



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NUMBER 542 OF 2015**

**IN THE MATTER OF: ARTICLES 10,22,23,35 AND 227 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT NUMBER 3 OF 2005 (“THE ACT”)**

**IN THE MATTER OF: AN APPLICATION BY WEBB FONTAINE GROUP FZ-LLC FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT NUMBER 3 OF 2005(“THE ACT”), THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**IN THE MATTER OF: ARTICLE 10,35 AND 227 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS PURSUANT TO ARTICLES 22 AND 23 THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: A TENDER FOR SUPPLY, INSTALLATION, TESTING AND COMMISSIONING OF AN INTEGRATED CUSTOMS MANAGEMENT SYSTEM (ICMS) AND RELATED MODERNISATION SERVICES AT THE KENYA REVENUE AUTHORITY**

**BETWEEN**

**ELIAS MWANGI MUGWE.....PETITIONER**

**VERSUS**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**TRADEMARK EAST AFRICA.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

AND

WEBB FONTAINE GROUP FZ – LLZ.....1<sup>ST</sup> INTERESTED PARTY

BULL SAS LTD.....2<sup>ND</sup> INTERESTED PARTY

## RULING

### Introduction

1. These proceedings were commenced by way of a Petition dated 4<sup>th</sup> December, 2015 by **Elias Mwangi Mugwe**.

### The Petitioner's Case

2. According to the Petitioner, the petition seeks to impugn and have declared unlawful, the procurement process by the 2<sup>nd</sup> Respondent relating to the Tender for supply, installation and commissioning of an Integrated Customs Management System (hereinafter referred to as "ICMS") and related modernization services, which tender was advertised in the local media and was stated as being conducted by "Trademark East Africa on Behalf of Kenya Revenue Authority" (hereinafter referred to as "TMEA").

3. It was disclosed that upon the conclusion of the subject tender, the same became the subject of a Request for Review filed before the Public Procurement Arbitration Review Board (hereinafter referred to as "the Board" or "PPARB"). According to the Petitioner, it is the matters arising in the said proceedings before the Board that compelled the Petitioner to file the current Petition informed by the imperative to ensure that the subject procurement process is in compliance with the law, and in the event that the same is not, then the same must be stopped in the public interest. To the Petitioner, the subject tender is for the procurement of a system for revenue collection by the procuring entity, Kenya Revenue Authority (hereinafter referred to as "KRA"), and it is in the interest of the public that the same be carried on lawfully to ensure that Kenyans get maximum revenue from the system that is eventually implemented.

4. To the Petitioner, in the course of the proceedings before the Board, it became crystal clear that the manner in which the tender was conducted did not comply with the law as stated in the **Public Procurement and Disposal Act** (hereinafter referred to as "the Act") and therefore the same poses grave danger of loss of public funds exceeding Kshs. 1,000,000,000/=. It was the Petitioner's case that in its denial before the Board, KRA and TMEA were acting against public interest a position frowned upon by the PPARB which stated as follows:

**"To uphold the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argument on this ground would also endanger Public Interest since it would remove the procurement process from oversight by the Public bodies charged with the oversight function such as the Public Procurement Oversight Authority, the Public Procurement Review Board and all the other bodies charged with the mandate under the Law"**

5. To the petitioner, in its ruling PPARB went on to find that contrary to KRA's assertion, the subject tender would be utilizing public funds. The Petitioner acting through his Advocates therefore wrote to the KRA and to the Public Procurement Oversight Authority (hereinafter referred to as "the PPOA") posing the following questions:

a) Is Trade Mark a duly appointed agent under the provisions of Section 28 of the Public Procurement and Disposal Act?

b) Did KRA competitively appoint Trade Mark as its agent in compliance with Section 28 of the Public Procurement and Disposal Act?

c) Was Trade Mark pre-qualified by the PPOA to act as a procuring entity in compliance with Section 28 (2) of the Public Procurement and Disposal Act?

d) Was the entire subject procurement null and void?

6. Though it was the Petitioner's legitimate expectation that KRA and PPOA would address its concerns, this was not done and to the Petitioner, unless compelled by this Court, they shall not address these matters which have an obvious bearing on public interest. To the Petitioner, TMEA was not properly appointed to conduct the subject tender on behalf of KRA and hence the same is a nullity in law and an endeavour in vain which is contrary to public interest.

7. The Petitioner therefore seeks the following orders:

**1. Pending the hearing and determination of this Petition, conservatory Orders be issued in terms of the Chamber Summons filed herewith.**

**2. An injunction do issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to confirm by way of evidence to the Petitioner and to this Court whether or not in appointing the 3<sup>rd</sup> Respondent as an agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the provisions of Section 28 of the Public Procurement and Disposal act were complied with.**

**3. A declaration be issued to declare that the Respondents conduct infringed Articles 10, 35 and 227 of the Constitution.**

**4. A declaration be issued to declare that in appointing the 3<sup>rd</sup> Respondent as its agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the 1<sup>st</sup> Respondent breached section 28 (1) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**

**5. A declaration be issued to declare that in failing prevent and/or investigate the 3<sup>rd</sup> Respondent's appointment as a procuring agent in respect of the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services, the 1<sup>st</sup> Respondent is in breach of section 28(2) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**

**6. The Honourable Court be pleased to uphold the Articles 10 and 227 of the Constitution by issuing an order of injunction :**

**a) Restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from proceeding any further with the Tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority.**

**b) Compelling the immediate cancellation of the Tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority.**

**7. This Honourable Court do issue such Orders and gives such Directions as it may deem mete, just and appropriate in the circumstances of this matter.**

**8. The Costs of the Petition be awarded to the Petitioner.**

8. The Application was opposed by the 1<sup>st</sup> Respondent the PPOA.

9. According to the PPOA, it is an oversight authority established under the **Public Procurement and Disposal Act**, 2005 (hereinafter referred to as “the Act”) with *inter alia* the statutory mandate of ensuring that procurement procedures established under the Act are complied with. It averred that on 4<sup>th</sup> November, 2015, it received a letter from the Law firm of Mwangi Waiganjo & Co. Advocates, acting on behalf of the Petitioner herein described as an interested party in the Tender for Supply, Installation and Commissioning of an Integrated Customs Management System and Related Modernization Services at Kenya Revenue Authority. In the said letter, the Petitioner sought to know the following from the Authority:

- a. Whether Trade Mark is a duly appointed agent under the provisions of section 28 of the Act.
- b. Whether the PPOA competitively appointed Trade Mark as its agent in compliance with Section 28 of the Public Procurement and Disposal Act.
- c. Whether Trade Mark was prequalified by PPOA to act as a procuring entity in compliance with section 28(2) of the Act.
- d. Whether the entire subject procurement null and void.

10. According to PPOA, it did respond to the issues raised by the Petitioner vide a letter dated 13<sup>th</sup> November, 2015 clarifying that Trade Mark was not prequalified to act as procuring agent under the provisions of section 28(2) of the Act. This response, it was averred was dispatched through the PPOA’s contracted courier service provider Postal Corporation of Kenya on 19<sup>th</sup> November, 2015 and on both 19<sup>th</sup> and 20<sup>th</sup> November, 2015 5h3 courier service provider returned the letter undelivered for failure to locate the physical offices of Mwangi Waiganjo & Co. Advocates, as provided in their letterhead. It was therefore the 2<sup>st</sup> Respondent’s case that though the 1<sup>st</sup> Respondent sought to provide the information requested for through the Petitioner’s advocates then, the physical address of the advocates as indicated in their letterhead could not be traced by the courier service provider.

11. The 1<sup>st</sup> Respondent’s contention was that the issues raised in the petition were issues that arose at the hearing of Public Procurement Administration Review Board Application No. 27 of 2015 and are currently the subject of an appeal in Civil Appeal No. 356 of 2015 - **Kenya Revenue Authority vs. Webb Fontaine LLC** challenging the findings of the Review Board on whether the 2<sup>nd</sup> Respondent was the procuring entity in the subject tender; and whether therefore the 3<sup>rd</sup> Respondent was acting as a procuring agent of the 2<sup>nd</sup> Respondent.

12. According to the 1<sup>st</sup> Respondent, section 114(1) of the Act, prevents the Director General from investigating an issue that is being reviewed or has been reviewed by the Public Procurement Administrative Review Board.

The PPOA’s position was therefore that the Petitioner’s allegations that the PPOA abdicated its duty are baseless and unwarranted; and is a ploy by the Petitioner to circumvent the issues currently pending before the High Court in Civil Appeal No. 356 of 2015 Kenya - **Revenue Authority vs. Webb Fontaine LLC**, and the provisions of the law.

### **2<sup>nd</sup> Respondent’s Case**

13. The 2<sup>nd</sup> Respondent, **Kenya Revenue Authority**, similarly opposed the petition.

14. According to it, it is a statutory body duly established under the **Kenya Revenue Authority Act** (Cap. 469 of the Laws of Kenya) as the sole agent of the Government for the collection and receipt of all government revenue under section 5 of the said Act. In exercise of this mandate, it enforces and

administers various provisions of written laws in the first schedule to the Act, among them the ***East African Community Customs Management Act, 2004*** which is an Act of the East African Community to make provisions for the management of customs and for related matters. It was averred that the role of Customs Services within the Kenya Revenue Authority and globally is the facilitation of trade and border control. However, Customs Services also has fiscal responsibilities which include collection and accounting for import duty and other tax heads that may accrue on imports and exports. In discharging its customs functions, the 2<sup>nd</sup> Respondent is empowered by the ***East African Community Customs Management Act*** to carry out customs formalities and procedures using information technology as provided for under Part XVI of the said Act.

15. According to KRA, since 2005, it has been on an aggressive reforms and modernization programme that has seen it re-engineer several of its business process in order to, *inter-alia*, enhance revenue collection; improve service delivery; facilitate trade; and increase compliance. As part of the Reforms and Modernization Programme, it has undertaken several projects with funding and support from various Development Partners due to the heavy capital outlay of the projects and that the collaboration with the Development Partners has been through its parent Ministry, The Ministry of Finance.

16. KRA disclosed that (TMEA), the 3<sup>rd</sup> Respondent, is an autonomous not for profit organization that is funded by a range of Development Agencies with the aim of growing prosperity in East Africa through trade. TMEA's Theory of Change is built on the philosophy that enhanced trade contributes to economic growth, a reduction in poverty and subsequently increased prosperity and that some of the donors who pool funds in TMEA include; DFID, UKAID, DANIDA, CIDA, World Bank among others.

17. It was contended that the Government of Kenya through the Ministry of East African Community and the Ministry of Finance entered into an understanding with the 3<sup>rd</sup> Respondent aimed at offering financial, technical, capacity building and logistical support to the EAC partner states individually in the integration process. Pursuant thereto, the 2<sup>nd</sup> Respondent approached the 3<sup>rd</sup> Respondent with a request that they extend support to the on-going reforms within KRA a request which the 3<sup>rd</sup> Respondent acceded to and agreed to provide financial assistance to KRA to the tune of US\$13,020,000 to fund initiatives the four (4) areas of implementation of a customs management system; requirements management (centre of excellence); capacity building; and project advisory.

18. According to KRA, the Petition herein emanates from the award of the Public Procurement Administrative Review Board herein after called "Board" pronounced on 14<sup>th</sup> July 2015 and that proceedings leading up to the Award by the Board on 14<sup>th</sup> July 2015 were concerned with a Tender for the supply, installation and commissioning of an Integrated Customs Management System and related modernization services at Kenya Revenue Authority. At the Board, the Applicant was an unsuccessful tenderer that filed a Request for Review being **Review No. 27 of 15<sup>th</sup> July 2015** seeking the following orders:-

- a) The Board do annul the decision of TMEA awarding the tender for supply, Installation and Commissioning of an Integrated Customs Management System (ICMS) to the 3<sup>rd</sup> Interested Party (Bull SAS Ltd.).
- b) the Board to substitute do substitute its decision with that of TMEA and proceed to award the tender to the Applicant;
- c) an order that TMEA do negotiate and sign contract with the Applicant in accordance with the tender document and the decision of the Board;
- b) In alternative, the Applicant also sought that the Board do order TMEA and 1<sup>st</sup> Interested Party (KRA) to conduct a fresh evaluation of all bids

19. In their responses to the Request for Review the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents supported by the 1<sup>st</sup>

Interested Party herein raised preliminary objections among them that the Request for Review had been filed out of time and therefore the Board had no jurisdiction to hear the matter and the Board in rendering its award, upheld the preliminary objection that indeed the Request for Review had been filed out of time and it therefore had no jurisdiction to hear the same and on that basis struck out the Request for Review dated 15<sup>th</sup> July 2015 and ordered that Parties were at liberty to proceed with the procurement process. Being dissatisfied with part of the decision of the Board's award, the 2<sup>nd</sup> Respondent filed an Appeal to the High Court on 27<sup>th</sup> July 2015 being Civil Appeal Number 356 of 2015 **Kenya Revenue Authority versus Webb Fontaine Group F2 LLC** which appeal is still pending on grounds that:

- 1) The Board erred in finding that Kenya Revenue Authority was the Procuring Entity when it was clear in law and fact that the procurement was undertaken by Trademark East Africa, a Private Entity limited by guarantee and hence outside the ambit of the Public Procurement and Disposal Act, 2005.**
- 2) The Board erred in concluding that Kenya Revenue Authority was the procuring entity and Trademark East Africa was its agent when it was clear in law and in fact that the procurement was undertaken pursuant to a negotiated grant under terms and conditions agreed therein and hence fell outside the Jurisdiction of the Board.**
- 3) The Board erred in concluding that Trademark East Africa was an agent of Kenya Revenue Authority when it was clear that no liability would lie with Kenya Revenue Authority in respect of the procured system.**
- 4) The Board erred in concluding that public monies would be utilized in the procurement process when no material pointing to that possibility was placed before it.**
- 5) The Board failed to appreciate that no grant monies were going to be put in the control and disposal of Kenya Revenue Authority and that the monies would be disbursed directly to the approved Suppliers by Trademark East Africa.**

20. In KRA's view, the issues raised in this Petition are the subject of appeal in Civil Appeal Number 356 of 2015 - **Kenya Revenue Authority versus Webb Fontaine Group F2 LLC** and that the entire Petition herein is based on distorted misunderstood factual background of the nature of engagement between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and which issues are the subject matter of the said appeal.

### **3<sup>rd</sup> Respondent's Case**

21. According to the 3<sup>rd</sup> Respondent, the petition herein is basically a complaint by the petitioner against the respondents relating to an alleged breach of law in public procurement process for *Supply, Installation, Testing And Commissioning of an Integrated Customs Management System (ICMS) And Related Modernisation Services at the Kenya Revenue Authority*. Based on legal advice, it was averred that under section 93 of the ***Public Procurement and Disposal Act, 2005*** ("the Act"), the petitioner or such other persons who claims to have suffered risks, losses and damage as a result of an alleged breach of duty by the procuring entity were entitled to seek an administrative review in the manner prescribed under the "the Act". In this case, the Petitioner has not shown that he indeed followed the law and referred the complaint for an administrative review in a manner under the "the Act". Whereas the Petitioner admits knowledge of the proceedings before the Public Procurement and Administrative Review Board in Application No. 27 of 2015, he fails to demonstrate why he ignored to participate in the said proceedings being the first port of call in resolving public procurement disputes before filing this petition in court.

22. The 3<sup>rd</sup> Respondent disclosed that there are ongoing proceedings in the High Court Misc. Civil Application No.250 of 2015 and Civil Appeal No. 356 of 2015 emanating from the Administrative Review Proceedings before the Public Procurement and Administrative Review Board, yet the petitioner has failed to demonstrate why he did not promptly seek to be enjoined in those proceedings instead of

clogging the court with another suit on issues which are already pending court in other pending suits. It was averred that despite prior knowledge of the proceedings of the two pending proceedings, the petitioner, after an inordinate delay attempted to be enjoined in the High Court Misc. Civil Application No.250 of 2015 on the 7<sup>th</sup> December,2015 long after parties had filed their written arguments and were appearing for hearing which application the Court heard and dismissed.

23. To the 3<sup>rd</sup> Respondent, the issues raised in this petition and the chamber summons are those which the court will deal with in the Civil Appeal No. 356 of 2015 filed by the Kenya Revenue Authority. Further and without prejudice to the foregoing, the petitioner has failed to demonstrate any sufficient interest in the subject procurement and how his constitutional rights or the rights of other Kenyan are being infringed or risk being infringed to warrant the intervention of this Honourable Court especially in light of the following:-

**(a) The petitioner was not one of the bidders in the procurement process for *Supply, Installation, Testing and Commissioning of an Integrated Customs Management System (ICMS) And Related Modernisation Services at the Kenya Revenue Authority.***

**(b) Persons, who were aggrieved by the procurement process, invoked the appropriate procedures laid out under the *Public Procurement and Disposal Act, 2005* and participated in the review proceedings before the Board.**

**(c) Persons who were aggrieved by the decision of the Board further invoked the relevant procedures laid out under the Act and either appealed or moved to the High court by way of judicial review to challenge the decision of the Board.**

**(d) The High Court through the pending proceedings namely High Court Misc. Civil Application No. 250 of 2015 and Civil Appeal No. 356 of 2015 has already been presented with an opportunity to rehear both the procedural and substantive aspects of the subject procurement, a fact well within the knowledge of the petitioner before he filed this petition.**

**(e) Article 227 of the Constitution provides that an Act of Parliament (read Public Procurement and Disposal Act) shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.**

24. To the 3<sup>rd</sup> Respondent, these proceedings are frivolous and an abuse of the due process of court and the same should be struck out with costs.

#### **1<sup>st</sup> Interested Party's Case**

25. The Petition was similarly opposed by the 1<sup>st</sup> interested party herein, **Bull SAS Ltd** (hereinafter referred to as "Bull SAS").

26. According to Bull SAS, to the extent that the proceedings herein are essentially an appeal against the decision of the Review Board this Honourable Court lacks jurisdiction to hear and determine the same for the following reasons:-

**1) THAT upon delivery of the Decision, on 27<sup>th</sup> July 2015, the 2<sup>nd</sup> Respondent filed High Court Civil Appeal No. 356 of 2015 in which it challenged several findings by the Review Board, including the finding that the 3<sup>rd</sup> Respondent was its agent and instead it asserted that it was merely a beneficiary of the grant issued by or through the 3<sup>rd</sup> Respondent. That appeal is pending determination.**

**2) THAT the 2<sup>nd</sup> Respondent having appealed against the Review Board's finding on the question of agency, which is the basis of the declarations sought herein, the said finding is not final and cannot in the circumstances found a cause of action as purported by the Petitioner.**

3) **THAT** in view of the similarity of issues pending in High Court Civil Appeal No. 356 of 2015 and the proceedings herein, it would be improper to proceed with the Petition herein as there is a likelihood of conflicting decisions being issued by two courts of concurrent jurisdiction on the same issue which would cause an embarrassment to the administration of justice.

4) **THAT** to the extent that the Petitioner herein seeks an order nullifying the entire procurement proceedings on the basis of a decision being appealed against in a court of concurrent jurisdiction, the Petition herein is *sub judice* and ought to be stayed to await the outcome of the said appeal which was filed first in time.

27. It was further contended that the allegations in the Petition are in any event without basis for the following reasons:-

i. It is common ground that by a Financing Agreement dated 19<sup>th</sup> September 2013 between the 3<sup>rd</sup> Respondent and the Government of Kenya, the 3<sup>rd</sup> Respondent agreed to provide financial assistance to the 2<sup>nd</sup> Respondent in the sum of US\$13,020,000 to be applied towards the Supply, Installation, Testing and Commissioning of an Integrated Customs Management System (ICMS) and Related Modernization Services at Kenya Revenue Authority (KRA).

ii. It was a term of the Financing Agreement that:-

(a) The 3<sup>rd</sup> Respondent would procure the suppliers in accordance with its Procurement and Grants Manual.

(b) The Grant would be disbursed directly to the approved suppliers.

(c) The 3<sup>rd</sup> Respondent would be liable for all taxes levied by the 2<sup>nd</sup> Respondent together with import and customs duties imposed by the Government of Kenya.

iii. The funds to be applied towards the Project were sourced from The UK Government Department for International Development (DFID) contribution to the activities of the 3<sup>rd</sup> Respondent's programmes in Kenya.

28. Based on legal advice, it was averred that in view of the fact that the tender was funded by way of a negotiated grant, by virtue of section 6(1) of the **Public Procurement and Disposal Act** (hereinafter referred to as "**the PPDA**") it was exempted from application of the said statute which envisages a situation where the donor of funds imposes conditions for giving a grant. In this case, one of the conditions imposed by the donor included the fact that the procurement was to be carried out by the 3<sup>rd</sup> Respondent on behalf of the 2<sup>nd</sup> Respondent. It was therefore not an option for the 2<sup>nd</sup> Respondent to tender for agents as suggested by the Petitioner. In addition where statute provides a clear procedure for the redress of a particular grievance, that procedure should be strictly followed. To the said interested party, the PPDA provides an elaborate mechanism for challenging the decision of a Procuring Entity with respect to procurement including who can challenge the said process and expressly confers the role of determining disputes arising in public procurements on the Review Board.

29. Bulls SAS averred that since the Petitioner did not submit a tender in respect of the said procurement, it was not a candidate within the meaning Section 3 as read together with section 93 of PPDA which limits the right to challenge a tender only to candidates that participated in the procurement process. Therefore to the extent that the right to challenge a tender is closely circumscribed and limited by statute as aforesaid, the Petition filed herein is fatally defective and ought to be dismissed. In any event, the Petitioner herein was not party to the proceedings before the Review Board that gave rise to the impugned decision and is therefore a stranger to the said impugned proceedings hence has no legal or other basis of lodging an appeal against the decision.

30. The said party further contended that to the extent that the power to nullify a procurement is vested only on the Review Board, being the specialized tribunal envisaged by statute, the Court cannot in the exercise of its supervisory role usurp the role of the Review Board and/or substitute its decision with that of the Review Board. To the said party, the Review Board did not deem it fit to nullify the procurement process. By asking this Court to nullify the process based on the Review Board's findings, the Petitioner is essentially asking the Court to substitute its decision with that of the Review Board which is not permissible. To the party, it is clear from the foregoing that the Petition herein is but an attempt to circumvent the findings of the Review Board without showing any error in the application of the law or the process applied by the Review Board.

31. The 1st interested party noted that the Petitioner has not demonstrated on whose behalf the proceedings have been commenced and/or his *locus standi* to bring these proceedings. Based on legal advice it was contended that it is not sufficient for a party to state that he is litigating in the public interest and that one must show the people whose interests are sought to be protected. In this case, the Petitioner has not satisfied this condition and as such, the Petition is fatally defective. To the party, the Petitioner cannot call to aid the provisions of Article 22(2) of the Constitution which allows any party to lodge proceedings on behalf of another person because:-

(a) The unsuccessful bidder, the 4<sup>th</sup> Interested Party herein, already lodged a Request for Review before the Review Board and is therefore litigating in its own name;

(b) The other tenderers who were disqualified have not expressed any interest in challenging the procurement and neither has it been alleged that the Petitioner is litigating on their behalf.

32. It was therefore contended that the Petitioner has not demonstrated to this Court on whose behalf the present proceedings are commenced and neither has he adduced evidence of the class or group of persons or the public affected by the impugned proceedings. In the circumstances, this Honourable Court has no basis for making an assumption that this is a public interest matter and the only reasonable conclusion that can be drawn is that the Petitioner has for undisclosed reasons, brought these proceedings in his own interest. It was asserted that there is no special constitutional mandate donated to the Petitioner to commence these proceedings and as such, the Petitioner enjoys no special status before this Court to warrant an enquiry into the allegations made in the Petition. It contended that a Petitioner invoking the Constitutional jurisdiction of the High Court is required by law to set out with particularity the provisions of the Constitution or statute which have been violated or threatened with violation and the manner in which they have been violated. The said party added that since the Petitioner has not demonstrated the manner in which the Review Board violated either his rights or the rights of any other person under Articles 10, 35 or 227 of the Constitution, the Petition lacks merit, is a non starter and ought to be dismissed forthwith.

33. The 1<sup>st</sup> interested party averred that the proceedings herein are in any event an abuse of the court process and the same ought to be dismissed for the following reasons:-

(a) The Petitioner is guilty of laches and is not deserving of the exercise of discretion in his favour. As admitted at paragraphs 7 to 9 of the Affidavit, the Petitioner was aware of the impugned decision way back in July 2015. No or no reasonable explanation has been given as to why he waited for about five (5) months before moving the Court hence the timing of filing of the Petition herein is suspect and/that the same is clearly meant to further delay the procurement process.

(b) Other than purporting that the Review Board ought to have nullified the whole procurement process, the Petitioner has not demonstrated non-compliance with the tender requirements or statute that would pose a risk to the project implementation. In this regard, there is no justification for seeking a nullification of the entire procurement process.

(c) The Petitioner has also not satisfied the requirements under Article 35 of the Constitution to warrant a declaration that his rights have been violated. It is instructive that the explanations sought by the Petitioner were in actual fact explanations and/or justifications on matters pending in court

and were therefore outside the purview of Article 35 of the Constitution.

(d) The mere failure by the 2<sup>nd</sup> Respondent to provide the justification sought cannot, without more, warrant the nullification of the entire tender process.

34. In totality, it was contended that no proper constitutional questions have been framed by the Petitioner and where such questions have been framed, no material has been placed before this Honourable Court to enable it make a proper determination. It was contended that the importance of ICMS to revenue collection and therefore the financial well being of the country, I verily believe that the balance of convenience tilts in favour of the greater public interest of enhancing revenue collection as opposed to the Petitioner's private interests.

35. The 1<sup>st</sup> interested party therefore urged the Court ought to dismiss the petition with costs.

### **2<sup>nd</sup> Interested Party's Case**

36. The 2<sup>nd</sup> interested party on its part supported the petition.

37. According to it, the matters arising in the Petition are serious matters deserving the pronouncement of this Court in the discharge of its constitutional mandate and noting that Kenya Revenue Authority, Trade Mark East Africa and M/s Bull SAS are resolute in forging ahead with the implementation of the subject contract which is expected to be completed 18 months or so.

38. Its view was that the subject contract is one intended for the use and benefit of the Kenyan Public and it behoves the PPOA, KRA and indeed all parties concerned that to ensure that the Constitutional and Statutory obligations in relation to the procurement thereof are complied with to the letter.

39. The 2<sup>nd</sup> interested party therefore asserted that it is in the interests of justice and this Honourable Court address the prayers sought in the Petition and that the same be heard and determined expeditiously and in the event that there is any breach of the Constitution or Statute the Court does issue such Orders as are meted.

### **Determinations**

40. I have considered the issues raised and which are the subject of this ruling.

41. The facts giving rise to these proceedings arose from the floating of a tender the Supply, Installation and Commissioning of an integrated Customs Management System (ICMS) and related modernisation services at Kenya Revenue Authority. The tender as advertised was to be conducted by the 3<sup>rd</sup> Respondent herein, Trade Mark East Africa. Upon the conclusion of the said tender, it became the subject of a Request for Review to the Public Procurement Administrative Review Board being Review No. 27 of 15<sup>th</sup> July, 2015 to which the following preliminary objections were raised:

**1) That the Kenya Revenue Authority was not the Procuring Entity and that since the Procurement the subject of the Request for Review was undertaken by the 2<sup>nd</sup> Respondent which a private company is limited by guarantee, the PPARB did not have jurisdiction to hear and determine the Request for Review.**

**2) That no public funds would be utilised in the project which is the subject matter of the Request for Review.**

**3) That the Request for Review was time barred.**

42. Upon hearing the said objections, the Board dismissed the first two objections but allowed the third preliminary objection with the result that the request for review was struck out.

43. Aggrieved by the decision to disallow the said two objections, the 2<sup>nd</sup> Respondent herein, Kenya Revenue Authority, filed Civil Appeal No. 356 of 2015 Kenya - **Revenue Authority vs. Webb Fontaine LLC** challenging the same. The said appeal is still pending. On the other hand the 2<sup>nd</sup> interested party herein, **Webb Fontaine Group FZ-LLC**, filed High Court Misc. Civil Application No. 250 of 2015 which was heard and determined on 22<sup>nd</sup> December, 2015 by which decision this Court upheld the decision of the Board and dismissed the application. The applicant being aggrieved by the said decision has preferred an appeal to the Court of Appeal which appeal is similarly pending.

44. It is therefore clear that if the appeal pending before the High Court succeeds and the Court finds that the two preliminary objections which were disallowed ought to have been allowed, the substance of the decision before the Board would be upheld on further grounds.

45. On the other hand if the appeal pending before the Court of Appeal is allowed and the Court of Appeal finds that this Court was wrong in upholding the decision by the Board that the Request for Review before it was time barred the matter would have to be remitted back to the Board for hearing on merit. However the proceedings before the Board would be murkier if by then the High Court would have determined that the Board ought to have upheld the said two objections in which event the decision of the Court of Appeal which is limited to the issue of limitation would be inconsequential.

46. If this Court were to proceed with this petition and arrive at a decision that the process of tendering was in order and the High Court in the pending appeal finds that in fact said two preliminary objections ought to have been allowed, we would end up with two conflicting decisions from the Court with concurrent jurisdiction. That finding would turn judicial process into a circus. In my view that scenario ought to be avoided at all costs. This Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In **John Muritu Kigwe & Another vs. The Attorney General Nairobi HCCC No. 223 of 2000** the Court expressed itself as hereunder:

**“There is no doubt that the High Court has inherent power to see that its processes are fairly used by all and to preserve public confidence in their ability by preventing its process being used to oppress the people.”**

47. That the Court has power in constitutional petitions to invoke its inherent jurisdiction to prevent abuse of its process was made clear in **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** where it was held that:

**“The need to administer justice in accordance with the constitution occupies an even higher level due to the supremacy of the Constitution and the need to prevent the abuse of the constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. The Court does have inherent powers to prevent abuse of its process in declaring, securing and enforcing constitutional rights and freedoms.”**

48. Therefore having considered the issues raised in this petition vis-à-vis pending legal proceedings, it is my view that in order to preserve the dignity of the judicial process, this petition ought not to proceed at this stage.

49. In the premises, I direct that the hearing of this petition be stayed pending the hearing and determination of the High Court Civil Appeal No. 356 of 2015 and/or the appeal pending before the Court of Appeal or further orders of this Court.

50. It is so ordered.

**Dated at Nairobi this 28<sup>th</sup> day of July, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mburu for the Petitioner***

***Mr Mumbo for Miss Lucy Barno for the 1<sup>st</sup> Respondent***

***Miss Nganga for Miss Mburugu for the 2<sup>nd</sup> Respondent***

***Mr Wanga for the 3<sup>rd</sup> Respondent***

***Miss Mwasau for Miss Odari for the 1<sup>st</sup> interested party***

***Cc Mwangi***