



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NO. 106 OF 2016

IN THE MATTER OF: AN APPLICATION BY ENVIRONMENTAL & COMBUSTION LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER ORDERS OF ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: SECTION 91 (1) (2) & (3), 93 (1) (2) (3) & 96 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2015

AND

IN THE MATTER OF: THE ENVIRONMENTAL & MANAGEMENT AND CO-ORDINATION ACT – 1999 & ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (WASTE MANAGEMENT REGULATIONS 2006), SECTION 83 OF 1999 ACT, SECTIONS 10 (1) (2) (3) (4)(5) AND 23

AND

ARTICLES 35(b), 70 & 102(a)(b)(c)(d)

IN THE MATTER OF: IRREGULAR AWARD OF CLEAN UP TENDER OF MAKUENI OIL SPILL TO ENVIROSERVE WASTE MANAGEMENT LIMITED BY KENYA PIPELINE COMPANY LIMITED

BETWEEN

ENVIRONMENTAL & COMBUSTIONCONSULTANTS LTD.....APPLICANT

-VERSUS-

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

ENVIROSERVE WASTEMANAGEMENT LIMITED.....2ND RESPONDENT

NATIONAL ENVIRONMENTALMANAGEMENT AUTHORITY....3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th March, 2016, the *ex parte* applicant herein, **Environmental & Combustion Consultants Ltd**, seeks the following orders:
 1. **THAT this application be certified as urgent.”**
 2. **THAT an order of certiorari to quash the decision of the 1st respondent in irregularly awarding clean up tender of Makueni oil spill to Enviroserve Waste Management Ltd.**
 3. **THAT an order of prohibition against the 2nd respondent, its officers, agents and servants and or agents from works or further works if any until this matter is heard and determined by the Court.**
 4. **THAT an order of mandamus against the 3rd respondent to apply the law fairly and without discrimination to all stake holders in complying with the Environment Management & Co-ordination Act of 1999 and the Environment Management & co-ordination (waste management) Regulations 2006.**
 5. **THAT this Honourable court cancels the said tender and order afresh tendering process.**
 6. **THAT leave granted to the applicant operate as stay of works and or further works by the 2nd respondent until the matter is heard and determined over whether the tender and or expression of interest was procured regularly.**
 7. **The costs of this application be provided for.**

Ex Parte Applicant's Case

2. The application is based on the following grounds:
 - a. **The 1st respondent secretly, irregularly and unprocedurally purported to award tender to Enviroserve Waste Management Limited to the great disadvantage and prejudice to the applicant.**
 - b. **The mandatory requirement of tender or expression of interest was shrouded in great secrecy, was single sourced contrary to Public Procurement and Asset Disposal Act 2015.**
 - c. **The Applicant has and has always had legitimate expectation in tendering for works relating to treatment plant/waste disposal site, incineration and soil remediation plant per his license.**
 - d. **The extent of the oil spill and damage to the environment has not been adequately assessed to justify current activities.**
 - e. **The environment restoration exercise to be carried out by Enviroserve Waste Management Ltd is not licensed in Kenya by National Environment Management Authority (NEMA) as a waste management company.**
 - f. **The contract is single sourced. The extent of the works is not known to commit public funds on.**
 - g. **The company contracted intends to introduce microbes in the country. The microbes have not been licensed by National Environment Management Authority (NEMA) or Kenya Plant Health Inspectorate Service (KEPHIS).**
 - h. **The company intends to use GCL and HDPE Linings, the standards of which have not been licensed by National Environment Management Authority (NEMA).**
 - i. **By Gazette Notice, NEMA has not given standard specifications for foreign microbes and HDPE linings.**
 - j. **SGS was single sourced to carry out the environmental mapping and sampling the area to establish migration and pathways of oil spill and extent of contamination.**
3. The application was supported by affidavits sworn by **Dr Philip Mwabe**, the applicant's Managing Director.
4. According to the deponent, on or about the 1st March 2016, he came across an article business

- daily entitle – “Lessons from KPC clean-up of Makueni oil spill” in which the acting Managing Director of Kenya Pipeline Company Ltd (hereinafter referred to as “KPC”), the 1st respondent a State Corporation established under Cap 446 Laws of Kenya, confirmed awarding the 2nd respondent the clean up tender.
5. The deponent deposed that though he was licensed to own/operate a treatment plant/waste disposal site incineration and soil remediation plant, to his surprise, and as a keen citizen of this country, no bids were ever floated and or advertised for local experts in the realm of waste management. He therefore felt discriminated and greatly prejudiced as he has heavily invested in the facility with legitimate expectation of genuine tenders.
 6. The deponent deposed that the process of obtaining a license to own a plant is highly tedious and lengthy and that by the 3rd Respondent herein National Environmental Management Authority (hereinafter referred to as “NEMA”) licensing and or not licensing the 2nd respondent and at the same time allowing the 2nd respondent to operate in this county without full compliance is discriminatory fraudulent and an abuse of the very statutes that created it.
 7. According to the deponent, under section 91(1) (2) and (3), 93 (1) (2) (3) and 96 of the **Public Procurement and Disposal Act 2015**, methods of procurements of goods, works and services is done through open tenders and that there is further the element of pre-qualification for complex and specialized works and services, all of which were overlooked for reasons best known to the 1st and 2nd respondents.
 8. In the deponent’s view, for reasons of irrationality, discrimination, bias, unreasonable and illegal grounds, as a Kenyan Citizen, he lost this tender yet his incinerator is over 19 years and is highly modernized and that NEMA had been inspecting the facility and conducting audit quarterly without any grievance. According to him, by NEMA approving the 2nd respondent who do not have any physical structure to operate locally yet a structure was part of the criteria for approval, amounted to discrimination on account of financial prowess and was contrary to the Constitution.
 9. It was further averred by the deponent that it was not availed the opportunity to bid by KPC. He added that to seek the so called work experience in oil sector, giving a list of work carried out in the relevant field and work experience without advertising the same was to say the least fraudulent of all persons and pertinent citizens who wished to participate in the tender process since there was no forum availed either locally or via international link.
 10. The deponent averred that it was the duty of the 1st respondent to verify documents from NEMA and seek their expert opinion and that any form of bypassing NEMA is an affront to the Constitution and resultant by-laws. To the deponent, the tender was single sourced, done under water and shrouded in mystery contrary to the **Public Procurement and Asset Disposal Act 2015**. He asserted that the applicant is a licensed company to deal in oil spills clean up in the country and that the NEMA license confirms dealing in contaminated soil for the last 19 years.
 11. In the deponent’s view there was no explanation for the single sourcing of the tender and that the same was driven by personal interest without a detailed evaluation. To him it was not shown what was being compared to warrant an evaluation and that the knowledge and expertise of the person evaluating was a mystery and that not even NEMA who have the expertise were consulted. According to him, it is for these reasons that KPC acted with increasing interest and locked other competent persons from the bid contrary to section (sic) 10(2) of the Constitution of Kenya 2010 which provides for the national values and principles of governance on the participation of the people, non-discrimination, integrity, transparency and accountability.
 12. It was further asserted that **Messrs. Enviroserve Kenya** if at all are on site illegally, are a product of impunity by the 1st respondent and that any act that does not meet the threshold set by the NEMA is ab-initio a nullity.
 13. The deponent averred that since KPC has no capacity to order clean up of any form, any act that does not have NEMA as a point of reference in any form of clean up, is a nullity.
 14. It was deposed that by NEMA giving a restoration order, KPC was duty bound to conduct EIA and Terms of Reference (TOR) required to effect the restoration order yet KPC did not exhibit these or even the restoration order together with the terms and conditions to be complied. To him, the report by SGS was to be submitted to NEMA for TOR to be drawn by experts in NEMA before going for international tender. In his view, by Legal Notice number 121 of 2006, any institution, state corporation or state agency that desires to engage in any activity likely to generate

- hazardous waste, has to have a valid Environmental Impact Assessment license and that under section 10 of the Legal Notice 121 of 2006, any person granted a license shall fully comply with the provisions of the Act to ensure the manner of disposal operate in an environmentally sound manner.
15. It was the deponent's contention that the 2nd respondent does not have any such facility to dispose off what is taken from the contaminated area and that by purporting to state that they have hired a facility in Kitengela, the facility's license expired on the 19th February 2016.
 16. The deponent averred that the oil spill took place in the month of May 2015 when the applicant was in existence hence there was no reason for any institution more so a state corporation to source, advise to be incorporated a company for a particular assignment, purport to singly evaluate without a comparable and award the tender.
 17. According to the deponent, the law is settled that the who comes to equity must come with clean hands and the courts cannot be used to justify a wrong. By flouting the law, KPC cannot be heard to state that Enviroserve cannot be stopped. Once no EIA was undertaken, then even the people of Kibwezi are at more risk in dealing with briefcase institutions as the 2nd respondent. He asserted that it is within the public domain that rains were in Kenya within the months of October to December 2015 and that in any case, it is not good enough reason to act outside the law.
 18. In the deponent's view Kshs. 136 Million to be used for the exercise is a huge public funds committed where there is no timeline within which the project will be finalized and there are no terms of reference by NEMA, the only authority vested with verification powers. In his view, by failing to bring to light what was already in the public domain i.e. the spill, KPC not only failed to encourage public participation in the management and conservation of the environment; but also failed to co-operate with the state organs tasked with issues of environment contrary to section (sic) 35 of the Constitution which is to the effect that every citizen has a right of access to information held by another person and required for the exercise or protection of any right.
 19. It was averred that KPC did not adhere to the rules of **Public Procurement Act** by failing to notify of the award or date of occurrence of breach or disposal process. Since all these were overlooked, the High Court remained the only forum where the applicant was to ventilate his grievances since the nature of work and specifications was not within the public domain for anyone to review. According to him, under the said Act, open tendering is the preferred method for procurement of goods, works and services but KPC did not state which method it adopted and for what reasons.
 20. In the deponent's view, since the spill took place in May 2015, the issue of emergency does not arise. According to him, KPC had to wait until a company was formed in October yet this company did not have any facility to facilitate the works, it had to liaise with others who did not have a valid license to operate.
 21. The deponent relied on section 103 of the Act and deposed that services can be procured directly only under the following circumstances:
 - i. The goods and services or works are available from a particular supplier or contractor. That he has exclusive rights in respect of the goods, works, services and no reasonable alternative or substitutes exists.
 - ii. Due to invasion, war or natural disaster, there is need for urgent needs for goods, works or services.
 - iii. Owing to catastrophic event, there is an urgent need.
 - iv. For reasons of standardization: NEMA was to give TOR or standards.
 22. Since these conditions were not shown to exist, the deponent averred that there was no basis at all for the direct procurement and according to him, KPC appears to have instigated the formation of the 2nd respondent. To him, the fact that the 2nd Respondent is registered with NEMA does not absolve it from fully complying with the laws as laid down under **NEMA Act**. To him, the use of direct tender was an abuse and is criminal in nature per the **Public Procurement and Disposal Act** and the fact that the company was registered for this particular assignment negates competitive bidding. In his view the provisions of section 103 of the Act were never satisfied to warrant direct tender.
 23. The deponent therefore sought an order of Mandamus to compel the 1st respondent to adhere to the procedure and re-advertise the tender. He further sought an order of Certiorari to quash the

- decision to irregularly award the tender without adhering to the mandatory procedure and for an order prohibiting the 2nd respondent, its agents and or servant from proceeding with the works obtained out of the flawed process till the matter is heard and determined.
24. It was submitted on behalf of the applicant that the applicant is a limited liability company incorporated under the **Companies Act** Laws of Kenya and had been in operation for the last 19 years. Per the license issued by the NEMA on 23rd June 2015 and which is renewed yearly, the applicant is licensed to own/operate a treatment plant; operate a waste disposal site; operate incineration and soil remediation plant (type of facility); and deal in biomedical/industrial waste and contaminated soil. The same, it was submitted are what the applicant is engaged in and consults for NEMA, Corporations and the Government of Kenya.
 25. To the applicant, the application is pegged on *the Constitution of Kenya 2010* which gives the applicant locus standi to institute this present application and in particular 10(2) on participation of the people of Kenya in their governance, non-discrimination in works, integrity, transparency and accountability for sustainable development.
 26. It was submitted that the issue of oil spill in Makueni was within the public domain. Although the applicant like any other Kenyan reasonably expected an advertisement for clean up bids or expression of interest to clean the oil spill, it only came to learn about the award of tender in a write up by a writer purporting to be the Managing Director of the 1st respondent where he confirmed the tender for clean up having been awarded to Enviroserve Waste Management Ltd.
 27. According to the applicant, this Court has powers to make an order of certiorari to quash the decision of the 1st respondent in irregularly awarding clean up tender of Makueni Oil Spill to Enviroserve Kenya as no candid reasons have been advanced why there was single sourcing with all other eligible participants being locked out. The applicant reiterated circumstances under the Procurement Act when direct procurement of services are allowed and submitted that the said circumstances did not apply to the award of the tender in question.
 28. According to the applicant, at the commencement of the procurement process, Enviroserve Kenya Ltd did not have the capacity to conduct a clean up since it had no facility or ability of its own and that is why it had to resort to collateral agreement with other entities such as Enviroserve Uganda vide an agreement dated 28th January 2016. The applicant also referred to a license to Enviroserve Ltd issued on 20th August 2015 whose expiry date was 19th February 2016 hence in its view was temporary as its duration was not more than one month from the time Messrs. Enviroserve Kenya Ltd allegedly got the tender. It also referred to the license to Transport Waste, whose import, according to it was that Messrs. Enviroserve Kenya Ltd depended on others to secure the award. The applicant urged the Court to note that the arrangements to partner came later after the award had been awarded hence in the applicant's view, the procedure was faulty ab-initio.
 29. The applicant also faulted the agreement dated 3rd February 2016 between Enviroserve Ltd and Green Care Kenya Ltd for waste disposal which according to it was not even witnessed by any person hence was a mere creation of parties. In addition, Enviroserve Kenya Ltd purported to contract all NEMA licenses and agreements per proposal dated 29th January 2016 which means it was the 1st respondent who requested this to be done.
 30. It was reiterated that none of the conditions above have been met for a party to purport to indicate there was necessity to do direct procurement. Infact, the 1st respondent did not have capacity to draw up nor did National Environment Management Authority delegate to it the terms of reference of the clean up contract. On the issue of the urgency, it was submitted that whereas the spill took place in the month of May 2015, the award was given in the month of February 2016 and the company that purportedly won the tender was incorporated in the month of October 2015 and the award was made without reference to NEMA which is the only body with the authority to draw the terms of reference for any works to commence. Any other agencies like the SGS consult for NEMA and have to have their point of reference being NEMA.
 31. On the allegation that the applicant has no known expertise in the clean up realm, the applicant submitted that what the 1st respondent did was purely shrouded in secrecy, without inviting bid for persons to express interest and give their ability in writing, hence there was no way in which the applicant's ability could be gauged. To the applicant, even the persons who sat in the evaluation committee of the 1st respondent, their ability, capability, or legality to determine how an oil spill is

- cleaned is unknown. There was a mere internal memo by persons within the 1st respondent's entity to the effect that a team be set to evaluate Enviroserve Kenya Ltd. Infact, it is not known what exactly they were evaluating since there were no terms of reference for whatever they were undertaking. It was contended that to evaluate encompasses a comparison between two entities. This evaluation team was merely justifying the award to Enviroserve Kenya after it had single sourced the newest company in town. It is this that the court should rightly intervene and order fresh bid so that all interested parties can apply and be considered. This is not a preserve of the 1st respondent who is a state corporation. It involves public funds and which funds belong to the people of Kenya.
32. It was submitted that in the absence of NEMA and other stakeholders to verify the clean up exercise, there is no basis or yardstick to confirm that indeed the clean up has taken place.
33. With respect to the option for review, the applicant submitted that there was no basis for recourse to the Board since the tender was secretly awarded and the applicant only knew of it through the papers. To the applicant, KPC failed to notify of the award, and date when the award was given. In fact, the applicant was discriminated from the initial stages and could not review what he did not participate in. To it, it is only the High Court of Kenya that has the forum to now solve the applicant's grievance.
34. It was submitted that pursuant to section 9 of the *National Environment Management Authority Act 1999*, the purpose of NEMA is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principle instrument of government in the implementation of all polices relating to the environment. While admitting that gave a restoration order to the 1st respondent, the applicant contended that the same was not been exhibited for the court to verify its import, terms and conditions to be adhered to before works commenced. To it, KPC had not indicated to the court any EIA conducted and verified by NEMA. In its view, the people of Kibwezi are not guaranteed a clean environment contrary to the Constitution 2010. The applicant therefore urged the Court to compels KPC to take measures to prevent or discontinue any act or omission that is harmful to the environment.
35. It was the applicant's submissions that the court has capacity to cancel the tender for the reasons that firstly no justifiable reason has been advanced why it was not advertised, for all persons both local and international to apply. The 1st respondent uses public funds and thus responsible to the public. Since the procedure used to single source is unjustified, then the whole tender ought to be and should be cancelled. The people of Kibwezi are not assured of a clean environment as there is no measure of cleanliness to be ascertained since NEMA is not part and parcel of the process.
36. The applicant therefore urged the Court to grant the orders sought with costs.

1st Respondent's Case

37. In opposition to the application, KPC filed a replying affidavit sworn by **Gloria Khafafa**, its Acting Company Secretary, on 30th March, 2016.
38. According to the deponent, the applicant has not in any way provided its work experience in the oil sector, or given a list of works carried in this field or any relevant work experience. To the deponent, the deponent to the supporting affidavits only exhibits a copy of a license to own and operate a treatment plant/waste disposal site/Incineration and Soil Remediation Plant but did not indicate or prove whether it in actual fact owns relevant equipment to undertake the environmental cleanup exercise suffered by KPC and the residents of Kibwezi, Makueni County resulting from petroleum products spillage. To the deponent, the Applicant misapprehended the nature of specialized work and consultancy required and complains that no bids were ever floated in the realm of waste management.
39. Whilst, the applicant complained that he lost the tender he admitted that he never applied, nor was he invited to bid for the same. Whereas, the applicant admitted owning a 19 year old incinerator, it failed, according to the deponent to indicate how useful the same would be in the environmental cleanup at hand, having mistaken the exercise for garbage waste disposal.
40. It was averred that KPC awarded the tender for the Environmental Cleanup works at KM 256 Thange to M/s Enviroserve Kenya on 15th February 2016, which is part of the 2nd Respondent's group of companies, which is an Africa wide holding company which is a group of companies

- specializing in environmental waste management and cleanup. It was disclosed that M/s Enviroserve Kenya has been on site from 29th February 2016, to date and have started excavation and cleanup. It was further averred that KPC had been given access to four of the affected plots and further leased more plots in the affected area to enable it effectively carry out the cleanup.
41. The deponent gave the background of the process as being the petroleum product spillage on 12th May 2015 occasioned by a leakage which was discovered at KM 256 Mombasa-Nairobi Pipeline in Kibwezi, Makueni County which spillage led to the contamination of the soils in the area, the underground and surface water, livestock, and crops. Subsequent to the discovery of the product spillage, KPC on 12th May 2015, received an environmental restoration order from NEMA and moved to mitigate the situation by contracting *Societe Generale de Surveillance* (SGS) to undertake an environmental mapping of the area to determine the extent of the ground water contamination, following which KPC sought to engage a contractor to carry out the cleanup of the environment.
 42. It was deposed that the circumstances leading to the award of the tender by KPC are such that time was and remains of the essence and any delay in the cleanup of the oil spill at Kibwezi, Makueni County will further aggravate the damage to the environment, with far reaching social, economic, and health ramifications on the residents, surrounding soils, underground and surface water, plant, and animal life not only in the affected area but also in the surrounding areas. In her view, to delay or stop the cleanup, and “preserve” the subject matter of the instant proceedings is to jump from the proverbial frying pan into the fire, as stopping the Enviroserve Kenya from carrying out the cleanup works will further injure the quality of life of Thange area residents, the surface and river water, and the soil, and further render the schools in the area inaccessible. Further, should the rainy season, that is fast approaching, begin before the process progresses, the cleanup process will not only be hampered, but the rains will facilitate further seepage and spread of the product into the surrounding environment and ecosystem further downstream on Thange River.
 43. In her view, the clean-up process to restore the environment is the first step towards a lasting solution, and restoring safe access and use of schools and other social amenities in the area. In the meantime, and while it conducts the cleanup, KPC is providing food and clean water to residents of Thange in Kibwezi, and the affected schools, with the help of Kenya Red Cross Society.
 44. In the deponent’s view, these judicial review proceedings are an abuse of this Court’s process, and the orders sought if granted will function against public interest. By filing this application, and seeking indefinite orders of stay against the urgent environmental cleanup, the applicant has *prima facie* proven that it does not understand the nature of works, and the implications of delay in cleaning up petroleum product spillage, and cannot therefore in any event be qualified to carry out the cleanup works. In her view, being aware that a choice of procurement method cannot, and for good reason, be challenged before the Public Procurement Administrative Review Board, the Applicant has for no other motive but to cause a nuisance, chosen to file this ill advised application before this Honourable Court.
 45. It was the deponent’s case that KPC under the **Public Procurement & Asset Disposal Act** No. 33 of 2015, hereinafter “the **Procurement Act**” or the “**PPAD Act**”, is obliged in the existing aggravated circumstances to elect the most appropriate method of procurement, to enable it comply with the law, and to ensure that immediate and effective environmental restoration is achieved.
 46. To her, it appeared that the Applicant was questioning the merit of KPC’s decision to procure the services of Enviroserve Kenya by direct procurement, and as such the orders sought are unavailable to them since while sitting on judicial review, this Honourable Court is concerned only with due process. The deponent averred that the order sought to be granted of prohibiting Enviroserve Kenya, from carrying out cleanup works until this matter is heard and determined is a prayer for a temporary injunction, against the Enviroserve Kenya, which is not a public, or a administrative body and that the orders sought if granted will be in contravention of Article 42 of the Constitution of Kenya, as it will deny the residents of Thange, Kibwezi, Makueni County, their right to a clean and healthy environment recognized and protected under the Constitution. In addition, the orders sought are against the mandate of this Honourable Court under Article 70 of the constitution which empowers it to give any directions, it considers appropriate, to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public

officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. Citing **Kenya National Examination Council and the Republic, Civil Appeal number 266 of 1996**, it was averred that an order of *certiorari* cannot issue against an action or decision which has been taken or made in execution and discharge of a constitutional or legal mandate and that KPC, and NEMA being public bodies are mandated under the Constitution of Kenya and statute to adhere to the requirements of Article 42 of the Constitution, and the ***Environmental Management and Co-ordination Act* Cap 387 of the Laws of Kenya**.

47. Further that section 103(2)(c) of the ***PPAD Act*** provides that a procuring entity may use direct procurement if it is satisfied that owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods. In her view, the petroleum product spillage being an unexpected and catastrophic event, whose extremely harmful consequences increase exponentially with the passage of time, required an urgent solution for cleanup works and services, and it would have been impractical to use any other methods of procurement owing to the fact that this was an emergency, the limited time involved, with public health and safety implications if mitigation measures were not effected immediately.

48. The deponent outlined the steps for direct procurement as provided for under section 104 of the Procurement Act as follows:

- a. Issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations,
- b. Appoint an *ad hoc* evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided,
- c. Ensure appropriate approvals under this Act have been granted,
- d. Ensure the resulting contract is in writing and signed by both parties.

49. It was the deponent's position that it will be the first time that a cleanup of an oil spill of this nature will be carried out in Kenya, and KPC identified Enviroserve Kenya through its associated companies and or subcontractors as having the capacity to carry out the environmental cleanup, and being registered with NEMA to handle waste storage and transportation; the use of direct procurement under section 103(2)(c) of the ***Procurement Act*** was considered, and approved for the award of the contract to the Enviroserve Kenya. By a Memo dated 28th January 2016, ref: SU/QT/008N/16 to the Managing Director through the Procurement Manager, a direct method of procurement was sought for the acquisition of the environmental cleanup services of the Enviroserve Kenya and its associated companies and or subcontractors and on 29th January 2016, KPC invited the Enviroserve Kenya to tender for consultancy services for environmental cleanup of a contaminated site which tender closed on 4th February 2016 at 10:00 am. Time being of essence, the tender was opened on 4th February 2016, and the tender evaluation committee proceeded to evaluate the tender, and submitted its evaluation report on the same day to the Acting Managing Director, requesting approval for negotiations with the Enviroserve Kenya. Having obtained all appropriate approvals under the ***Procurement Act***, the negotiation for the tender was carried out on 5th February 2016, the evaluation and negotiation process were conducted in conformity with Sections 44, 46, and 47 of the ***Procurement Act***, it was recommended that the tender for consultancy services for environmental cleanup of a contaminated site be awarded to the Enviroserve Kenya.

50. The deponent emphasised that it is extremely urgent that environmental cleanup process continues uninterrupted, and that the product spillage is immediately contained and not allowed to spread taking into account the fact that the long rainy season is fast approaching, further increasing the level of urgency. In her view, should the rains begin the environmental cleanup process would not only be hampered, but the rains would accelerate further seepage and spread of the hazardous contamination into the surrounding environment and ecosystem and further downstream on the Thange River further contaminating the soil, and water sources for the residents. Accordingly, a delay in the cleanup works would mean the contaminant would remain in the area longer, further endangering the lives of, and injuring the quality of life of Thange area residents, the area soil, and surface and river water, and further render the schools in the area unsafe. Apart from the hazardous contamination to the soil, water, the oil products are flammable, and as such a fire

- hazard hence the need to have the situation immediately contained, and the contaminant removed from the area.
51. The deponent disclosed that all the residents of Thange, Moki, Mbulutuni, Mwanza, Nzavoni, and Ngomano villages in Kibwezi East Constituency, Makueni County and all citizens affected downstream the Thange river, and Athi river have brought a class action through one Alice Muthike Maingi in HC. Petition No. 526 of 2015 seeking *inter alia* an order to compel NEMA to issue a restoration order against KPC to restore the environment to its original condition, undertake a cleanup of river Thange, the water wells, aquifers and soils of the affected area in accordance with the international standards under the supervision of NEMA and UNEP. It was disclosed that NEMA had already issued a restoration order which KPC was complying with through Enviroserve Kenya, but which would be frustrated by any order of stay to the detriment of the entire population named hereinabove. The deponent cited **R vs. Permanent Secretary Ministry of Local Government and Others ex parte Immaculate Transporters Limited and Others Nairobi HC Misc. Appl. No. 133 of 2008 (Unreported) [2008] eKLR**, where the court discharged ex-parte orders of stay on account of public interest because the stay order issued against implementation of rules to govern transport within the Nairobi Central Business District would affect order and traffic flow and lead to chaos unless discharged.
52. It was KPC's case that this tender was awarded in accordance with the law, and in adherence with the **Procurement Act** and averred that it was in the interest of justice, and public interest that this Honourable Court denies the Applicant's prayers sought.
53. On behalf of KPC, it was submitted that the application as filed is misconceived, frivolous, vexatious, and filed in bad faith and a hopeless judicial maneuver, nothing but an attempt at blackmail, and filed against public interest. To KPC, the orders sought threaten to diminish the rights of the residents of Thange, Kibwezi, Makueni County under Article 42 of the Constitution of Kenya, and deny them, their right to a clean and healthy environment recognized and protected under the Constitution.
54. By way of background, KPC submitted that on 12th May 2015 petroleum product spillage occasioned by a leakage was discovered at KM 256 Mombasa-Nairobi Pipeline in Kibwezi, Makueni County. This leakage released significant amounts of petroleum product from the pressurized pipeline due to the high flow rate and resulted in the product soaking in the ground leading to accumulation in the underground soil, and subsequently in the porous rocks in the farmlands in the immediate vicinity and onto Thange River which is a key water source for Thange Village and other neighboring villages downstream. KPC through its emergency team identified the leak point on the same day it was discovered, and worked through the night to successfully repair the pipeline, and prevent any further spillage.
55. To KPC, for any effective environmental remediation to take place, it was incumbent on it to collect samples and conduct an analysis to determine the extent of damage, and nature of remediation required, and for this purpose the 1st Respondent contracted *Societe Generale de Surveillance* (SGS) to undertake an environmental mapping of the area. It averred that the situation was further aggravated by the fact that one of the residents; one **Alice Muthike Maingi** filed Constitutional Petition No 522 of 2015 against KPC, seeking *inter alia* orders that the Court compel NEMA to issue an Environmental Restoration Order against KPC to undertake a cleanup of River Thange, the water wells, aquifers and soils of the affected area in accordance with international standards and indeed NEMA on 17th December 2015 issued an environmental remediation order to KPC.
56. It was submitted that the magnitude of the oil spill is such that KPC had to in conjunction with NEMA seek assistance from the Kenya Forestry Research Institute, the Water Resources Management Authority, and further received an offer for assistance from the Directorate of Occupational Safety and Health Service so as to remedy the effects of the oil spill as soon as possible, and to the benefit of the residents of Kibwezi, Makueni County.
57. According to KPC, it was this emergency, and catastrophe caused by the product spill, and the effects to the environment that necessitated the it to resort to the provisions of section 103(2)(c) of the **Procurement Act** to use direct procurement to tender for the services of M/s Enviroserve Kenya Ltd. to undertake the clean-up process and restore the environment and subsequently grant safe access and use of schools and other social amenities in the area. It was reiterated that in the meantime, and while the cleanup exercise is ongoing, KPC is providing food and clean water to

residents of Thange in Kibwezi, and the affected schools, with the help of Kenya Red Cross Society.

58.KPC identified the issues raised by the applicant in this application as follows:

- a. Whether the Applicant was discriminated against by KPC when it awarded the Tender to the 2nd Respondent?
- b. Whether KPC committed any breach of the **Procurement Act** by applying the direct method of tendering in the prevailing circumstances?
- c. Whether KPC applied the laid down procedure under section 103(2)(c) of the **Procurement Act**?
- d. Whether the orders sought are merited, in the interest of justice, and in the public interest?

59.With respect to the alleged discrimination, KPC submitted that it is well established that a party who seeks redress before court for discrimination under the Constitution must state his claim with precision in fact, and by reference to the provisions of the Constitution violated, threatened with violation and the manner in which they have been violated and relied on **Anarita Karimi Njeru vs. Attorney General [1979] KLR 54, Mumo Matemu v Trusted Society of Human Rights Alliance and Others Nairobi CA Civil Appeal No. 290 of 2013[2013] eKLR** and **Meme vs. Republic [2004] 1 EA 124** for the proposition that:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”

60.On the allegation that the tendering process was shrouded in secrecy and that the right to information was violated, KPC cited the holding in **Kituo Cha Sheria & another vs. Central Bank of Kenya & 8 others [2014] eKLR** to the effect that;

“There must be a request for information before a party entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.”

61.To KPC, the Applicant, did not demonstrated that it made a request, which request was denied leading to a violation of the right to information, for this reason, the claim of any alleged or threatened violation of the Constitution or the Bill of Rights must fail.

62.KPC denied that it discriminated against the Applicant, whom in any event failed to state to the required threshold the alleged discrimination and or violation, whether threatened actual or imagined.

63.On the issue whether KPC committed any breach of the **Procurement Act** by applying the direct method of tendering in the prevailing circumstances, it was submitted that KPC followed due process in contracting the interested party and relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** for the position that judicial Review proceedings the court is concerned with the decision making process and not the merits of the decision. It was averred that it is not in contention that the **Procurement Act** provides under section 103(2) (c) that a procuring entity may use direct procurement if it is satisfied that *owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods*. To KPC, it is further not in contention, that the product spill at KM 256 Mombasa-Nairobi Pipeline in Kibwezi, Makueni County had significant effects, on environment, and disruptions to the livelihood of the residents of the area hence it was impractical and without a doubt self serving if the Applicant refuses to acknowledge that the spill of such nature that its counsel states might take 20 years to remedy was not catastrophic in nature.

64. According to KPC, by failing to appreciate that any effective environmental remediation to take place, it was necessary to determine the extent of damage, which was carried out by *Societe Generale de Surveillance*, and which in its very nature and area covered could not be conducted in a few days, to inform the nature and extent of remediation required, reveals the Applicant's deficiency in the requisite ability to provide the services sought by the 1st Respondent. It is for this emergency, and catastrophe that befell the 1st Respondent, and more particularly the residents of Kibwezi, Makueni County, and the dependents of Thange River, that provided the justification and necessitated KPC to apply the provisions of section 103(2)(c) of the **Procurement Act** and use of direct procurement to tender for the services of M/s Enviroserve Kenya Ltd. to undertake the clean-up process and restore the environment and subsequently grant safe access and use of schools and other social amenities in the area. Further, the anticipated long rains made a bad situation more dire, hence it was right and proper that the 1st Respondent act fast to avert a further spread and or seepage and contamination. To KPC, time was and remains of the essence and any delay in the cleanup of the product spill, and environmental remediation will only further aggravate the damage to the environment, with far reaching social, economic, and health ramifications on the residents, surrounding soils, underground and surface water, plant, and animal life not only in the affected area but also in the surrounding areas, and downstream river Thange.
65. According to KPC, having determined that it was necessary to procure the clean up services by direct procurement, it took steps and implemented the procedures for direct procurement provided under section 104 of the **Procurement Act** and being the first time that a cleanup of an oil spill of this nature was to be carried out in Kenya, it identified Enviroserve Kenya through its associated companies and subcontractors as having the capacity to carry out the environmental cleanup, and being registered with NEMA to handle waste storage and transportation; the use of direct procurement under section 103(2)(c) of the **Procurement Act** was considered, and approved for the award of the contract to the Enviroserve Kenya.
66. It was contended that whereas the Applicant in its submissions described itself, it failed to recognize or inform this Honorable Court that the interested party is part of the 2nd Respondent which is a holding company for an Africa wide group of companies specializing in environmental waste management and cleanup, and as elucidated in the tender documents. To it, the Applicant does not dispute that by a Memo dated 28th January 2016, ref: SU/QT/008N/16 to the Managing Director through the Procurement Manager, a direct method of procurement was sought for the acquisition of the environmental cleanup services of the Enviroserve Kenya and its associated companies and or subcontractors.
67. It was submitted that KPC by its Replying Affidavit demonstrated that in accordance with section 104 of the **Procurement Act**, it on 29th January 2016, invited the interested party to tender for consultancy services for environmental cleanup of a contaminated site which tender closed on 4th February 2016 at 10:00 am and as time was of essence in the cleanup of the oil spill, the tender was opened on 4th February 2016, and the tender evaluation committee proceeded to evaluate the tender, and submitted its evaluation report on the same day to the Acting Managing Director, requesting approval for negotiations with the Interested Party. Having obtained all appropriate approvals under the **Public Procurement Act**, the negotiation for the tender was carried out on 5th February 2016, the evaluation and negotiation process were conducted in conformity with sections 44, 46, and 47 of the **Procurement Act**, it was recommended that the tender for consultancy services for environmental cleanup of a contaminated site be awarded to the Interested Party and this was done.
68. KPC submitted that under Article 42 of the Constitution of Kenya, the residents of Thange, Kibwezi, Makueni County, have a right to a clean and healthy environment recognized and protected under the Constitution, it is this right that KPC, in conjunction with NEMA, and with the assistance from the Kenya Forestry Research Institute, the Water Resources Management Authority, and the Directorate of Occupational Safety and Health Service seeks to ensure by the currently ongoing clean up environmental remediation.
69. To KPC, the orders sought are against the mandate of this Honourable Court under Article 70 of the Constitution which empowers it to give any directions, it considers appropriate, to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the

- environment. Based on **Kenya National Examination Council and the Republic, Civil Appeal number 266 of 1996**, it was submitted that an order of *certiorari* cannot issue against an action or decision which has been taken or made in execution and discharge of a constitutional or legal mandate. To KPC, Article 10 of the Constitution of Kenya mandates all State Organs, State Officers, Public Officers and all persons whenever any of them applies, interprets the Constitution, enacts, applies or interprets any law, makes or implements public policy decisions to at all times be alive to adhere to and apply the national values which *inter alia* include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. It asserted that it acted within the law and did not commit any breach of the ***Procurement Act*** by applying the direct method of tendering in the prevailing circumstances.
70. In KPC's view, while it has committed to, and taken steps towards ensuring the human dignity and the human rights of the residents of Kibwezi, the Applicant rather than support such an endeavor, has filed this application for its own commercial interests, putting at risk the livelihood and well being of Kenyan citizens. In support of its submissions KPC relied on **R vs. Permanent Secretary Ministry of Local Government and Others ex parte Immaculate Transporters Limited and Others Nairobi HC Misc. Appl. No. 133 of 2008 (Unreported) [2008] eKLR**, and **Republic vs. Public Procurement Administrative Review Board & Another Ex-Parte Avante International Technology Inc [2013] eKLR**.
71. The petroleum product spill being an unexpected and catastrophic event, whose extremely harmful consequences increase exponentially with the passage of time, it was KPC's contention that it required an urgent intervention for cleanup works and services, and it would have been impractical indeed careless to use any other methods of procurement, in the limited time available, with public health and safety implications if mitigation measures were not effected immediately. It maintained that the orders sought if granted are such that the harm and hardship that shall be visited on the public and where the nature of the injury is of so grave a character as in the prevailing circumstances no other interest private or otherwise, should be allowed to prevail over those of the public.
72. KPC noted that even when presented with the opportunity in these proceedings, the Applicant has not in any way provided relevant work experience, that would qualify it to provide the services sought by KPC.
73. KPC submitted that as the purported grievance that the Applicant seeks this court to remedy is not apparent from pleadings, if the Applicant feels aggrieved that it was not awarded the tender, it must present its grievance before the Public Procurement Administrative Review Board, as provided by law. To it, as it complied with the law, indeed followed due process in engaging the services of the Interested Party, it would therefore be unjust and against the mandate of this Honourable Court under Article 70 of the Constitution which empowers it to give any directions, it considers appropriate, to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.
74. According to KPC, no sufficient grounds or case has been presented by the Applicant to warrant the issue the writs for prohibition, certiorari or mandamus as sought and urged the Court to dismiss the Notice of Motion Application herein dated filed on 7th March 2016 with costs, to allow the clean-up of the product spill to remedy the effects of the same as soon as possible, and to the benefit of the residents of Kibwezi, Makueni County.

The 3rd Respondent's Case

75. The 3rd Respondent, NEMA, opposed the application vide a replying affidavit sworn by **Prof. Geoffrey Wahungu**, its Director General, on 21st April, 2016.
76. According to the deponent, on or about May, 2015, there was a petroleum leakage by the KPC in Kibwezi, Makueni County and resulting therefore, NEMA received numerous complaints from the area residents as the spillage had contaminated the soil, crops and both underground and surface water. Consequently, on 12th May, 2015, NEMA issued an environmental restoration order to KPC after it became apparent that the situation on the ground required urgent attention to avoid further contamination of the soil and underground water.
77. It was deposed that vide various correspondences, KPC did inquire from NEMA a list of licensed

- companies that could handle and dispose the waste oil. However NEMA was not a party to the procurement process of KPC and was only informed by KPC that it had procured the services of Enviroserve Waste Management Limited in undertaking the cleaning exercise of the spillage. On 18th February, 2016, NEMA conducted a site inspection on the remediation site and vide its letter dated 19th February, 2016 advised the 2nd Respondent to comply with the ***Environmental Management and Coordination Act*** (EMCA) and as a further follow up, on 2nd March, 2016 it wrote to Enviroserve Kenya requiring it to comply with the laid down procedures and laws. It further visited the site on 13th April, 2016 and prepared a progress report which it was still deliberating upon.
78. According to NEMA, vide a letter dated 13th April, 2016 it required KPC to furnish it with various documentations as proof of compliance with the laid down rules and regulations regarding waste management.
79. To NEMA, the assertion by the applicant that NEMA licences the use of microbes, GCL and HDPE linings is fallacious and misguided as the same are cleaning products which are approved by the Kenya Bureau of Standards as opposed to NEMA.
80. To NEMA, since the applicant is challenging the procurement process, the same ought to be before the Public Procurement Administrative Review Board. In its view, the applicant has no legitimate claim whatsoever against NEMA and NEMA's name ought to be struck off from the suit since NEMA has not applied the law unfairly and the averments against it are baseless. Further it contended that the application is scandalous and defamatory and has no basis in law and in fact and similarly the order sought against it is ambiguous and untenable and an abuse of the Court process.
81. It was submitted by NEMA that the only order sought against it was an order of mandamus and it had issued a restoration order. Whereas NEMA had an issue with the interested party's licence, it was submitted that it was satisfied with the clean up exercise so far. It was therefore concerned about the bigger picture as far as the people of Makeni are concerned, the issues relating to licensing notwithstanding. This, it submitted was what informed its decision not to issue a stop order.
82. According to NEMA, its mandate is not to an individual but to the public hence individual's interests cannot override public interest.

Interested Party's Case

83. The interested party, **Enviroserve Kenya Limited**, on its party opposed the application vide a replying affidavit sworn by **Eric K. Muigai**, its Director on 15th April, 2016.
84. According to the deponent, the instant proceedings are bad in law and hence ripe to be struck out on the grounds that it has been brought by the wrong party as judicial review orders are issued in the name of the Republic and the orders as sought in the Notice of Motion vary from those sought in the Chamber Summons application at the ex-parte stage.
85. It was deposed that the Interested Party, which specializes in environmental management and clean up was invited by the 1st Respondent vide a letter dated 29th January, 2016 the 1st Respondent herein invited the Interested Party herein to tender for *Consultancy Services for Environmental Clean-Up of a contaminated site*. On 15th of February, 2016, the 1st Respondent upon confirmation that the Interested Party had met all the prerequisite qualification, proceeded to award the Interested party herein the tender for the Environmental Cleanup Works KM 256 Thange of which the deponent duly executed on behalf of the Interested Party herein. To the interested party, the award of the said tender was necessitated by petroleum product spillage from the 1st Respondent's Mombasa-Nairobi pipeline in Kibwezi, Makeni County which spillage contaminated the soils in the area and the underground and surface water and as a result, the health of the residents, their livestock and crops was affected or was at risk of being affected hence the necessity to urgently undertake the clean-up.
86. It was averred that due to the said urgency and sensitivity of the issue the interested party moved to the site on 29th February 2016 and commenced works in order to execute its mandate to clean up the affected area and restore the same and proceeded to set up equipment to be used during the cleaning process, and also employed locals to assist with the clean-up exercise which exercise was

- to take a duration of up to 24 months due to the severity of the petroleum product spillage.
87. It was the interested party's case that the Applicant's allegations of the different standards that the Interested Party shall use for the clean-up process are unfounded and made in bad faith.
88. To the interested party, based on legal advice:
- a. Section 103(2)(c) of the **Public Procurement and Asset Disposal Act 2015** (PPAD Act) allows the 1st Respondent to procure directly owing to a catastrophic event requiring urgent work and services making it impractical to use other methods of procurement because of the time involved in using those methods.
 - b. If the Ex-parte Applicant thought that there was anything wrong with the manner in which the procurement was done, it should have first lodged a complaint with the **Public Procurement Regulatory Authority** pursuant to the provisions of section 35 of the PPAD Act. In the event of a complaint the Authority would have appointed an investigator to investigate the complaint and submit a report to the Authority.
 - c. Section 38 provides that if, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of the Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following —
 - a. direct the procuring entity to take such actions as are necessary to rectify the contravention;
 - b. terminate the procurement or asset disposal proceedings;
 - c. prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or
 - d. require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.
 - d. Section 38(2) provides that before making an order under subsection (1) thereof, the Director-General shall give the following persons an opportunity to make representations —
 - (i) the procuring entity; and
 - (ii) any other person whose legal rights the Director-General believes may be adversely affected by the order.
 - e. Section 39 then provides that the procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) may request for Judicial Review against an order of the Board to the High Court within fourteen days after the order is made.
 - f. From the foregoing it is clear that the application for judicial review is premature and therefore misconceived as the Applicant did not lodge a complaint with the Authority.
89. In buttressing the foregoing position the interested party also relied on section 9 of the **Fair Administrative Action Act, No. 4 of 2015** which provides that the High Court or a subordinate court shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. It was the interested party's view, based on legal advice that *the onus is upon the applicant to satisfy the Court that it ought to be exempted from resorting to the available remedies under the aforesaid provisions of the PPAD Act in order to justify it instituting these proceedings.*
90. The interested party contended that if the Orders sought are granted;
- i. The residents of the affected areas shall be denied their right to a clean and healthy environment in contravention of Article 42 of the Constitution on every person's right to a clean and healthy environment.
 - ii. Would be in contravention of **Basel Convention On Control Of Transboundary Movements Of Hazardous Wastes and Their Disposal** of which Kenya is a signatory to whereby Kenya is mandated to;

“Be Mindful of the spirit, principles, aims and functions of the World Charter for Nature adopted by the General Assembly of the United Nations at thirty-seventh session (1982) as the rule of ethics in respect of the protection of the human environment and

conservation of natural resources.”

91.To the deponent:-

- a. That the orders for judicial review are concerned with the decision making process and not the merits of the decision.
- b. That for an order of certiorari to issue, it must be demonstrated that the 1st Respondent acted without and/or in excess of jurisdiction or without adhering to the rules of natural justice. This has not been demonstrated.
- c. An order of prohibition cannot issue to stop a decision that has already been made. The decision to award the contract to the Interested Party has already been made. Consequently, an order of prohibition cannot issue to stop the interested party from carrying out the works. Even if prohibition had been available to the Applicant it must demonstrate that the 1st Respondent was about to make a decision without and/or in excess of jurisdiction.
- d. An order of mandamus is directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Such public duty on the part of the 1st Respondent has not been demonstrated.
- e. **An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.**
- f. The instant proceedings go against the principles of utilitarianism on the greater good of the society.

92.To the interested party the instant proceedings are based on the assumption that the clean-up process has not commenced, which are however are in full gear. Further, the proceedings have been brought in bad faith as due process was followed prior to the award of the tender to the Interested Party herein. It disclosed that Interested Party has obtained the necessary licenses through a sub-contractor, being Saimbot Ship Contractors, a company duly licensed by the 3rd Respondent for used oil handling and disposal. To the interested party, it duly submitted the licenses to the 3rd Respondent for approval and which licenses were duly approved by the 3rd Respondent.

93.The interested party averred that NEMA had not issued a stop order to the Interested party since the work commenced on 15th March 2016 and had in fact commended the Interested Party for the milestones achieved in recovering petroleum from the ground hence the averments in NEMA's replying affidavit were unfounded, untrue and made in bad faith.

94.In its submissions, the interested party relied on **Boniface Waweru Mbiyu vs Mary Njeri & Another [2005] eKLR**, where **Ojwang J**, (as he then was) is quoted as saying;

“...The entry point into any Court proceeding is jurisdiction. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question... Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel...”

95.According to the interested party, in the current case, the ex-parte Applicant is aggrieved by the decision made by KPC, to wit, granting a tender to the interested party to which the Applicant contends was discriminatory. To the interested party, the applicant was ignorant of section 103(2) (c) of the ***Public Procurement and Assets Disposal Act, 2015*** which allows the 1st Respondent to procure directly. To the interested party, if the Applicant is aggrieved by the decision of KPC in awarding a clean-up tender to the interested party, its remedy falls within the ambit of the ***PPAD Act*** under which section 5 provides that the correct procedure to have been followed would have

- been to set forth the grievance by a request in writing to the Authority so as to jump start investigations as to the award of the clean-up tender to the interested party. After investigations have been carried out as outlined in the *PPAD Act* and the Applicant was aggrieved by the decision of the Board then would he have had recourse to the High Court by way of Judicial Review under section 39 thereof. In support of its submissions, the interested party relied on **Abdalla Abubakar Miraj & Another vs. Kenya Ferry Services Ltd [2015] eKLR**, in which the main issue was whether the High Court had jurisdiction to determine a matter which would have otherwise fallen within the ambit of the *Public Procurement and Disposal Act, 2005*.
96. To the interested party, since the decision was made well within the ambit of the law under section 103(2)(c) of the *PPAD Act* which allows KPC to procure directly owing to a catastrophic event which required urgent work to be done and made it impractical to use other methods of procurement because of the time involved in using those methods, the Applicant should have therefore followed the correct procedure as provided by the *PPAD Act* and exhausted all avenues as provided therein and only moved this Court by way of Judicial Review if and when aggrieved by the decision making process of the Board.
97. It was contended that whereas the Applicant's contention was that the decision made by KPC was discriminatory, no Wednesbury unreasonableness or irrationality as to warrant grant of the orders prayed was pleaded or disclosed from the tenor of the pleadings. To the interested party, judicial review is not concerned with the merits of the decision, but the process through which the decision is reached and relied on **Republic vs. Attorney General & 4 others Ex-Parte Diamond HashimLalji and Ahmed HashamLalji [2014] eKLR**, where the Court held that:
- “Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”**
98. It was therefore submitted that the application before this Court is premature, misconceived and a clear abuse of the Court process and should be dismissed.
99. It was further contended that the application before this Court is defective as the Notice of Motion is indicated as the Applicant rather than the Republic hence the same was wrongly intituled and reliance was placed on **Jotham Mulati Welamondi vs. Chairman, Electoral Commission of Kenya [2002] eKLR** and **Farmers Bus Service vs. Transport Licensing Appeal Tribunal (1959) E.A. 779**. It was therefore submitted that the application is incurably defective and as such should be dismissed.
100. To the interested party, the prayer for orders of prohibition against the Interested Party from carrying on further works until this matter is determined cannot stand as the Interested Party and the 1st Respondent already signed the contract and the work is currently on going and reliance was placed on **Kenya National Examination Council V Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**. Moreover, the Applicant seeks an order of prohibition against the Interested Party who is not a public body against whom such orders cannot issue. In support of this position the interested party relied on **Republic vs. Kenya Association of Music Producers (KAMP) & 3 Others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) [2014] eKLR** and **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443**.
101. With respect to an order of *Mandamus* it was submitted that in the case at hand, NEMA was clearly acting within its mandate under Article 42 of the Constitution of Kenya to ensure the citizenry enjoy a clean and healthy environment. Consequently, the Applicant cannot purport to enforce what has already been done and this submission was based on **Kenya National Examination Council vs. Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others** (supra). As regards an order of *certiorari* to quash the decision of KPC in irregularly awarding the clean-up tender to the Interested Party, it was contended based on the same decision that the same is also not available to the Applicant since there is no decision that has been made against the Applicant and which decision can lawfully be quashed. This is owing to the fact that the Applicant has not demonstrated any rights and/or legitimate expectation and/or breach of the rules of natural

- justice to avail the orders sought to warrant the granting of an order of certiorari.
102. To the interested party, the effect of granting the Orders sought would be catastrophic to a section of this good country since they are against public interest and the same should not issue for their effect would be grossly prejudicial and unfair to the good citizens of Makueni County who would be denied their right to a healthy and clean environment as is enshrined in Article 42 of the Constitution.
103. To the interested party, granting judicial reviews orders are discretionary. However, the Interested Party contends that judicial discretion in this case should be exercised judicially, that is to say on sound reason rather than to whim, caprice or sympathy. The Interested Party is alive to the fact that *in deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. One of the considerations in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary and if it would amount to public inconvenience. Further, the Court has an ultimate discretion to decline granting orders on account of public interest, notwithstanding that it holds and declares the decision to have been made unlawfully.*
104. *It was the interested party's view that the Applicant has brought the proceedings on the assumption that the clean-up process has not commenced and also seems not to appreciate the urgency of the situation at hand as well as the implications of delay in cleaning up petroleum spillage. Further, the Application has been brought in bad faith as due process was followed when awarding the tender to the Interested Party. Finally, the orders sought are against the principles of utilitarianism on the greater good of the society. From the foregoing, the Application cannot stand.*
105. The interested party therefore prayed that the Application before this Court be dismissed with costs.

Determinations

106. Having considered the foregoing, this is the view I form of the matter.
107. Before dealing with the issues raised herein, I must agree that the manner in which the Motion and the affidavits were drafted was not an epitome of impeccable, elegant or paragon drafting. First and foremost the Motion itself is not properly intituled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
108. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellants’ advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

109. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is:-

“REPUBLIC.....APPLICANT

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

110. However in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

111. I however must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

112. Apart from that, the order of prohibition was directed at the 2nd Respondent which is described in the statement as “a foreign company incorporated in the Republic of South Africa.” In Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005, Nyamu, J (as he then was held:

“The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

113. The law is that ordinarily, judicial review orders do not issue against private bodies unless such private bodies are exercising powers of public nature. Here there is no evidence and it was not alleged that the 2nd Respondent was exercising powers which were public in nature. To the contrary all the averments seem to contest the award to it of a tender by KPC, hence contractual in nature. It follows that an order of prohibition cannot issue against the 2nd Respondent or even the interested party herein. Being of that persuasion, nothing turns on the issues raised with respect to the fact that the prayers are still directed against the 2nd Respondent as opposed to the interested party.

114. Further the manner in which the supporting affidavits were drawn tended to show that the entity or person who was contesting the award of the tender was in fact the deponent as opposed to the *ex parte* applicant.

115. The affidavits themselves also violated the rules relating to the drafting of affidavits. Some of the matters contained in the said affidavits were questions rather than factual matters. As held by the Court of Appeal in Pattni vs. Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269:

“an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply.

Hearsay evidence and legal opinions are for exclusion...Where the portions complained of are fraught with argumentative propositions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out”.

116.It is therefore clear that a consideration of both the application and the affidavits in support thereof reveal a comedy of procedural errors. However as was held in Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC NO. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460:

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that...[a party] has attempted to comply with the rule[s]...but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

117.This is now the spirit of Article 159(2)(d) of the Constitution. However as I have said hereinabove the Court is perfectly entitled to take those lapses into account in exercising its discretion with respect to an award of costs.

118.It was contended that the orders sought in the Motion are not the same as the ones which were sought in the application for leave. In my view, it would defeat the principle underlying the requirement for leave if parties were free to mutate their prayers and in their substantive motion, seek orders for which leave was never sought and granted. In this case, I have considered the prayers in the Chamber Summons and in the Motion and I find no merit in this contention as there is not divergence in the said prayers.

119.It was contended that there was lack of precision in the pleadings hence the orders sought could not be granted. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General, Mumo Matemu vs. Trusted Society of Human Rights Alliance and Others and Meme vs. Republic (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

See Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.

120. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

121. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the applicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in Peter M. Kariuki vs. Attorney General [2014] eKLR, declined to adopt the *Anarita Karimi* (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

“Although section 84(1) was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal...The narrow approach in ANARITA KARIMI NJERU was ultimately abandoned in Kenya, in favour of purposive interpretation of Section 84(1).”

122. I associate myself with the decision in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

123. I must however underscore the need for pleadings to be as precise as possible and this requirement applies both to civil proceedings as in any other proceedings including constitutional petitions. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (See Bullen & Leake and Jacob: Precedents of Pleadings, 2th edn. page 3). The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.) However where the proceedings can be salvaged by way of further and better particulars or amendment, that option ought to be resorted to first. In this case, there was no allegation that the Respondents and the interested party were disabled from adequately answering the allegations made by the applicant. Accordingly, I am not inclined to disallow the application on the ground of lack of precision.

124. It was contended that once it is recognised that KPC had the power to opt for direct tendering, any issues arising therefrom cannot be the subject of judicial review as they would be on the merits rather than on the process hence outside the realm of judicial review. In my view, that statement is too sweeping. It must be appreciated that the grounds for judicial review keep expanding and now judicial review can be issued on grounds of Wednesbury unreasonableness as well as proportionality amongst other grounds.

125. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

126. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3 I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

127. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and

concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

128. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that:

“... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century...”

129. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. This position was appreciated in the South African case of Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

“Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution... Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.”

130. According to *Judicial Review Handbook*, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public

authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

131. However, as stated hereinabove, like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. The *Fair Administrative Act* (Sections 7(i) and 7(ii)) specifies proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. Proportionality was recognized by **Lord Diplock**, in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374** where he recognized the development of this ground in the Laws of the European Economic Community. Apart from that the courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, *Judicial Review of Administrative Action*, Fifth Edition (pp.594-596) that it is:

“a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues”

132. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

133. Apart from that since in arriving at the decision to opt for direct tendering, KPC was purportedly applying the law, it was constitutionally obliged pursuant to Article 10(1)(c) of the Constitution to comply with the national values and principles of governance and in my view this include fair administrative action as enshrined in Article 47 of the Constitution which provides as hereunder:

1. *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
2. *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.*

134. This was the position adopted in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

135. In other words KPC is under a constitutional obligation to be efficient and if it fails to adhere to this constitutional decree, that failure may well render its decision unfair liable to be struck out as amounting to abuse of power. As was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR**:

“If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations.”

136. Even in pure exercise of discretionary powers, the Court is entitled to investigate the manner in which the same was exercised and may interfere in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

137. It therefore follows that if in the exercise of its discretion to opt for direct tendering KPC abused its powers or discretion this Court would be entitled to interfere and reverse the decision assuming all the other conditions that favour the grant of such orders exist.

138. It was contended that since the contract had been already been entered into between KPC and the interested party, an order of prohibition cannot be granted. It is true that where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which *forbids that tribunal or body to continue proceedings* therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.” [Emphasis mine].

139. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still continuing. Accordingly, where a contract has been entered into to undertake a certain project which is still underway, there is nothing to stop the Court from prohibiting the completion of the same assuming the same is being undertaken by a body against whom an order of prohibition can issue. In this case however, it would seem that what is being undertaken and what the applicant intends to prohibit is the fulfilment by the interested party of its part of the contract. As I have held hereinabove, the orders of prohibition cannot in the circumstances of this case issue against the

interested party hence issuing the same against KPC, assuming the applicant had directed the orders against KPC, would be of no consequence.

140. That brings me to the issue whether KPC was in the circumstances justified in opting for direct tendering. Section 103 of the **Public Procurement and Asset Disposals Act** provides that:

(1) A procuring entity may use direct procurement as allowed under sub-section (2) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if any of the following are satisfied—

(a) the goods, works or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;

(b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances.

141. In this case, it was contended and this cannot be disputed that on 12th May 2015 there was petroleum spillage at KM 256 Mombasa-Nairobi Pipeline in Kibwezi, Makueni County which spillage led to the contamination of the soils in the area, the underground and surface water, livestock, and crops. This Court must take judicial notice of the fact that it was necessary for urgent steps to be taken to ameliorate the problem before it generated into a disaster. I agree that the delay in doing so would have in all probability aggravated the damage to the environment, with far reaching social, economic, and health ramifications on the residents, surrounding soils, underground and surface water, plant, and animal life not only in the affected area but also in the surrounding areas. I also agree that with the onset of the rains, the cleanup process would not only have been hampered, but the rains would have aggravated the problem by facilitating further seepage and spread of the product into the surrounding environment and ecosystem further downstream the said Thange River. I am satisfied that the oil spillage was a catastrophic event for the purposes of section 103(2)(c) of the **PPAD Act**. However, mere catastrophe does not justify direct procurement unless it is further shown that *there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods.*

142. In this case, the spillage took place on 12th May, 2015 and the tender was awarded on 15th February, 2016, which was 9 months later. The tender process, on the other hand did not start till after NEMA had on 17th December 2015 issued an environmental remediation order to KPC. That there was definitely a delay between the date of the oil spillage and the commencement of the tender process, is not in doubt. In my view KPC, ought not to have waited for the issuance of the

said remedial order before commencing the action to remedy the problem. It seemed to have been woken up from its deep slumber by the said remedial order which itself seems to have been goaded by the petition filed by the residents. It would seem that the authorities which ought to have expeditiously taken action were in a state of dormancy.

143. The preamble to our Constitution recognises our respect of the environment, as our heritage and expresses our determination to sustain it for the benefit of future generations. Article 42 of the Constitution entitles every person to a right to a clean and healthy environment and to have such rights fulfilled and in so doing is entitled to apply under Article 70 of the Constitution for the fulfilment of the said rights. It is therefore clear that the rights to clean and healthy environment is protected by the Constitution and those who are under the obligation to protect and restore the same ought to take the necessary steps within the shortest time possible to remedy any environmental degradation and to restore the same.

144. In this case, KPC has explained the steps it took after the issuance of the remedial order by NEMA and I cannot say that those steps were unreasonable. This Court is aware that the weathermen had predicted the onset of *el nino* rains towards the end of 2015 and in light of such predictions, KPC would have been negligent had it not taken immediate measures to remedy the problem.

145. The question that arises then is whether it followed the lawful procedure since even in light of a catastrophe, there are legal steps to be taken. Section 104 of the **PPAD Act** provides:

An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—

- a. ***issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.***
- b. ***appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or nonconsultancy services being provided;***
- c. ***ensure appropriate approvals under this Act have been granted;***
- d. ***ensure the resulting contract is in writing and signed by both parties.***

146. KPC has adduced evidence showing that the procedure herein was adhered to. It is however not in doubt that the interested party which was awarded the tender was not approved by NEMA before the tender was awarded. That the manner in which it was selected leaves a lot to be desired is not in doubt. The Respondents and the interested party have however contended that the issue ought to have been addressed under section 35 of the **PPAD Act**. The said section provides that:

(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 proceeding 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) may be 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.

147. It is therefore clear that the applicant could have opted for the remedies provided under section 35 aforesaid. A party aggrieved by the decision made pursuant to the complaint may then move under section 39 of the **PPAD Act** which provides that:

The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) may request for Judicial Review against an order of the Board to the High Court within fourteen days after the order is made.

148. Although the applicant has contended that it was unaware of the award of the tender hence could not resort to the above remedies, there is no time limited for lodging a complaint thereunder. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

149. Whereas, subsection (4) of the said section gives the Court the powers to *exempt such person from the obligation to exhaust any remedy in exceptional circumstances if the court considers such exemption to be in the interest of justice*, the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.

150. In this case there is no evidence on which I can find that there exist exceptional circumstances which would justify, the exemption of the applicant from exhausting the available remedies. This was the position adopted in Civil Appeal No. 84 of 2010; **Republic vs. National Environmental Management Authority**, where the Court of Appeal held that:

“...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

151. It was similarly held in **Abdalla Abubakar Miraj & Another vs. Kenya Ferry Services Ltd [2015] eKLR**, that:

“The Public Procurement and Disposal act 2005 contains very clear provisions with regard to public procurement. Should there be violation of its provisions...Once a claim is based on the Public Procurement and Disposal Act, one brings oneself within its provisions and any dispute pertaining to procurement must go before the Public Procurement Administrative Board; the law being that once a procedure is prescribed by law, one should use that procedure unless there are special circumstances to show that the matter is best dealt with in the High Court...”

152. With respect to the interest of justice which is the second condition, it is the Respondents’ and interested party’s positions that public interests gravitate towards disallowing the application since to do otherwise would amount to contravention of Article 42 of the Constitution of Kenya, as it would deny the residents of Thange, Kibwezi, Makeni County, their right to a clean and healthy environment recognized and protected under the Constitution. In addition, the orders sought would militate against the mandate of this Honourable Court under Article 70 of the constitution which empowers it to give any directions, it considers appropriate, to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.

153. This Court appreciates the position 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. This was the position in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where the Court held 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.”

154. This Court however appreciated in Republic vs. Public Procurement Administrative Review Board & Another Ex-Parte Avante International Technology Inc [2013] eKLR that:

“As is stated in *Black’s Law Dictionary, 9th Edn.* “public interest” is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in Rwanyarare & Others vs. Attorney General [2003] 2 EA 664, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in Konway vs. Limmer (supra) that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.”

155. This position is appreciated in *Halsbury’s Laws of England 4th Edn. Vol. 1(1) para 12 page 270* where it is stated that:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of

relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

156. In this case having taken into account the fact that an order of prohibition cannot issue against the interested party; that there is no justification for exempting the applicant from exhausting the alternative remedies; that the principle of proportionality which require that public interest be taken into account and the need to secure the environment for the wider benefit and interest of the people of Makueni County; and the fact that NEMA is under an obligation to continuously monitor the progress of containing the spillage and take appropriate steps, I am unable to grant the orders sought herein whose effect would be to unwind whatever gains have been made in containing the spillage.

Order

157. In the premises in the exercise of this Court’s discretion, I decline to grant the orders sought in the Motion dated 7th March, 2016. Considering the fact that KPC took unreasonably long in taking remedial steps and the fact that the award of the tender to the interested party is not, based on the evidence presented before me, entirely clear, there will be no order as to costs of the Motion.

158. It is so ordered.

Dated at Nairobi this 20th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Owaga for Mr Omani for the Applicant

Mr Murgor with Mr Ouma for the 1st Respondent

Mr Ouma for Mr Ngare for the 3rd Respondent

Miss Muthee for the 1st interested party

Cc Mutisya