



**Parbat Siyani Construction Limited v Kenyatta International
Convention Centre (Petition E397 of 2021) [2025] KEHC 2778 (KLR)
(Constitutional and Human Rights) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2778 (KLR)

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

PETITION E397 OF 2021

LN MUGAMBI, J

MARCH 13, 2025

BETWEEN

PARBAT SIYANI CONSTRUCTION LIMITED PETITIONER

AND

KENYATTA INTERNATIONAL CONVENTION CENTRE RESPONDENT

JUDGMENT

Introduction

1. The petition dated 21st September 2021 is supported by the affidavit of even date sworn by the petitioner's Director, Mukesh Halai and a further affidavit sworn on 13th February 2024.
2. The petition assails the respondent's conduct in dealing with the Petitioner in connection with Tender Reference No. KICC/52/18-19 for the construction of a prefabricated exhibition centre where the petitioner was the successful bidder. Accordingly, the petitioner brings this petition against respondent claiming violation of its constitutional rights that caused it substantial economic loss.
3. The petitioner thus seeks the following reliefs against the respondent:
 - i. A declaration that the respondent's purported decision to terminate the tender award vide the letter dated 8th April 2020 is irrational and unreasonable.
 - ii. A declaration that the respondent's decision to arbitrarily terminate the tender award without providing justifiable reason contravenes Article 227 of *the Constitution*.
 - iii. A declaration that the respondent was in breach of the petitioner's right to fair administrative action under Article 47(1) of *the Constitution* and the petitioner's legitimate expectation that



the respondent would formalize the contract as required under sections 134 and 135 of the *Public Procurement and Asset Disposal Act*, 2015.

- iv. A declaration that the petitioner is entitled to compensation for violation of Articles 10, 47 and 227 of *the Constitution* as read together sections 3, 134 and 135 of the *Public Procurement and Asset Disposal Act*, 2015.
- v. An order for the respondent to pay the petitioner the sum of Ksh. 339,295,223.52 as compensation as set out in paragraph 59 of the petition herein-above.
- vi. Costs of this petition.
- vii. Interest on the sum of Ksh. 339,295,223.52 above at court rates from the date of filing this petition until payment in full.
- viii. This Court be pleased to issue any other appropriate orders and directions or relief as it may deem fit and just to defend, uphold and protect *the Constitution*.

Petitioner's Case

4. On 24th December 2018, the respondent advertised a tender on the local dailies and its website in respect of Tender Reference No. KICC/49/18-19 for the provision and installation of a prefabricated exhibition centre at its grounds and invited interested parties to put in their bids.
5. The petitioner through its representative made a site visit of the respondent's premises on 7th January 2019 where they made further enquiries with the Chief Architect, Ministry of Public Works, Housing and Development.
6. The petitioner submitted its bid on 14th January 2019. On 31st January 2019, the Petitioner received a letter informing it that its bid was unsuccessful.
7. Thereafter, the respondent re-advertised the tender ref. KICC/52/18-19 in the local dailies and its website.
8. On 11th March 2019 the Petitioner submitted its bid.
9. After carrying out the relevant processes and procedures, the respondent wrote to the Petitioner through a letter dated 11th April 2019 to convey its decision that the Petitioner was the successful bidder and had been awarded the Tender at the price of Kshs. 799,015,957.78. There being no appeal in the matter, the petitioner accepted the award on 23rd April 2019.
10. The Petitioner deponed that subject to Clause 3.28.2 of the Request for Proposal, the notification of the award was to formation contract subject to the parties signing the formal contract.
11. Afterwards, the respondent invited the petitioner for the contract negotiations and presentation of the proposed design on 13th May 2019. The signing of the contract was scheduled for 16th May 2019 but this did not happen after the signing was rescheduled to allow further negotiations.
12. On 22nd May 2019, the Petitioner submitted the bid security in form of a performance guarantee from I & M Bank for Kshs.39,959,798.00 in line with Clause 3.28.4 of the Request for Proposal.
13. The following day, the petitioner requested the respondent for the National Environmental Management Authority (NEMA) permits and approvals for tender drawings from the Nairobi City County but this did not get a response.



14. On 27th May 2019, the respondent invited the petitioner's representatives for a meeting but no contract was not signed as scheduled. Already, this was past the 30-day period which is required for the signing of formal contract as provided in Sections 134 and 125(1) of the [Public Procurement and Asset Disposal Act](#).
15. The Petitioner alleges that after the notification of award and approval of design by the respondent, it had commenced post award implementation of the contract through obtaining the performance guarantee from I & M Bank in addition to putting together a technical team comprising of Brickehaus Architects and MaceYM to develop the complex design of the project. The petitioner in the further affidavit detailed various services and steps undertaken by the petitioner and their full costs.
16. The Petitioner wrote a letters dated 24th July 2019 and 4th September 2019 seeking to establish the status of the project but did not receive any response from the respondent.
17. The petitioner further wrote to the Works Secretary, State Department of Public Works in the Ministry of Transport, Infrastructure, Public Works, Housing and Development on 1st October 2019 to which the Principal Secretary brought the petitioner's concerns to the attention of the respondent in a letter dated 14th October 2019 but the same was never responded to.
18. However, in a letter dated 8th April 2020, the respondent repudiated the contract indicating as follows: 'due to circumstances beyond our control, we are not in a position to continue the undertaking of the project.'
19. The petitioner contends that prior to invitation of the bid, under Section 44 and 53 of the [Public Procurement and Asset Disposal Act](#), the respondent was under a duty to ensure it had a budget and a procurement plan, a fact that the respondent's Chief Executive Officer had assured during engagement with the Petitioner.
20. The petitioner complained about the substantial costs that it incurred for the architectural and engineering services in coming up with the project concept that was ultimately approved by the respondent. It is a process in which the petitioner engaged the firm of Kutto and Ruitha Management Company as showed by the contract dated 25th February 2019.
21. The petitioner claims that respondent's repudiation of the contract inflicted loss in terms of the consultancy costs incurred post award of the letter of contract as illustrated in the further affidavit, which in summary is as follows:
 - a. Design and costs in Partnership with Mace/YMR - Ksh.17,500,000
 - b. Kutto & Ruitha Consultants - Ksh.38,000,000
 - c. Costs of drawing performance bond - Ksh.1,797,785.91
 - d. Accrued Finance Costs for Cash Guarantee for Performance Bond -Ksh.12,230,132.46
 - e. Overhead costs - Ksh.10,504,187.76
 - f. Finance charges - Ksh.24,095,244.82
 - g. Loss of expected profits in the project - Ksh.187,547, 645.88 (as corrected in the further affidavit)

Sub -Total - Ksh.292,495,882.35

 - h. Add VAT @ 16% - Ksh.46,799,341.17



Total claim Ksh. 339,295,223.52

22. The petitioner asserts that its demand letter dated 21st July 2020 to the respondent notifying its intention to sue also elicited no response.
23. In view of the foregoing, the petitioner asserts that it formed a legitimate expectation that having been awarded Tender Reference No. KICC/52/18-19, the respondent would act in good faith and formalize the contract. That expectation was in the end breached by the respondent.
24. Furthermore, the petitioner contends that the respondent's actions were in contravention of Article 10, 47 and 227 of *the Constitution* for the failure to conduct itself in a fair, equitable and transparent manner.

Respondent's Case

25. In reply, the respondent through its Chief Executive Officer, James Mwaura filed its Replying Affidavit sworn on 13th June 2024.
26. He states that there is no contract between the petitioner and respondent as alleged. He relied on Section 135(4) of the Public Procurement and Assets Disposal Act which provides that no contract is formed between the successful bidder and the procuring entity until the written contract is signed by the parties. He asserts that no contract was signed in this matter. He further emphasized Section 87(4) of the Public Procurement and Assets Act to the effect that notification of the award does not constitute a contract.
27. It was deponed on behalf of the respondent that Clause 3.28.4 of the Request for Proposal required the petitioner to give a performance guarantee within 28 days of the Notification of Award but the petitioner gave the same on 22nd May 2019 which was outside the stipulated period.
28. Furthermore, he points out that Clause 3.28.5 of the Request for Proposal provided that the parties to the contract ought to have signed it within 30 days from the date of notification of award. He avers that this term was also not complied with as the parties had not fully agreed on the terms.
29. Consequently, the tender validity period by April 2020 had expired.
30. He contends that the parties could not thereafter enter into a lawful contract as guided under Section 13(5) of the Public Procurement and Assets Disposal Act, following the lapse of the stipulated period. He points out that the Tender period having expired the respondent was not under obligation to inform the petitioner as it was already clear in the terms and the provisions of the Act.
31. He points out in view of this that there was no basis for the petitioner to incur expenses before signing of the contract. As such, it is stressed that the costs accrued therein are not attributable to the respondent. Be that as it may, he avers that the petitioner has to prove the cost of the performance guarantee.
32. Furthermore, he avers that the nature of this dispute is contractual. He argues that private law claims cannot be litigated as constitutional petitions. In like manner, he states that the petitioner could not obtain legitimate expectation contrary to the law.
33. It was further argued that the petition violates Section 8, 9(2) and 9(4) of the *Fair Administrative Action Act* as the petitioner did not exhaust all the available remedies under the Public Procurement and Assets Disposal Act before instituting these proceedings.



Petitioner's Submissions

34. Issa and Company Advocates for the petitioner filed submissions dated 15th February 2024 and sought to discuss the following points: whether the respondent contravened the petitioner's rights under the doctrine of legitimate expectation pursuant to Article 47 (1) of *the Constitution* as read together with Sections 134 and 135 of the *Public Procurement and Asset Disposal Act* by failing to formalize and execute the contract for the design and construction of a Prefabricated Exhibition Centre at KICC Grounds; whether the respondent's cancellation of the tender award without lawful and justifiable cause violates Article 227 of *the Constitution*; whether in failing to give justifiable and cogent explanation for cancelling the tender, the respondent contravened the principle of accountability under Article 227 of *the Constitution*; whether the respondent breached the petitioner's right to fair administrative action under Article 47(1) of *the Constitution*; whether the petitioner's legitimate expectation to make profit has been violated in view of the fact it had expended time and resources in coming up with the winning bid and continued to incur post award costs; whether the respondent contravened the national values of good governance, integrity, transparency and accountability under Article 10 of *the Constitution* in failing to respond to the petitioner's request for clarification on the status of the project and on the status of contract signing and whether the petitioner is entitled to an award for compensation under Article of 23(3)(e) of *the Constitution* for violation of Articles 10, 47 and 227 of *the Constitution*.
35. To begin with, Counsel sought to discuss issue one and five together. Counsel submitted that having competitively won the tender as advertised by the respondent, it had a legitimate expectation that the respondent would prepare and forward the formal contract for signing within 30 days of receiving the notification of the tender award as set out under Clause 3.28.5 of the Request for Proposal as required under Section 135(3) of the *Public Procurement and Asset Disposal Act*.
36. Counsel noted that the respondent had gone further as espoused in the petitioner's affidavit to make various representations concerning the tender and even indicated that the formal contract would be signed on 13th May 2019 and 16th May 2019. This was later re-scheduled to 27th May 2019. It is averred that based on the strength of these representations, the petitioner proceeded to prepare and forward structural designs for the respondent's approval. Counsel emphasized that the petitioner had a legitimate expectation that the contract would be formalized between the two parties.
37. It is asserted thus that the respondent violated the petitioner's right to a legitimate expectation. In addition, Counsel submitted that the respondent had violated the petitioner's legitimate expectation in view of making a profit and termination of the tender award.
38. Reliance was placed in *Jane Kiongo & 15 Others vs. Laikipia University & 6 Others* [2019] eKLR where it was observed that:
- “Legitimate expectation is based on legitimate representation made by an authority which has power to make such representation that certain actions will be done in a particular way without any qualification. Such representation gives rise to legitimate expectation and the authority or institution is thus bound by that representation.”
39. Comparative reliance was placed in *National Director of Public Prosecutions v Phillips and Others* [2002] (4) SA 60 (W); *Republic vs. Principal Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR and *Communications Commission of Kenya & 5 Others vs. Roval Media Services & 5 Others* [2014] eKLR.



40. Counsel on the right to a fair administrative action under issue four, submitted that the respondent's action had violated the petitioner's right under Article 47 and Sections 4(1),4(2),4(3)(a) (b) and (g) of the *Fair Administrative Action Act*. This is because the respondent who is obligated to issue written reasons regarding the decision to terminate the tender failed to do so.
41. Additionally, Counsel submitted that the respondent had failed to issue the petitioner prior and adequate notice of its intended action. In like manner, Counsel submitted that the petitioner was not granted an opportunity to be heard and to make representations. Furthermore, the respondent did not supply the materials and evidence relied upon to reach its decision.
42. To buttress this point reliance was placed in *Charles Kaindo Kuria & 20 others vs. Technical University of Kenya* [2019] eKLR where it was held that:

“I have no doubt in finding, that the Respondent infringed Article 47 of *the Constitution* of Kenya 2010 as the Respondent failed to resolve the petitioners' issue in time and within 6 months as required by law, for the petitioners to graduate on time; thus 18th December 2014. The Respondent should know and was aware by their failure to act expeditiously, the petitioners right and fundamental freedom were likely to be adversely affected by their administrative action but failed to give written reasons for their action as required by Article 47 of *the Constitution* of Kenya 2010. I note, that the Respondent has not demonstrated to the court, that it gave written reasons to the petitioners informing them the reasons why they were not graduating on 1st December 2014. The Respondent's actions are clear violation of Article 47 of *the Constitution*.”

43. Like dependence was placed in *Geothermal Development Company Limited vs. Attorney General & 3 Others* [2013] eKLR; *Kenya Human Rights Commission vs. NGO Co-ordination Board & 2 Others* [2016] eKLR and *Kenya Human Rights Commission & Another vs. Non-Governmental Organizations Co-ordination Board & Another* [2018] eKLR.
44. Turning to issue two and three, Counsel submitted that the respondent is bound by the provisions of Article 227 of *the Constitution* as well as the *Public Procurement and Asset Disposal Act* when undertaking any procurement. It is claimed that in this matter the respondent contravened both laws in the arbitral manner in which it terminated the tender awarded to the petitioner.
45. Counsel emphasized as guided by Section 63(1) of the Act that tender for supply of goods and services may only be terminated prior to the notification of tender award not after. Counsel pointed out that the respondent did not have a valid reason for terminating the tender and neither did the termination comprise of the reasons set out in this provision. In Counsel's view, the respondent's actions were unreasonable and irrational being that that tender had been awarded in the petitioner's favor.
46. Reliance was placed in *Republic vs. Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [2018] eKLR where it was held that:

“83. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the *Fair Administrative Action Act*. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function... if a statute which confers a decision-making power is silent on the topic of reasonableness. That statute



should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.”

47. Similar reliance was placed in Republic vs. Principal Secretary, Ministry of Defence & 2 others; Kenya Tents Limited (Interested Party) Ex parte Unique Supplies Ltd [2019] eKLR.
48. Moving to the sixth issue, Counsel submitted that the respondent was also in breach of the Article 10 of *the Constitution* as failed to carry out its mandate with, transparency, integrity and accountability in light of the circumstances of this case.
49. In view of the foregoing, Counsel submitted in the seventh issue that the petitioner was entitled to compensation for violation of Articles 10, 47 and 227 of *the Constitution* as detailed in the petitioner’s affidavits. Reliance was placed in MWK & Another vs. Attorney General & 3 Others [2017] eKLR where it was held that:

“It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

118. Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. /45/The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; Such claim is distinct from, and in addition to remedy in private law for damages for tort.”

50. Similar dependence was placed in Kenya Human Rights Commission & Another (supra) among others.

Respondent’s Submissions

51. State Counsel, Wanjiru Wanja on the respondent’s behalf filed submissions dated 19th July 2024 and underscored the issues for determination as: whether there exists a contract between the petitioner and the respondent; whether the petitioner can obtain legitimate expectation as per the applicable law; whether the respondent has the mandate to appropriate any public funds provided for under Article 226(5) of *the Constitution*; whether the current proceedings are instituted contrary to the provisions of Section 8, 9(2) and 9(4) of the Fair Administration Action Act.
52. On the first issue, counsel rehashing the dictates of Section 135(4) of the Public Procurement and Assets Disposal Act submitted that no contract existed between the two parties. Counsel highlighted that this is further underscored under Clause 3.28.2 of the Request of Proposals which states that “Notification of award will constitute the formation of contract subject to the parties signing the contract”. Counsel also noted that the petitioner had also admitted to this fact in the petition. Equally Counsel said that the petitioner as seen in the letter dated 11th March 2019 agreed to abide by the tender



up until 7th September 2019. It was stressed hence that by April 2020 the tender validity had already expired.

53. In addition to this, Counsel referring to the respondent's averments submitted that the petitioner had breached Clause 3.28.4 on grant of the performance guarantee as issued the same outside the stipulated period.

54. Counsel submitted in the second issue that the doctrine of legitimate expectation entails legal certainty where individuals are able to rely on government actions and policies and shape their lives and planning on such representations. It was noted however that the dictates of the law override one's expectations. As such, Counsel submitted that there cannot be legitimate expectation against the clear provisions of a statute. Reliance was placed in *National Director of Public Prosecutions v Philips*. 2002 (4) SA 60 (W) where the requirements for such legitimate expectation were outlined as:

“ a) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification,”

b) that the expectation must be reasonable in the sense that a reasonable person would act upon it,

c) that the expectation must have been induced by the decision-maker and

d) That it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will the administrative ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.”

55. Like dependence was placed in *R vs Kenya Revenue Authority; Proto Energy Limited (Exparte) Judicial Review Application 2021*; *R v Devon County Council, ex parte Baker and Another*; *R v. Durham County, ex parte Curtis and Another* (1995) 1 All ER 73 and *Communications Commission of Kenya (supra)*.

56. Drawing from this, Counsel submitted in the third issue that the respondent would have thus been in breach of Article 226 (5) of *the Constitution*, if it had approved use of public funds contrary to the law.

57. Turning to the next issue, Counsel submitted that Section 167(1) of the Public Procurement and Asset and Disposal Act is clear that a candidate who asserts that they have suffered loss or damage due to the breach of duty by the procuring entity can request for a review within 14 days. In counsel's view, given that the two parties had not complied with the provisions of Section 135(4) of the Act, the petitioner ought to have sought a review.

58. To buttress this point reliance was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where it was held that:

“ The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is,



first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

59. Comparable reliance was placed in *Peter Odour Ngoge v Francis Ole Kaparo & others* [2012] eKLR; *Council of, Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410; *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR and [*Republic vs Public Procurement Administrative Board and 2 Others Misc. Civil Application No. E005 of 2022*](#).

Analysis and Determination

60. It is necessary to point out at the onset that the Notice of Preliminary Objection dated 16th November 2021 against this Petition by the respondent which opposed the Petition on the basis of the doctrine of exhaustion of remedies by citing failure to utilize the available remedies under the Public Procurement and Assets Disposal Act was dismissed in a ruling dated 10th March 2023 by Mrima J, who held as follows:

- “ 41. Section 173 of the Act accords the Review Board wide powers when dealing with a Request for Review. For instance, the Board may annul anything the accounting officer of a procuring entity has done in the procurement or disposal proceedings, including annulling the procurement or disposal proceedings in their entirety; give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings or it may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.
42. The Review Board may also order the payment of costs as between parties to the review in accordance with the scale as prescribed and may also order termination of the procurement process and commencement of a new procurement process.
43. This Court has already set out the nature of the reliefs sought in the Petition. They are numerous reliefs. They include declarations that [*the Constitution*](#) and the law were infringed, compensation for the violation and contravention of the Petitioner’s rights, costs, among others.
44. A reading of the Section 173 of the Act leaves no doubt that the Review Board has specific powers. The powers are clearly stated as much in the law. None of the powers of the Board relates to the grant of award of damages or grant of compensation for constitutional violations.
45. If this matter were to proceed before the Review Board, still the Review Board will not be able to deal with the prayer for award of damages and compensation for the violation and contravention of the Petitioner’s rights.
46. It is, hence, apparent that, in the circumstances of this matter, the Review Board will not accord an adequate forum for the adjudication of the dispute as laid in the Petition. To that extent, the jurisdiction of the Review Board is ousted and it is the High Court which ought to deal with this matter.
- ”



47. In other words, the principle of constitutional avoidance or the doctrine of exhaustion is not applicable in this case.”

61. In view of the above, this Court considers that the only issues for determination are:

- i. Whether the respondent violated the petitioner’s rights under Article 10, 47 and 227 of the Constitution taking into account the respondent’s conduct in this procurement process.
- ii. Whether the petitioner is entitled to the reliefs sought.

Whether the respondent violated the petitioner’s rights under Article 10, 47 and 227 of the Constitution taking into account the respondent’s conduct in this procurement process

62. Article 227 of the Constitution sets out the principles to apply in public procurement process as follows:

1. When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective.
2. An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following-
 - a. categories of preference in the allocation of contracts;
 - b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
 - d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

63. The Public Procurement and Asset Disposal Act, 2015 was enacted to give effect to this Article 227. In its preamble, the Act states as follows:

An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

64. The Act under Section 3 lays down the guiding principles of the procurement process as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- a. The national values and principles provided for under Article 10;
- b. The equality and freedom from discrimination provided for under Article 27;
- c. Affirmative action programmes provided for under Articles 55 and 56;
- d. Principles of integrity under the Leadership and Integrity Act (Cap. 185C);
- e. The principles of public finance under Article 201;
- f. The values and principles of public service as provided for under Article 232;



- g. Principles governing the procurement profession, international norms;
- h. Maximization of value for money;
- i. Promotion of local industry, sustainable development and protection of the environment; and
- j. Promotion of citizen contractors.

65. In order to appreciate fully the matter at hand, it is necessary to examine the relevant provisions of the law governing procurement from the point of award of tender to a successful bidder, which is the stage that the present parties had reached and now the area of focus in this Petition.

Section 86 - Successful tender

1. The successful tender shall be the one who meets any one of the following as specified in the tender document—
 - a. the tender with the lowest evaluated price;
 - b. the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;
 - c. the tender with the lowest evaluated total cost of ownership; or
 - d. the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

- (2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

Section 87 - Notification of intention to enter into a contract

1. Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
2. The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.
3. When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.
4. For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

Section 88 - Extension of tender validity period



1. Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.
 2. The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.
 3. An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.
 4. For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).
66. As pertains the procurement contracts, the Act provides as follows:

Section 134 - Preparation of contracts

1. The accounting officer shall be responsible for preparation of contracts in line with the award decision.

Section 135 - Creation of procurement contracts

1. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
2. An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.
3. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
4. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.
5. An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.
6. The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—
 - (a) Contract Agreement Form;
 - (b) Tender Form;
 - (c) Price schedule or bills of quantities submitted by the tenderer;
 - (d) Schedule of Requirements;
 - (e) Technical Specifications;
 - (f) General Conditions of Contract;
 - (g) Special Conditions of Contract;



(h) Notification of Award.

7) A person who contravenes the provisions of this section commits an offence.

Section 136 - Refusal to sign contract

1. If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 64 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.
2. This section does not apply if the period during which tenders shall remain valid has already expired.

67. In respect of the redress mechanism under the Public Procurement and Disposal Act, Section 27 is germane. It makes provision for the establishment of the Public Procurement Administrative Review Board whose powers are outlined under Section 28 as follows:

1. The functions of the Review Board shall be—
 - a. reviewing, hearing and determining tendering and asset disposal disputes; and
 - b. to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
2. In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.
3. The Authority shall provide secretariat and administrative services to the Review Board.

68. The procedure for review under the Act is as outlined as follows:

Section 167 - Request for a review

1. Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
2. A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract: Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.
- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
 - a. the choice of a procurement method;
 - b. a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
 - c. where a contract is signed in accordance with section 135 of this Act.

Section 170 - Parties to review



The parties to a review shall be—

- a. the person who requested the review;
- b. the accounting officer of a procuring entity;
- c. the tenderer notified as successful by the procuring entity; and
- d. such other persons as the Review Board may determine.

Section 173 - Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- e. order termination of the procurement process and commencement of a new procurement process.

Section 175 - Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties

69. In addition to the redress before the Review Board, the Act provides for the powers to ensure compliance. Section 34 provides as follows:

“A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing.”

70. The investigations envisaged under Section 35 can be instigated as follows under sub-section 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.”

71. The investigator under Section 37 will then issue the Report to the director general. Under Section 38, the Director General may issue the following orders:

- (1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this 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.
72. A party aggrieved by the Director General's order has liberty to seek a judicial review at the High Court under Section 39. Section 40 provides that such proceedings will not be commenced if the matter is already before the Review Board.
73. Matters procurement have been litigated in courts for a long time now hence there exists rich jurisprudence in this field. In *Okoiti v Kenya Ports Authority & 5 others; Portside Freight Terminals Limited & 8 others (Interested Parties)* [2023] KEHC 20571 (KLR) the Court observed as follows:
- “137. Article 227 of *the constitution*, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be *the constitution*. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words, any other stipulation whether in an enactment or in the tender document can only be secondary to the said constitutional dictates...”
74. The Court of Appeal in *Public Procurement Administrative Board v Four M Insurance Brokers Limited & 3 others* [2024] KECA 79 (KLR), stated as follows on application of Section 134 and 135 of PPDA.
- “...The key requirements and procedures in Sections 134 and 135 of the Act in this regard are that the accounting officer of the procuring entity shall be responsible for preparation of the written contract in line with the award decision after an award has been made; the written contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and by the successful tenderer; and the written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification, provided that a contract shall be signed within the tender validity period.
- The learned Judge, having acknowledged that there was no evidence of a written contract between the 2nd respondent and 3rd and 4th respondents, then it also followed that it was not legally possible for the 2nd respondent to refuse to sign the written contract, and consequently no new award could legally be made to the 1st respondent in the circumstances...”
75. Furthermore, in *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others* [2018] KEHC 7978 (KLR) the Court stated as follows:
- “
- “202. In my humble view, irregularities and the breaches complained of against the Review Board and the procuring entity impact on the outcome of the procurement process and undermine the guiding principles set out in section



3 of the PPAD Act, Articles 10 and 227 (1) of the Constitution on good governance, integrity, transparency and accountability.

...

239. Thus, failure to provide reasons for the decision raises significant question marks as to the transparency and clarity of the procurement process and exercise and gives rise to a whole host of questions. The tenderers may not be certain that there has been a fair and transparent process of the documentation.

240. In addition, a losing bidder may not adequately advance their case without detailed reasons for non-responsiveness and or incompleteness of their bids and it is not enough that the reasons are only disclosed during the hearing of the review. Giving reasons for rejecting the bidder assures participants that the tender process was above board.”

76. The gravamen of this petition is whether the principles of procurement under Article 227 (1) of the Constitution as read with Section 3 of the Public Procurement and Disposal Act, Article 10 and Article 47 were adhered to by the Respondent considering the manner in which it dealt with the Petitioner subsequent to the notification of the award as a successful bidder.
77. The petitioner was informed about its successful bid through the Notification of Award letter dated 11th April 2019 which it accepted through the letter dated 23rd April 2019. The Request for Proposal specified in Clause 3.28.5 that the contract was to be signed within 30 days from the date of Notification of Award. The contract signing was initially set for signing on 16th May 2019 following a meeting held on 13th May, 2019.
78. From the onset, it is manifest that even the initial date that was set for the signing of the contract was in fact outside the 30-day period specified in clause 3.28.5 of the Request for proposal.
79. Pursuant to Section 134 (1) Public Procurement and Disposal Act, it was the obligation of the Respondent to prepare the contract, it states:
- “The accounting officer shall be responsible for preparation of contracts in line with the award decision.”
80. This ought to have been done within the period specified in the notification but not before fourteen days had elapsed following giving of the notification and for the contract to be signed within the tender validity period as per provisions of Section 135 (3). None of these statutory obligations was carried out by the Respondent and curiously, the respondent did not provide reasons to the Petitioner for the studious silence it had maintained.
81. Indeed, even with the petitioner making follow ups later on as depicted in the letters dated 24th July 2019 and 4th September 2019 as well as the letter to the Ministry of Transport, Infrastructure, Public works, Housing and Urban development: letter dated 14th October 2019, all these correspondences went unanswered.
82. The letter of 8th April 2020 by the respondent to the petitioner came too late in the day after the tender validity period had long vanished.
83. In my very humble view, the Respondent’s conduct in this whole process does not demonstrate transparency or accountability in the handling of the procurement. The Respondent was very much aware of the timelines required for the execution of a valid contract after the notification of the award



yet it kept the Petitioner in the state of limbo for such a long time without performing the legal responsibility of drawing the contract and having it executed within the timelines specified. It is baffling why the respondent was behaving in a manner suggestive that it was oblivious of the timelines yet it is the one that had in fact set them out in the Request for Proposal. Why the Respondent did not come out clean as to real the reasons for its dilly-dallying tactics is again baffling?

84. In my view, the Respondent employed deliberate delaying tactics by taking the Petitioner round in circles until the tender validity period expired. It is my finding that the manner in which the respondent treated the Petitioner does not align with the principles of procurement as set out Article 227 (1) as such conduct cannot be described as transparent or fair.
85. The act of allowing the specified timelines pass without availing the contract for signing despite notifying the petitioner about the award and being cagey about the reasons for not preparing and having the contract signed was completely unfair, devoid of transparency, arbitrary and thus a violation of Article 227 (1) and Article 10(2)(c) of *the Constitution* as well as Section 3 of the Public Procurement and Disposal Act. There was demonstrable lack of transparency and accountability in the respondent's conduct towards the Petitioner.
86. Public bodies must not be allowed to abuse their powers. The prolonged refusal to respond to the Petitioner's enquiries and the failure to provide reasons for not preparing and signing the contract was an unreasonable act towards a winning bidder. I find the respondent's conduct to be an outright violation of right to fair administrative action of the petitioner under Article 47 (1) of *the Constitution*.
87. In Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] KEHC 8088 (KLR) the Court emphasized the duty on the public bodies to conduct themselves with fairness and reasonableness failing which they will attract judicial intervention. The Court explained:
- “... judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable...”
88. Having arrived at the decision that the principles under Article 227 (1), Article 10 (2) (c) and Article 47 were in view of the Respondent's actions against the Petitioner violated, I must now move on to consider the reliefs that the Petitioner is entitled to.
89. The Supreme Court in Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC Petition No.13 (E015) of 2022) guided as follows:

“

“(91) By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:

- “(a) a declaration of rights
(b) an injunction



- (c) a conservatory order
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.
 - (e) an order for compensation
 - (f) an order of judicial review.”
- (92) This Court in the case of *Gitobu Imanyara & 2 Others v. Attorney General*, SC Petition No. 15 of 2017, described Article 23 as “the launching pad of any analysis on remedies for Constitutional violations”. This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; *Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”

...

“(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

- (95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim’s constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....



Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

90. One curious observation I made about the procurement law is that it appears to provide for compensation to the procuring entity should the winning bidder refuse to sign the contract but it is completely silent when the vice-versa occurs as in the present case. This is provided for in Section 136 as follows:

Section 136 - Refusal to sign contract

1. If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 64 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.

91. To ensure that the neither of the parties is disadvantaged or that none of the parties takes advantage of the other, what the respondent would have claimed had the Petitioner been the one at fault in my view represents the correct assessment of what the Petitioner should equally receive for the respondent’s failure hence I would invoke the equality of arms principle and consider that to be appropriate compensation for the Petitioner as well. I would thus reject the respondent’s claim that because the contract was not signed, the Petitioner could not have incurred any costs or prejudice. Such an argument is unfair considering that the same condition would not apply had it been the Petitioner at fault.

92. In the overall analysis, the reliefs that commend themselves to this Court and which I hereby grant in this Petition are as follows:

1. A declaration is hereby issued that the manner in which the Respondent terminated the tender award to the Petitioner was arbitrary, unreasonable, devoid of transparency and accountability hence a violation Articles 227, Article 10 (2) (c) and Article 47(1) of the Constitution.

2. An order that the Respondent shall pay to the Petitioner compensation for the violation. The amount of compensation shall be Kshs.39,950,798.00 (Thirty-Nine Million Seven Hundred Fifty Thousand Seven Hundred Ninety-Eight Only) being the equivalent of the performance guarantee sum that the Petitioner would have forfeited to the Respondent as per the performance guarantee dated 22nd May, 2019 had it been the petitioner’s fault.

3. Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH, 2025.

.....

L N MUGAMBI

JUDGE

