compliance the award by the 1st Respondent to the 2nd Respondent of Tender No. NTSA/ICB-014/2014-2015 shall stand suspended.

3. **THAT the costs of the application will be in the course.**

9. It was therefore the petitioners' case that bearing in mind that this Honourable Court does not act in vain, most of the declarations and orders sought are spent or rendered nugatory as follows. According to the petitioners therefore the only issues pending determination were:

1) Whether the 1st Respondent violated the rights and fundamental freedoms of the 1st and 2nd Petitioners to fair administrative action by failing/refusing to respond to their letter of May 26, 2015.

2) Whether the 1st and 2nd Petitioners are entitled to payment of damages and compensation for the violation and contravention of their rights and fundamental freedoms by the 1st Respondent

3) Who pays the costs of the instant Petition.

10. According to the Petitioners, the Authority should have acknowledged and responded to their letter, which stated categorically that the 2nd Respondent was not qualified to continue participating in the tender beyond the threshold point where it was established that it had guaranteed itself, instead of, as by law required, being guaranteed by a third party. The Authority's deliberate decision to totally ignore their letter, it was contended was not only contrary to law, but it also points to the disdainful manner it regards the petitioners.

11. The petitioner asserted that being a public entity, the Authority is subject to public scrutiny and is answerable and accountable to stakeholders, including the petitioners, in the performance of their duties under the law and as citizens of Kenya resident in Kenya under the laws of Kenya, and taxpayers, they have a fundamental right to participate in the activities of the Authority under Articles 1, 2, 3(1), 10(2), 19(3), 47, 232 (d), (e), and (f), and 259(1) of the Constitution, and cannot be restricted in the enjoyment of that right by the Authority, without reference to Article 24 of the Constitution. To them, even the exercise of discretion by the Authority under section 57 of the repealed **Public Procurement and Disposal Act** (No. 3 of 2005) including whether or not to accept a tender security, was not out of bounds to public scrutiny where such discretionary power was exercised in violation of the Constitution or other laws. Further, since it does not meet the threshold required of legislation for limiting rights, section 57 of the repealed **Public Procurement and Disposal Act** (No. 3 of 2005) cannot be construed as the law anticipated in Article 24 of the Constitution for restricting the enjoyment of rights and fundamental freedoms.

12. Based on Article 2 of the Constitution the Petitioners contended that they were vested with the capacity to intervene in the exercise of the Authority's discretion in the manner they did, to ensure it accords with the supreme law of the land, by dint of the following provisions of Articles 1, 3, 4 and 10 the Constitution.

13. It was the Petitioners' case that that act or omission of failing to respond to their request was violative of Articles 19, 46, 47, 73 (as read with Section 52 of the **Leadership and Integrity Act 2012**), 232(1) and 259 of the Constitution and submitted that from the above, the impugned action of the Authority, the unlawful, prejudicial, self-centred and oppressive decision to ignore the petitioners' letter, infringed on their fundamental rights under Articles 1, 2, 3(1), 4(2), 10(2), 19, 46, 47, 73, 232 and 259(1) of the Constitution. In their view, had the Authority acted on their letter, and complied with the section 11(1)(b) of the **Banking Act**, they would not have filed the instant petition. In support of their submissions the Petitioner relied on the **Fair Administrative Action Act 2015**, which gives effect to Article 47 of the Constitution, and defines "administrative action" to include "powers, functions and duties exercised by authorities or quasi-judicial tribunals" or "any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates" as well as section 4 of the Act which re-echoes Article 47 of the Constitution. Their view was that to ignore their letter was violative of sections 5 and 7(5) and 9(2)(d) of the **Public Service (Values and Principles) Act, 2015** which were reproduced as hereunder:

Section 5:

(1) Every public officer shall maintain high standards of professional ethics.

(2) For the purposes of Subsection (1), a public officer maintains high standards of professional ethics if that public officer-

(a) is honest;

(b) displays high standards of integrity in that officer's dealings;

(c) is transparent when executing that officer's functions;

(d) can account for that officer's actions;

(e) is respectful towards others;

(f) is objective;

(g) is patriotic; and

(h) observes the rule of law.

Section 7(5):

The provision of public services is not impartial or equitable if —

(a) a public officer discriminates against a person or a community during the provision of public services; or

(b) a public officer refuses or fails to give accurate information during the provision of public services.

Section 9(2)(d):

a public institution or an authorised officer shall ensure the accountability of a public officer by — establishing a mechanism to address complaints arising out of the administrative acts of a public officer.

14. Although the petitioners appreciated that some of the issues in the petition had been superseded nevertheless they went on to submit that the legislative framework governing the bidding process includes the **Banking Act** which, at section 11(1)(b), imposes an obligation upon a contracting authority (i.e., the Authority) not to accept bids by bidders who issue tender security on themselves and since the said provision forbids *self-issued tender security*, it was their case that the Authority ought to have disqualified NBK from participating in the tender the moment it was established that the bidder had issued the requisite tender security on itself. Hence, the Authority's decision to allow NBK to continue participating in the tender and to award the tender to it, was irrational since it disregarded the very erudite provisions of the **Banking Act**. It was therefore contended that the Authority had no capacity in law to allow or accept NBK's tender security. Whereas the Authority has the discretion to accept or reject a bid bond, it cannot exercise its jurisdiction to overthrow the will of Parliament expressed in the **Banking Act**, particularly section 11(1)(b) thereof which provides:

(i) An institution shall not in Kenya:-

(b) grant or permit to be outstanding any advance or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company

(other than another institution) in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five per cent of the share capital of that company;

15. It was the petitioners' case that whereas, to the extent provided under Regulation 41 of the Procurement Regulations, the requirements of the form and the amount of the tender security is the discretion of the procuring entity, given the above provisions of the **Banking Act**, on 10th April 2015, the Authority was in error to issue clarifications in line with clauses 2.5 and 2.61 (on page 6) of the tender document that:

“The regulatory framework that govern issuance of bank guarantees is separate from those that govern the operations of a bidder as a legal entity and therefore it is acceptable for the bank to issue the bid bond provided the authorized signatories to such bid bonds are not the same as the ones who have been donated the power of attorney to sign the tender documents.”

16. It was the Petitioners' case that the clarification was issued in response to the very intriguing question:

“Where the bidder is a bank, can the bank issue the bid bond or does it have to get an independent party to guarantee?”

17. In the Petitioners' view, though the **Public Procurement and Disposal Act 2005** does not define it, the **Public Procurement and Asset Disposal Act 2015** states that "tender security" means a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfillment of any obligation in the tender process. Therefore being a written promise by one to answer for the debt/undertaking of another one cannot guarantee themselves and the Authority is not entirely right to argue that *“the basis for requiring tender security in a procurement process is to deter frivolous and irresponsible bids to encourage bidders fulfill the conditions of their respective bids.”*

18. It was averred that by allowing NBK to issue a tender security on itself, the Authority gave it an unfair and undue commercial advantage over other bidders who had to acquire third-party security, totally distorting fair competition between bidders. In the premises, the Authority's decision is unconstitutional as it is discriminatory, contrary to public policy, and violative of Article 27 of the Constitution.

19. The Petitioners' case was that although the Court through its interim order allowed the Authority's decision to stand, albeit after punishing NBK for it, the entire procurement of Tender No. NTSA/ICB-014/2014-2015 was contrary to Article 47 of the Constitution for being unlawful, unreasonable and procedurally unfair as it gives NBK advantage and it violates express provisions of law hence the Authority's decision to award the tender to NBK was an unfair practice which amounted to misuse of power. And it was an affront to the legitimate expectation that, being a creature of the law, the Authority would act impartially and in strict compliance with the law, including Section 11(1)(b) of the **Banking Act**.

20. On the authority of the Ugandan case of **Ojangole & 4 Ors vs. Attorney General (Misc Cause No. 303 of 2013) [2014] UGHCCD 58 (14 April 2014)**, it was contended that the Authority's decision not to respond to the letter demanding the disqualification of NBK amounted to denying them the right, as members of the public, to participate in the tender contrary to Article 10(2) of the Constitution. In this respect, they relied on paragraphs 329 – 346, inclusive, of the concurring opinion of **Mutunga, CJ & President, SC - In the Matter of the National Land Commission [2015] eKLR**, Supreme Court Advisory Opinion Reference No. 2 of 2014.

21. On the issue whether the 1st and 2nd Petitioners are entitled to *payment of damages and compensation for the violation and contravention of their rights and fundamental freedoms by the Authority*, it was submitted that under Article 23(3)(e) of the Constitution, this Court is vested with the authority to grant an order for compensation where it is moved under Article 22 as herein, and it establishes that rights have been violated. The fact that a public entity may be compelled to pay the compensation from public coffers

does not stop this Court from awarding damages to public interest litigants. After all, the public bodies have to meet their costs from public coffers even where they are sued in the public interests. Otherwise, such costs would prevent such bodies from being sued.

22. The Court was therefore urged to *assess the quantum of damages and compensation to be paid by the Authority to the Petitioners, and issues an order compelling the Authority to pay general damages, exemplary damages, and aggrieved damages under Article 23(3) of the constitution of Kenya 2010 for the unconstitutional conduct of the Authority.*

23. *With respect to costs, it was submitted that it is trite law that costs follow the event and since the application has merit and the orders sought ought to be granted, the Court was urged to allow the petition and condemn the 1st and 2nd Respondent in costs.*

1st Respondent's Case

24. The 1st Respondent opposed the petition.

25. According to the 1st Respondent, the **National Transport and Safety Authority**, it is a State Corporation established under the **National Transport and Safety Authority Act** No. 33 of 2012 with the key mandates of, *inter alia*, planning, managing and regulating the road transport system, and implementing policies relating to road transport and safety and is the sole State agency mandated to establish systems and procedures for training, testing and licensing of drivers. It was averred that having been so entrusted with the important regulatory functions pertaining to road transport which includes issuance of licence to drivers endeavoured to put in place policies to implement its statutory mandate. According to it, over the years the number of vehicles on the road has increased and as such there has been a corresponding increase in the number of drivers in Kenya with the current active population of drivers in Kenya being approximately 5 million. It averred that for a long time the driving licence issued in Kenya has been used not only as a driving licence but also as an identity document.

26. It was however contended that the existing system for production of driving licence is cumbered with long, slow and manual procedures such as listing of applications received from drivers, pasting the documents, trimming photos, referencing, writing of licence books, writing of renewable stickers, batching, examination, approval, signature and listing for dispatch whereupon they are manually filed and stored at the driver licence Registry which process of production of drivers' licences has exposed the system to production of fake licences as a result of which incompetent drivers have strewn the Kenyan roads operating with fake licences a matter which has posed a serious threat to road safety in Kenya.

27. It was therefore averred that in order to manage the issuance and tracking of driving licences, curb production of fake driving licences and track penalties for traffic offences with such large number of drivers coupled with the yearly heightened growth in the number of drivers the Authority initiated the programme for introduction of smartcard based driving licences which system will help improve reliability and authenticity of driving licences, as well as improving road safety by maintaining security of drivers' personal information in case of loss of a driving licence since the driving licences would have special PIN numbers and biometrics. Pursuant thereto, the Authority on 20th March, 2015, invited tenders for supply, delivery, installation and maintenance of second generation smartcard based driving licence and associated services being tender number NTSA/ICB-014/2014-2015. It was disclosed that the advertisement for the Invitation to Tender was carried out in strict compliance with the relevant provisions of the **Public Procurement and Disposal Act, 2005** (hereinafter the PPDA, 2005) and the **Public Procurement and Disposal Regulations, 2006** (the Regulations).

28. It was the Authority's case that the PPDA, 2005 mandates the Authority as a procuring entity to prepare tender documents in accordance with the PPDA and the Regulations and that the information entailed in the tender document ought to allow fair competition among potential bidders. According to it, in preparing and processing the said Tender document, the Authority strictly complied with all the relevant provisions of the PPDA, 2005 and the Regulations. It was contended that clause 2.5.1 of the

Tender Document permitted prospective tenderers requiring any clarification of the tender document to do so in writing vide email to the Authority and pursuant thereto, a number of prospective tenderers submitted inquiries relating to the tender document and the Authority duly responded to the inquiries in writing; which responses were entailed in Addenda issued on diverse dates by the Authority which accordingly becomes, upon issuance, part of the tender document and is binding upon the Procuring Entity and all tenderers.

29. It was averred that amongst the inquiries submitted to the Authority was by the National Bank of Kenya (the 2nd Respondent herein) concerning whether the Bank can issue its own bid bond or whether it would have to obtain the bid bond from an independent guarantee to which the Authority responded.

30. It was however appreciated that the PPDA, 2005 mandates the Authority as a Procuring Entity to require bidders to provide tender security for their respective tenders and that the decision of whether or not to accept a tender security as submitted by a tenderer is well within a procuring entity's purview and the exercise of such mandate solely lies with a procuring entity to the exclusion of third parties such as the Petitioners. In the Authority's view, the basis for requiring tender security in a procurement process is to deter frivolous and irresponsible bids and to encourage bidders to fulfil the conditions of their respective bids. It was therefore its view that in accepting the tender security submitted by NBK the Authority did so within its mandate and in any case needed no prior approval of other bidders as well as third parties such as the Petitioners in exercising its powers of accepting a tenderer's tender security. It was averred that the respective bids in the subject tender were opened in the presence of tenderers and/or their representatives on 22nd April, 2015 and the names of the tenderers as well as their respective bid securities read out loud.

31. According to the Authority, it lawfully and procedurally proceeded with the procurement process in the subject tender and successfully completed the technical and financial evaluation process in strict compliance with the PPDA, 2005, the Regulations and the tender document. Having lawfully and procedurally conducted the evaluation of respective bids in the subject tender the Authority communicated to the evaluated bidders on the outcome thereof and upon conclusion of financial evaluation the subject tender was awarded to National Bank of Kenya on account of having submitted the lowest evaluated bid. It was the Authority's case that throughout the procurement process in the subject tender the Authority endeavoured to fulfil and indeed fulfilled its obligation of ensuring fairness, integrity, transparency and accountability. However, following notification of award of the subject tender the procurement process was halted by the **Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)** which challenged the said tender process vide a Request for Review Application No. 56/2015 of 12th November, 2015: **Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)** =Versus= National Transport And Safety Authority which Request for Review raised the issues claimed herein by the Petitioners.

32. According to the Authority, under the PPDA, 2005 and the Regulations, upon filing of a Request for Review, the Review Board is mandated to obtain all the original documents in respect to the subject tender process for its consideration and scrutiny which documents include:- list of all the bidders and their contacts, all the original tender documents submitted by all the bidders, the original tender opening report, the original technical evaluation report, the original Tender Committee Report, the blank tender document, the notification letters and so on which documents are submitted to the Review Board for scrutiny and to aid the Board in determining whether the tender process was procedural, lawful or otherwise. The Authority availed to the Review Board all the above required documents, which documents were considered and scrutinized by the Board for purposes of identifying any anomaly and/or procedural/legal flaw in the tender process and the Review Board had the occasion to appraise and scrutinize the said documents.

33. It was averred that the Review Board upon considering the cases for the respective parties dismissed the Request for Review Application in exercise of its mandate under section 98 of the PPDA, 2005. It was its case that parties to a dispute must be afforded a fair hearing by the judicial or quasi-judicial authority which has the mandate to hear and determine the subject dispute and that the parties who were competently before the Review Board in Review Application No. 56/2015 were afforded a fair hearing

and in making its determination on the Review Application the Board comprehensively considered the respective submissions made on behalf of all the parties. To the Authority, the Addendum No. 2 issued on 10th April 2015 by the Authority was only binding upon bidders and not third parties such as the Petitioners herein who were not candidates in the subject tender. Further, it was contended that despite being ostensibly aware of the 1st Respondent's said Addendum the Petitioners herein had no locus to enquire into the validity thereof as the procurement process and any issues arising therefrom can only be competently lodged by bidders through the administrative and judicial mechanisms provided by the **PPDA, 2005** and the regulations thereunder.

34. It was disclosed that the validity of the bid security supplied by the 2nd Respondent herein was duly raised by **Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)** in their Request for Review Application No. 56 of 2015 and the issue was conclusively addressed by the Review Board in its decision delivered on 11th December, 2015 following which **Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)** opted to commence Judicial Review proceedings and filed Miscellaneous Application No. 507 of 2015 which proceedings sought to challenge the decision of the Review Board on its merits. To those proceedings, the 1st Petitioner herein was joined as a 3rd Interested Party but the said proceedings were entirely withdrawn by consent at the behest of **Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)** who were the Ex Parte Applicants therein and the 1st Petitioner herein was awarded costs which were borne by the Ex Parte Applicant therein as the 1st Petitioner herein claimed that he represented the public interest in the proceedings.

35. It was averred that having consented to the withdrawal of the Miscellaneous Application No. 507 of 2015 and being awarded costs thereon the 1st Petitioner alongside the 2nd Petitioner herein has mischievously and irregularly opted to file the instant purported Petition grounded on issues that have been conclusively heard and determined by the Review Board in the Request for Review No. 56/2015.

36. The Authority further contended that this Honourable Court lacks the requisite jurisdiction to hear and determine this Petition by virtue of being contrary to sections 96 and 100(2) of the **Public Procurement and Disposal Act** Cap 412A Laws of Kenya. Similarly, the Court lacks the requisite jurisdiction to hear and determine this Petition by virtue of being contrary to Article 22 & 23 of the Constitution of Kenya as the purported Petition does not disclose any breach of the Petitioners' constitutional right or fundamental freedom in the Bill of Rights by the 1st Respondent which warrants the issuance of orders sought.

37. It was therefore the Authority's case that the Petition is misconceived, incompetent, bad in law, incurably defective, frivolous and an abuse of process of this Honourable Court as the substance of the purported Petition is in regard to a procurement process in Tender No. NTSA/ICB-014/2014-2015 for the Supply, Delivery, Installation and Maintenance of the Second Generation Smart Card Based Driving License and Associated service whose redress mechanisms are duly provided for by the **Public Procurement Disposal Act** Cap 412A Laws of Kenya and that the internal mechanisms for appeal or review provided in the PPDA, 2005 can adequately and conclusively address the Petitioners' grievances.

38. It was further contended that this Court lacks the requisite jurisdiction to hear and determine the Petition herein as filed by virtue of being *res judicata* and that the facts and issues raised therein have already been litigated substantively on their merits in Request for Review Application No. 56/2015 between **Symphony Technologies Limited (Kenya) & United Telecoms Limited (India) versus National Transport & Safety Authority** wherein the Review Board conclusively determined the issues raised in the purported Appeal.

39. It was the Authority's case that the orders sought herein would affect other parties who procedurally participated in the subject tender and the said parties have neither been enjoined to purported Petition nor duly served. To the Authority, this Court ought to exercise restraint before exercising its jurisdiction under Article 165 of the Constitution when the relevant State organs such as the Public Procurement Administrative Review Board with the mandate to adjudicate upon the grievances has exercised the said mandate in accordance with the relevant provisions of the PPDA, 2005, parent statute relating to public procurement.

40. It was argued that as a peremptory principle of the rule of law when a dispute has been conclusively heard and determined through the elaborate process provided under the enabling laws this Honourable Court ought to exercise restraint altogether lest it usurps the powers of the of the Review Board clothed with the mandate to resolve the procurement grievances raised by the purported Petitioners herein. It was the Authority's case that this Petition is purely an appeal against the decision of the Review Board in Review Application No. 56/2015 disguised as a Petition yet the same has been instituted contrary to the express provisions of section 100(2) of the PPDA, 2005 and Article 22 and 23 of the Constitution. The Court was urged not to allow the Petitioners to dishonestly, mischievously and irregularly apply the process of this Honourable Court with the sole intention to derail the procurement process herein and the implementation of the project in the subject tender and instead reject the Petition and allow the procurement process to proceed to its logical conclusion.

41. It was contended that paragraphs 40 and 41 of the Petition are wholly wishful and embodies the purported Petitioners' skewed interpretation of section 11 of the **Banking Act** Cap 488 in that:-

a) Section 11(1)(h) of the **Banking Act** does not place a blanket ban on banks to issue guarantees in favour of third parties.

b) The Petition is speculative as it alleges that the 2nd Respondent's tender security was fraudulent and reckless yet the Petitioners have not demonstrated an iota of recklessness and/or fraud in the 2nd Respondent's bid security.

42. It was the Authority's case that in light of the purported Petitioners' prayers that the Honourable Court cannot be properly moved to make determinations on propriety of a tender process by way of a constitutional Petition as has been done herein. To the Authority, the project in the subject tender is of public importance hence ought not to be irregularly delayed by individuals such as the Petitioners who are pursuing personal interests under the guise of public interest and that the importance and the public interest of the project in the subject tender herein cannot be overemphasized and that the Petitioners' deliberate attempts to derail the project is overridden by the countervailing public interest in implementation of the project in the subject tender.

43. The Court was therefore urged to safeguard the integrity of its proceedings and the due process by dismissing the Petition herein with costs.

2nd Respondent's Case

44. According to the 2nd Respondent, the National Bank of Kenya, on 20th March 2015, the Authority advertised an Open International Tender No. NTSA/ICB-014/2014-2015 for Supply, Delivery, Installation and Maintenance of Second Generation Smart Card Based Driving Licence and Associated Services (hereinafter "*the Tender*") in accordance with Section 51 of the **Public Procurement and Disposal Act, 2005** (hereinafter "*the repealed Procurement Act*") which tender NBK participated in in the terms of the Tender document and by a letter dated 5th November 2015 the Authority, after concluding the procurement process, informed NBK that its Bid was successful.

45. It was NBK's case that at all times, in its dealings with regard to the Tender, it fully complied with the terms of the Tender Document pertaining to Tender No. NTSA/ICB-014/2014-2015, the repealed Procurement Act and the **Public Procurement and Disposal Regulations, 2006** (hereinafter "*the Procurement Regulations*") and as such, the Award of the said Tender to the Bank was not only lawful but also merited. Following the Notification of Award, the Bank was later informed that the contractual processes pertaining to the Award could not be finalised due to an Application challenging the Award filed with the Public Procurement Administrative Review Board by a dissatisfied bidder being **PPARB Application No. 56 Of 2015: Symphony Technologies Limited (Kenya) & Another Vs National Transport and Safety Authority**, in which Review Application the Bank was listed as an Interested Party. It was disclosed that the grounds raised before the Public Procurement Administrative Review Board were, *inter alia*, the validity of the tender security issued by the Bank to the Authority and whether the

decision was in compliance with the principles of public procurement which are enunciated under section 2 of the repealed Procurement Act and the **Banking Act**, Chapter 488 of the Laws of Kenya.

46. The Court was invited to take note of the Petitioners' admission in the Petition herein that they were not only aware of the procurement and tendering process, but were following the same keenly - including the proceedings at the Public Procurement Administrative Review Board. Nevertheless while the Public Procurement Administrative Review Board (hereinafter PPARB), in terms of Section 96(d) of the repealed Procurement Act, allowed other Interested Parties to participate in its proceedings, the Petitioners herein chose not to participate and ventilate any issues they had. Further, while the Petitioners contend that they had locus to participate in the PPARB proceedings (an assertion that is denied) they never sought the intervention of this Court until after over 6 months passed from the time the PPARB made its decision and over 7 months after the Tender was awarded to the Bank.

47. It was however averred that the Application before the PPARB was exhaustively heard and determined and a decision thereon delivered on 11th December 2015, which upheld the award of the Tender to the Bank and which the Petitioners were aware of. Being dissatisfied with the decision of the Public Procurement Administrative Review Board in **PPARB Application No. 56 Of 2015**, the said Bidders proceeded to file **Nairobi J. R. Civil Application No. 507 of 2015: R vs the Public Procurement Administrative Review Board Ex Parte Symphony Technologies Limited (Kenya) & Another**, in which the Bank and the 1st Petitioner herein were Interested Parties. Whereas the said **J. R. Civil Application No. 507 of 2015** was later withdrawn at the instance of the *Ex-Parte* Applicants, it is important to note that the 1st Petitioner herein supported the said Application, which among other orders, sought the tender to be awarded to Symphony Technologies and its partners. In essence, the 1st Petitioner was advancing the latter's commercial interests as opposed to any public interest. It was noted that the Petitioners have consciously omitted the body whose decision is essentially challenged, namely the Public Procurement Administrative Review Board, from the current proceedings.

48. In the NBK's view, for the Petitioners to succeed in the present Constitutional Petition they must demonstrate with a reasonable degree of precision the provisions of the Constitution which have been violated with regard to them and the manner of such violation. In this case despite having reproduced numerous provisions of the Constitution in Paragraphs 44 and 45 of the Petition, the Petitioners have failed to demonstrate the manner in which each or any of the Constitutional provision quoted therein has been violated by the Bank or any other Respondent. In any case, it will be noted, in particular, that on the face of it, the alleged violations in the said Paragraphs are claimed as against the Authority and not the Bank.

49. It was averred that no evidence has been produced by the Petitioners to show that the NBK has acted jointly and/or unlawfully in collusion with the Authority to award itself the Tender herein, which in any case would have been an impossible feat as the Bank had no power whatsoever to award itself the subject Tender and no evidence have been proffered to demonstrate that this could have been possible.

50. It was therefore the Bank's position that having failed to substantiate at all the manner in which the Bank violated the Petitioners' rights, the Petitioners are not entitled to any of the prayers or orders sought in the Petition and therefore the Petition should be dismissed with costs to the Bank.

51. It was however averred that the present Petition herein is predicated on two particular grounds, namely:

1. An alleged violation of the Petitioners' right to fair administrative action under Article 47 of the Constitution of Kenya 2010 as read together with Sections 3 to 6 of the **Fair Administrative Action Act**, 2015 based on the 1st Respondent's alleged failure to respond to the Petitioner's letter dated 26th May 2015 entitled, **"Re: Request for comprehensive information on your discriminatory exemption of National Bank of Kenya in Tender No. NTSA/ICB-014-2014-2015 from the requirement that bid bonds must be provided by third parties – cautionary notice made under articles 4(2), 10, 35, 22 & 258 of the Constitution"** (hereinafter *"the Petitioners' request for*

information”).

2. An alleged violation of Article 27 of the Constitution to the extent that the 1st Respondent’s decision to award the Tender to the Bank allegedly without a valid tender security was discriminatory and against Sections 11(1)(h) and 11(1A) of the **Banking Act**.

52. The Bank however noted that the Petitioners’ request for information to the 1st Respondent is dated 26th May 2015, hence the Petitioners’ rights to fair administrative action under Article 47 of the Constitution as read together with the applicable provisions of the **Fair Administrative Action Act** were not breached by the Bank or the 1st and 3rd Respondents because the information and/or clarification requested for therein was already available in public documents that were accessible to the Petitioners, namely:

1. The 1st Respondent’s Memorandum of Response, Supplementary Affidavit and Written Submissions filed in **PPARB Application No. 56 Of 2015: Symphony Technologies Limited (Kenya) & Another Vs National Transport and Safety Authority** dated 18th November 2015, 2nd December 2015 and 3rd December 2015 respectively. These documents clearly set out the 1st Respondent’s justification for awarding the Tender to the Bank while canvassing the issue of validity of the tender security issued by the Bank. It should further be noted that the Petitioners were aware of the existence of these documents as they have admitted they were following the said proceedings *keenly*.

2. The decision of the Public Procurement Administrative Review Board in the said **PPARB Application No. 56 of 2015** which was delivered on 11th December 2015, and which proceedings the Petitioners admitted they were following *keenly*. This decision outlined the 1st Respondent’s justification for awarding the Tender to the Bank very clearly between Pages 22 to 28 thereof while also determining the issue of validity of the tender security issued by the Bank. It should be noted that this decision was readily available to members of the public, including the Petitioners herein, both physically and on the PPARB website.

3. The 1st Respondent (then the 1st Interested Party)’s Replying Affidavit sworn by Patrick W. Wanjuki dated 29th January 2016 and filed in this Honourable Court on 16th March 2016 in **J. R Civil Application No. 507 of 2015** - in which Case the 1st Petitioner herein was an Interested Party. This particular document is reproduced at Pages 5 to 16 of the Annexures to the Petitioners’ Affidavit in Support of the Petition dated 15th June 2016. Needless to say, this document detailed, clarified and/or outlined the 1st Respondent’s justification for awarding the Tender to the Bank together with canvassing the issue of validity of the Bank’s tender security and was available to the Petitioners before the filing of the present Petition.

53. It was therefore the Bank’s view that the present Petition is an attempt by the Petitioners at victimizing the Bank for an alleged lack of response from the Authority in relation to information that was already available to them and the public and furthermore is an attempt by the Petitioners at obtaining compensation from public coffers for their own deliberate negligence, indolence and ignorance. This attempt at self-aggrandizement does not befit the public interest and the present Petition must therefore fail in its entirety.

54. With regard to the Petitioners’ allegations that the 1st Respondent’s decision to award the Tender to the Bank without an alleged valid tender security was discriminatory under Article 27 of the Constitution and was against the **Banking Act**, the Bank averred that:

1. This particular issue was substantively determined by the Public Procurement Administrative Review Board in **PPARB Application No. 56 Of 2015: Symphony Technologies Limited (Kenya) & Another Vs National Transport and Safety Authority** and therefore this Honourable Court is being invited to sit in an appeal of the Public Procurement Administrative Review Board’s

aforesaid decision under the guise of a Constitutional Petition.

2. Nevertheless, Section 96(d) of the repealed Procurement Act provided that other parties to a review before the Public Procurement Administrative Review Board were such other persons as the Review Board may determine, and as such the Petitioners herein could have elected to move the Review Board to be enjoined in the matter and make representations before it – which the Petitioners did not do despite being fully aware of the matter.

3. In any case, the Review Board made a substantive finding on the validity of the Bank's tender security, i.e. that in accordance with the provisions of Section 53(1) of the repealed Procurement Act, the 1st Respondent issued an **Addendum No. 2** which was forwarded to all bidders vide a letter dated 10th April 2015 which was to the effect that the regulatory framework that governed the issuance of bank guarantees is separate from those that govern the operations of the bidder as a legal entity; and therefore it was acceptable for a bank to issue a bid bond provided that the authorised signatories to such bid bonds were not the same as the ones who had been donated the power of attorney to sign the tender documents.

4. This position of the Review Board was not contested by any of the bidders, and therefore the said **Addendum** became part of the tender document which the Bank and the 1st Respondent were under a duty to comply with.

5. The Petitioners have not challenged the legality of the tender document which included the said **Addendum**, and in fact the Bank has all along acted in compliance with the Tender document.

6. In view of the foregoing, the 1st Respondent's decision to award the Tender to the Bank was therefore based on a valid tender security and was not discriminatory as the same condition was made known to all other prospective bidders in the Tender process vide the **Addendum** and which condition was not contested. As such the **Addendum** became part and parcel of the main Tender document. The contents of paragraphs 18, 22, 44.11 and 44.12 of the Petition are denied *in toto* and the Petitioners are put to strict proof of their allegations.

55. The Bank therefore adopted the position that:

1. Decisions made by the Review Board are final and binding unless Judicial Review thereof commences within fourteen (14) days from the date of the Review Board's decision. Indeed Judicial Review proceedings were commenced in **J. R Civil Application No. 507 of 2015**, but as admitted by the Petitioners herein, the said Judicial Review proceedings were withdrawn on 13th June 2016.

2. If Judicial Review is not declared by the High Court within thirty (30) days from the date of filing, the decision of the Review Board shall take effect. Those thirty days have since lapsed.

3. In view of the lapse of time by virtue of the foregoing provisions of Statute, the decision of the Review Board must stand and therefore the Review Board's findings regarding the validity of the tender security and lack of discrimination in the tendering process must be left to stand.

56. To the Bank, the Petition herein lacks merit and is self-serving as it seeks to re-litigate matters that have already been dealt with by the Public Procurement Administrative Review Board to advance personal monetary interests and the interests of commercial entities couched as a constitutional and public interest matter hence the prayers and remedies sought in the Petition cannot issue and the Petition should be dismissed with costs to the Bank, the 2nd Respondent herein.

57. It was submitted on behalf of the Bank that since the Petitioners in their written Submissions dated 7th October 2016 specifically abandoned Prayers (a), (b) and (g) of the Petition meaning that they are no longer seeking the invalidation of the Tender Award to the Bank but rather they seek damages from the

Authority for the alleged violation of their rights under the *Fair Administrative Action Act*, No. 4 of 2015, the remaining issues for determination before this Honourable Court as between the Bank and the Petitioners are as follows:-

- i. Whether the Bank has in any way violated the Petitioner's rights and fundamental freedoms?
- ii. Whether the Tender award to the Bank is legal?
- iii. Who is to bear the costs of the Petition?

58. As regard the issue whether the Bank has in any way violated the Petitioner's rights and fundamental freedoms, it was submitted that despite the Petitioners having reproduced numerous provisions of the Constitution in Paragraphs 44 and 45 of the Petition, the Petitioners have failed to demonstrate on a factual basis the manner in which any of the said Constitutional provisions have been violated by the Bank. Indeed, in their Submissions no reference is made to any actions by the Bank that could have violated the Petitioners' rights of freedoms protected by the Constitution. In this respect the Bank relied on Anarita Karimi Njeru v. Republic [1979] eKLR, Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and Stephen Nyarangi Onsomu & Another v. George Magoha & 7 Others [2014] eKLR and averred that the Petitioners failed to demonstrate the manner in which the Bank violated any of their fundamental rights and freedoms as alleged in the Petition or at all, and consequently the Court should find that the Bank has not violated any of the Petitioners rights under the provisions listed in the Petition or at all.

59. Regarding the issue whether the Tender Award to the Bank was legal, it was submitted that the Petitioners are seeking for the Court to sit on a review of the decision of the Public Procurement Administrative Review Board's decision in *PPARB Application No. 56 of 2015: Symphony Technologies Limited (Kenya) & Another v. National Transport and Safety Authority* under the guise of the present Constitutional Petition. In its view, the issue of validity of the Tender Security was already canvassed and a substantive decision thereon rendered in *PPARB Application No. 56 of 2015*, the proceedings of which the Petitioners themselves have admitted they were following keenly. In this respect the Bank relied on Abdalla Abubakar Miraj & Another v. Kenya Ferry Services Limited (2015) eKLR, in which the High Court held that a person who is outside the tender process can become a party to a review vide section 96(d) of the repealed Procurement Act, which provides that parties to a review shall be, *inter alia*, such other persons as the Review Board may determine. It was therefore submitted that the Petitioners herein, who were aware of the proceedings before the Public Procurement Administrative Review Board in *PPARB Application No. 56 of 2015*, chose not to make any applications to the Review Board to be enjoined in the matter and make representations thereon.

60. It was further submitted that there was no discrimination by the 1st Respondent in awarding the Tender to the Bank with respect to the Tender security offered by the Bank because in *PPARB Application No. 56 of 2015*, the Review Board found that in accordance with the provisions of Section 53(1) of the repealed Procurement Act, the 1st Respondent issued an *Addendum No. 2* which was forwarded to all Bidders and which provided that it was acceptable for a bank to issue a bid bond provided that the authorised signatories to such bid bonds were not the same as the ones who had been donated the power of attorney to sign the tender documents. The said *Addendum No. 2* was not contested by any bidders and therefore the *Addendum* became part of the Tender document, the validity of which has not been contested by any person including the Petitioners herein or the other bidders of the subject Tender. It was therefore submitted that the award of the Tender to the Bank by the 1st Respondent based on the Bank's Tender Security at the time was not discriminatory and not at all in violation of Article 227 of the Constitution or contrary to the *Banking Act*.

61. Furthermore, the Bank submitted, the validity of the decision of the Public Procurement Administrative Review Board in *PPARB Application No. 56 of 2015* must stand as section 100 of the repealed Procurement Act provides clearly that the decisions of the Review Board are final and binding unless Judicial Review thereof commences within Fourteen (14) days from the date of the Review Board's decision; and if Judicial Review is not declared by the High Court within 30 days from filing, the

decision of the Review Board shall take effect.

62. Dealing with the **Banking Act**, the Bank reproduced section 11(1)(b) thereof which provides that:

“An Institution shall not in Kenya –

.....

(b) grant or permit to be outstanding any advance or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company (other than another institution) in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five percent of the share capital of that company;...”

63. It was contended that as is clear from the wording of the section prohibition for granting of financial guarantee and other related actions related to banks granting advances, credit facilities of financial guarantee for sister or related companies in which such a bank holds more than 25% share capital. This means that the bank cannot provide financial guarantees to sister or related companies where it holds more than 25% of the share capital but does not relate to guarantees in relation to the bank itself. The Court was invited to take judicial notice of the fact that bank to bank guarantees are a common and legal practice that takes place daily in conveyancing and related transactions in Kenya and in other jurisdictions. It was therefore submitted that section 11(1)(b) has no application or relevance to the bid bond in question, which was issued by the Bank to the 1st Respondent since the security was issued in the cause of normal banking business and was not for the guarantee of a third party in which the Bank has over 25% share holding.

64. In view of the foregoing, the Court was urged to decline the Petitioners’ invitation to sit in an appeal of the Public Procurement Administrative Review Board’s decision in **PPARB Application No. 56 of 2015** under the principle of Constitutional Avoidance, and the Court was invited to look at **Abdalla Abubakar Miraj & Another v. Kenya Ferry Services Limited (supra)** and **Stephen Nyarangi Onsomu & Another v. George Magoha & 7 others (supra)** where this Honourable Court has upheld constitutional avoidance where a matter can or has been determined by other existing legal mechanisms such as those under the repealed Procurement Act particularly where no constitutional breach has been shown to have been committed by relevant tribunal, in this case, the PPARB.

65. In the Bank’s view, having demonstrated that it has in no way infringed or violated the fundamental rights and freedoms of the Petitioners as alleged in the Petition or at all and that the Award of the Tender to the Bank was legal, based on **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 Others [2014] eKLR** and **Hosea Mundui Kiplagat v. Sammy Komen Mwaita & 2 Others [2013] eKLR**, it was the Bank’s prayer that it be awarded the costs of the petition.

Determinations

66. I have considered the issues raised in this Petition.

67. It was contended that since the Petitioners were not parties to the Addendum No. 2 issued on 10th April 2015 by the Authority the said Addendum was only binding upon bidders and not third parties such as the Petitioners herein who were not candidates in the subject tender. If I understood the National Transport and Safety Authority’s position correctly, it seems to be taking the view that as the Petitioners were not parties to the procurement process, they ought not to raise issues relating to the said Addendum. In a ruling delivered in this same matter this Court while relying on Article 227 of the Constitution expressed itself as hereunder:

“In this case, it is contended that the decision by the Authority flies in the face of the Constitutional provisions since by awarding the tender to the Bank, the Authority violated the principles of public procurement... Therefore where it is alleged that in awarding the

tender the subject of the legal proceedings before the Court, the relevant constitutional provisions were not adhered to, such contention if true may well justify the filing of a constitutional petition.”

68. Similarly, this Court in Republic vs. Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR relied on the same provisions, Articles 3(1) and 258 of the Constitution and held that:

“In my view a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 of the Constitution, and who has no other recourse known to law, as the IEBC concedes the applicant does not have, must in my view find recourse in the High Court which is the Court entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In my view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution.”

69. The said decision was upheld by the Court of Appeal in Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & 2 others [2017] eKLR in which Musinga, JA relied on Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others [2014] eKLR, Anisminic vs. Foreign Compensation Commission [1969] 2 AC 147 and Habre International Co. Ltd vs. Kassam and Others [1999] 1 E.A. 125 opined that:

“In our view, if the 1st respondent’s application had been filed under the provisions of PPAD Act only, simply challenging the decision by the Review Board and no more, then perhaps the 1st respondent would qualify to be referred to as an “aggrieved party”. However, the Board and IEBC acknowledged that some of the issues raised by the 1st respondent were outside the jurisdiction of the Review Board. Only the High Court was able to determine them... The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services.”

70. In this case the Petitioners contend that the manner in which the NBK was awarded the tender was contrary to the provisions of Article 227(1) of the Constitution provides as follows:

When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

71. In other words the procurement in question violated the constitutional principles in Article 227 aforesaid. Article 3(1) of the Constitution mandates that:

Every person has an obligation to respect, uphold and defend this Constitution

72. The power to institute provisions in order to attain that mandate is provided under Article 258(1) of the Constitution which provides that:

Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

73. It is therefore my view and I hold that the Petitioners were within their rights to institute these proceedings in order to uphold and protect the constitutional principles guiding public procurement.

74. In my view the mere fact that the 1st Petitioner was a party to the earlier Judicial Review proceedings which were withdrawn by the applicant therein does not bar the petitioners from bringing these proceedings since not being the applicants therein, they had no control over the decision by the applicant therein to withdraw the same. It must be noted that withdrawal of proceedings without the same being heard and determined cannot render the same having been finally and conclusively determined. In other words those proceedings were not compromised. In those circumstances nothing bars the petitioners herein or even the applicant in those proceedings from instituting fresh proceedings challenging the said decision since there is no *res* capable of becoming *judicata*.

75. With respect to Request for Review Application No. 56/2015 between **Symphony Technologies Limited (Kenya) & United Telecoms Limited (India) versus National Transport & Safety Authority**, it is clear that the Petitioners herein not being candidates in the procurement process could not challenge the award before the Board hence were neither parties to the said proceedings nor could competently have been parties therein. Accordingly *res judicata* cannot be successfully raised against the Petitioners.

76. Whereas it may well be true that the orders sought in this petition would affect those who participated in the subject procurement process, Article 47 of the Constitution is clear that if a right or fundamental freedom of a person has been or is likely to be *adversely* affected by administrative action, the person has the right to be given written reasons for the action. Here it is not contended that those who lost in the procurement process would be adversely affected by the decision arising in these proceedings.

77. Whereas I agree that judicial review jurisdiction being discretionary, the Court ought to exercise restraint, where the allegation is that constitutional principles have been it violated, it would require very strong argument indeed to convince the Court to disregard such violation.

78. It was contended that the Review Board have made a determination regarding the legality of the security furnished by the NBK, this Court would under the guise of a Constitutional Petition be sitting on appeal against the said decision. In my view the issue before this Court revolves around the interpretation and application of the Constitution. Under Article 165(3)(d) of the Constitution, that is a jurisdiction reserved for the High Court and not the Review Board which exercises an appellate jurisdiction and to some extent the powers of review of the decisions of procuring entities. Accordingly this Court cannot be barred from investigating an allegation of violation of the Constitution simply because the Board has allegedly pronounced itself thereon as the Board has no powers to do so. I must emphasize that the Board is bound by the decision of the High Court and where a decision is made by the High Court whose effect is to nullify the Board's decision, the Board must, whether it is happy with it or not abide by it. Unhappiness with this Court's decision is not and has never been a ground for disregarding the same. In my view the finality of the decisions of the Board presumes that the decision is in fact constitutional. Where a decision is unconstitutional no estoppel, waiver or acquiescence can give it a seal of validity. Neither is the fact that the decision is not challenged cannot make it legal. Whereas as long as the decision remains, it is enforceable, if a challenge to it is taken on the ground that its effect would be to violate the Constitution then the Court is perfectly entitled to correct the same.

79. An issue was raised with respect to public interest surrounding the award of the tender. Public interest however is just like public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.**

80. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the

law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

81. A was appreciated in **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR:**

“We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum. We have considered the instant application and the importance of the subject project to future generations.”

82. In my view, the failure to adhere to the constitutional principles relating to public procurement may lead to serious ramifications on the part of the public that may have to shoulder the consequences of an otherwise improper procurement. Therefore where the particular procurement violates the constitutional principles the Court ought not to permit the same to proceed simply because the subject of the procurement is beneficial to the public.

83. With respect to the merits of the petition I agree that the Petition herein is substantially predicated on two particular grounds, namely:

1. An alleged violation of the Petitioners’ right to fair administrative action under Article 47 of the Constitution of Kenya 2010 as read together with Sections 3 to 6 of the ***Fair Administrative Action Act***, 2015 based on the 1st Respondent’s alleged failure to respond to the Petitioner’s letter dated 26th May 2015 entitled, ***“Re: Request for comprehensive information on your discriminatory exemption of National Bank of Kenya in Tender No. NTSA/ICB-014-2014-2015 from the requirement that bid bonds must be provided by third parties – cautionary notice made under articles 4(2), 10, 35, 22 & 258 of the Constitution”***.

2. An alleged violation of Article 227 of the Constitution to the extent that the 1st Respondent’s decision to award the Tender to the Bank allegedly without a valid tender security was discriminatory and against sections 11(1)(h) and 11(1A) of the ***Banking Act***.

84. As rightly submitted on behalf of the Bank, the remaining issues for determination before this Honourable Court as between the Bank and the Petitioners are as follows:-

- i) Whether the Bank has in any way violated the Petitioner’s rights and fundamental freedoms?**
- ii) Whether the Tender award to the Bank is legal?**
- iii) Who is to bear the costs of the Petition?**

85. Section 11(1)(b) of the ***Banking Act*** provides that:

“An Institution shall not in Kenya –

.....

(b) grant or permit to be outstanding any advance or credit facility or give any financial guarantee or incur any other liability to, or in favour of, or on behalf of, any company (other than another institution) in which the institution holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five percent of the share capital of that company;...”

86. In this case the said provision can be phrased as follows:

An Institution (here refer to the NBK) shall not in Kenya grant any financial guarantee in favour of, any company (other than another institution) in which the Bank holds, directly or indirectly, or otherwise has a beneficial interest in, more than twenty-five percent of the share capital of that company;...

87. In other words the National Bank of Kenya, the 2nd Respondent herein, is expressly barred from granting any financial guarantee in favour of any company (apart from a different institution), where it holds at least 25% share capital therein. The interpretation of the Bank that what that provision means is that “the bank cannot provide financial guarantees to sister or related companies where it holds more than 25% of the share capital but does not relate to guarantees in relation to the bank itself” is with due respect not entirely correct. Therefore the NBK was entitled to act as a guarantor in favour of the 1st Respondent assuming all the other conditions were fulfilled.

88. That now brings me to the intent and purpose of a financial guarantee. In **Kenindia Assurance Company Limited vs. First National Finance Bank Limited Civil Appeal No. 328 of 2002** the Court of Appeal expressed itself as follows:

“The Court’s view of the matter is that upon giving notice of default, the respondent had discharged its obligations under the guarantee and the burden then shifted to the appellant to rebut the rebuttable presumption raised by the notice that liability had attached unless payment is made before a formal demand is made. Notice is to enable the guarantor to approach the principle debtor to ascertain the truth and to urge it to pay. The position would have been different had no fixed period been fixed within which liability would attach in which case the respondent would then have been placed in the unenviable position of exhausting even the avenue of litigation and appointment of a receiver. But as the matter stands, the performance bond had a life of only 12 months and it was executed in 1997. It cannot have been contemplated that the respondent would first sue or appoint a receiver, and when those failed then make a formal demand. It would be faced with the answer that the demand had been made too late...All these leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank, which gives a performance guarantee, must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice...As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary’s stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement...The performance bond in the instant case is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party and in such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security...Performance bonds fulfil a most important role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go too far away countries for damages, or go through a long arbitration. He can get damages at once, which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller’s non-performance of the contract. The courts must see that these performance bonds are honoured. The courts always recognise that the bonds affected the ‘tempo’ of the parties’ obligations but not their substantive

rights...In the instant case the appellant's obligation was to pay upon demand which the obligation was established when it was served with a notice of default and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue. There is no question outstanding to go for trial or which will require the examination of witnesses...On the question of interest it was within the respondent's right to demand it provided the overall liability did not exceed what was covenanted. Besides it was a matter in the discretion of the court."

89. Similarly in Transafrica Assurance Co. Ltd vs. Cimbria (EA) Ltd [2002] 2 EA 627 (CAU), it was held:

"A performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit... A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice."

90. Again in Kamro Agroviet Limited vs. Ceva Sante Animale & Others Kisumu HCCC NO. 45 of 2008, the Court held:

"A performance guarantee was similar to a confirmed letter of credit. Where, therefore a bank had given performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the banks had notice of the fraud. As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken on its face value unless the contractor can establish the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor – In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement."

91. It was however contended that the basis for requiring bid security from bidders in a tender process is to deter frivolous and irresponsible bids and to encourage bidders to fulfil the conditions of their respective bids hence the purpose of a tender security is different from a performance security. To my mind there would be no sensible basis for seeking a bid security if the bidder can simply issue a statement that it is securing its bid. Any entity however hopeless is capable of issuing such a statement. In my view the performance bond or security is meant to ensure that in the event that the successful tenderer fails to perform the contract the procuring entity would be in a position to secure itself without the necessity of having to institute legal proceedings against an entity that may not be in a position to compensate the public for the loss. This must necessarily be in tandem with Article 227(1) of the Constitution which decrees that a State organ or any other public entity, when it contracts for goods or services, shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Cost effectiveness in my view requires that as much as possible the procuring entity secures the public funds against any foreseeable risk of loss hence the need for financial security. To permit a tenderer to also perform the role of a surety in its own tender in my view amounts to a hollow security and defeats the very essence of security. To contend that it **"it is acceptable for the bank to issue the bid bond provided the authorized signatories to such bid bonds are not the same as the ones who have been donated the power of attorney to sign the tender documents"** is in my view a misnomer with respect to the purpose of security in tender documents.

92. Apart from that, it was contended that by permitting the Bank to guarantee itself, the Authority discriminated against the other bidders. This contention calls for a determination of what constitute

discrimination and under what circumstances the court can interfere in allegations of discrimination. The *Black's Law Dictionary* defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."

93. In his decision in *Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688*, Nyamu, J (as he then was) held:

"The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim...The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification."

94. This Court takes judicial notice of the fact that financial guarantees do not come on a silver platter. In fact a party seeking the same must be prepared to part with some form of consideration which in most instances is in form of a levy of interest. If therefore some of the parties to a tender are required to facilitate guarantees from third parties while others are exempted from doing so, that amounts to a differentiation that bears no rational connection to the legitimate purpose hence is discriminatory.

95. In the above case, Nyamu, J further expressed himself thus:

"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is

forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...Applying the above *formulae* to the situation before the Court, the differentia is the access to the CBD by some operators who ply along Jogoo Road in Nairobi while denying access to the majority. On the other hand the object to be achieved by the By law is the decongestion of the CBD. It follows therefore in order to decongest the CBD few operators have to be given access in order to achieve the objective of the By law. By law 5 and 23 empowers the Town clerk to give consent before an operator can access the CBD. The denial of access to the majority including the petitioners cannot be said to be irrational. There is a clear rational relation between the differentia and the object of the By-laws. Yes, the argument that the Jogoo road users are being treated differently from the others is correct but this does not constitute discrimination in law. As regards the general body of PSV owners and the three operators who have access to the CBD, the difference is based on the reason that to keep the CBD decongested it is reasonable to give consent to only a few.”

96. In this case the differentiation would not meet the acceptable criterion that is excusable.

97. As regards the issue of the failure to respond to the Petitioner’s inquiry, in determining whether the Respondent has violated the Petitioner’s right to information one must look at the circumstances, past, present and future. Where the inquiry was not responded to but the said information has or ought to have come to the knowledge of the petitioner exercising reasonable diligence, to grant such a prayer would amount to trivializing constitutional petitions. This was the position adopted by the Supreme Court in **Peter Oduor Ngogo vs. Francis Ole Kaparo & 5 Others Petition No. 2 of 2012 [2012] eKLR** where it was held that:

“Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...It is our view that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters.”

98. In this case, it is clear that by the time these proceedings were commenced, the information that the Petitioners sought from the 1st Respondent was already available in the public domain in legal proceedings which the Petitioners have admitted they paid keen interest to.

99. Having considered the issues raised before me, it is my view that the award of tender in issue ought not to be interfered with. As there is now in force a Performance Guarantee issued on 9th August, 2016 by the Commercial Bank of Africa, let the same remain in force as per the terms thereof.

100. As I have found that the issue relating to the Petitioners’ request for information cannot be sustained, the claim for an award of damages must be and is hereby disallowed.

101. The costs of the petition are awarded to the Petitioners to be borne by the 1st Respondent.

Dated at Nairobi this 22nd day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sisule for the 2nd Respondent

CA Gitonga