



**Odhiambo v Agro Chemicals Food Co. Ltd & another (Petition  
E018 of 2024) [2025] KEHC 10904 (KLR) (25 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10904 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
PETITION E018 OF 2024**

**A MABEYA, J  
JULY 25, 2025**

**BETWEEN**

**DANCUN ONYANGO ODHIAMBO ..... PETITIONER**

**AND**

**AGRO CHEMICALS FOOD CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**LINDUM SYSTEMS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling determines the preliminary issues on the mootness of the case and the doctrine of exhaustion as directed by court on the 27/2/2025.
2. The petitioner filed a petition dated 8/11/2024 that relates to a procurement dispute that was subject of proceedings before the Public Procurement Administrative Review Board (PPARB) in Application No. 85 of 2024 filed by the 2<sup>nd</sup> respondent. Following the decision by the PPARB, the 1<sup>st</sup> respondent proceeded to issue the 2<sup>nd</sup> respondent with a Notice of Intention to Enter into a Contract.
3. The petitioner alleges that there were expunged documents by the PPARB in which he alleged that the 2<sup>nd</sup> respondent used forged documents to support its tender.
4. The suit was canvassed by way of written submissions. The petitioner submitted that while statutory mechanisms should ordinarily be followed, the doctrine of exhaustion is not cast in stone and the High Court retains original jurisdiction to determine constitutional issues particularly where an alternative remedy is ineffective or inappropriate. Reliance was placed on the cases of Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR and Republic v IEBC (Ex Parte NASA Kenya) [2017] eKLR, respectively.
5. That various decisions have rendered section 175 of the *Public Procurement and Asset Disposal Act* 2015 inconsistent with the values purposes and principles of *the Constitution*. Reliance was placed on



the cases of Republic v Public Procurement Administrative Review Board & Another Ex – Parte Kleen Homes Security Services Limited [2017] eKLR and Republic v Kenya Revenue Authority Ex-Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR.

6. The 1<sup>st</sup> respondent submitted that section 9 (2) of the *Fair Administrative Action Act* requires that an applicant first exhausts internal review or appeal mechanisms and all remedies availed by all other written laws before turning to the courts for review as was held in the Court of Appeal decision in the case of Speaker of the National Assembly v Njenga Karume [1992] eKLR.
7. That the petition is premature and is an attempt to appeal to this Court rather than have the review body take up its statutory mandate in that regard. Further, that the petition failed to meet the timelines set out in section 167 (1) and 175 of the *Public Procurement and Asset Disposal Act*.
8. The 2<sup>nd</sup> respondent submitted that the petition before the Court was premature and offensive to the spirit of the implementation of the Act. Reliance was placed on the case of Ankam Auto Parts Limited v Mini Suppliers Limited; Commissioner of Domestic Taxes & Another (Interested Parties) [2023] KEHC 19302 (KLR).
9. That the petition does not raise any question as to the interpretation of any constitutional provisions and as such the Petition itself and the Affidavit in support thereof are fundamentally defective. That by dint of section 175 of the Act, the period within which the procurement matter should have been heard and determined on the subject tender was the 3/1/2025 and as such the petition had been overtaken by events.
10. Upon consideration of the pleadings and submissions tendered, the only issue for determination is whether this court has jurisdiction to entertain the petition.
11. In the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi J observed as follows: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools”

12. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court of Kenya stated that: -

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

13. The relevant section of the law that provides for review of an award for a tender is section 167(1) of the *Public Procurement and Asset Disposal Act* No. 33 of 2015 which provides that: -

“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.”



14. In *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* (supra), the Court of Appeal observed as follows: -

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and 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... This accords with article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution.”

15. From the record, the petition was borne out of a procurement dispute that was subject of proceedings before the Public Procurement Administrative Review Board (PPARB) in Application No. 85 of 2024. The same had been filed by the 2<sup>nd</sup> respondent. Following the decision by the PPARB, the 1<sup>st</sup> respondent proceeded to issue the 2<sup>nd</sup> respondent with a Notice of Intention to Enter into a Contract. The petitioner contended that there the PPARB expunged some documents in which the petitioner had alleged that the 2<sup>nd</sup> respondent used forged documents to support its tender.

16. Section 167 and 168 of the *Public Procurement and Asset Disposal Act* of 2015, provides for review by the Public Procurement Review Administrative Board as a statutory dispute resolution mechanism of public tender procurement disputes, but only where an applicant is a candidate or tenderer in a tender. The right to judicial review of decisions made by the Public Procurement Administrative Review Board is in this respect regulated by section 175 (1) of the Act.

17. The petitioner has argued that various court decisions have rendered section 175 of the *Public Procurement and Asset Disposal Act* 2015 inconsistent with the values purposes and principles of *the Constitution*.

18. Section 175 of the PPAD Act has been the subject of consideration by our superior courts and decisions on the constitutionality thereof have been handed down. In the case of *ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal E598 of 2021)* [2022] KECA 407 (KLR) (4 March 2022) (Judgment), the Court of Appeal stated thus: -

“9. Section 175 has been the subject of consideration by this Court in *Aprim Consultants v Parliamentary Service Commission & Another, CA No E039 of 2021* (“the Aprim case”) and in *The Consortium of TSK Electronica Y Electricidad SA & Ansaldoenegria v PPARB & 3 Others, CA No E012 of 2022* (“the TSK Electronica case”). Indeed, the last decision was delivered barely three days ago, on 28th February.

10. In the *Aprima* case, the Court stated that section 175 was couched in mandatory terms. The Court expressed itself thus:

“A perusal of section 175 of the Act reveals Parliament’s unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act’s avowed intent and object of expeditious resolution of those disputes.



Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality.

Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.”

19. In *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* [2017] eKLR, Gatembu, JA stated: -

“40. In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against *the Constitution* or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Nyamu, J (as he then was) in *Republic vs. Public Procurement Administrative Review Board & another Ex-parte Selex Sistemi Integrati* [2008] KLR 728 opined that the elaborate provisions and ouster clauses in the then Public Procurement and Disposal Act, 2005 “were tailored to accelerate finality of public projects.”

20. Similarly, in *Republic v Public Procurement Administrative Review Board; Kenya Ports Authority & 7 others (Interested Party); Liason Group (Insurance Brokers) Limited & 3 others (Exparte)* (Judicial Review Application 3A & 30 of 2020 & Judicial Review Miscellaneous Application 2 of 2020 (Consolidated)) [2022] KEHC 285 (KLR) (16 March 2022) (Ruling), Mativo, J (as he then was) stated: -

“Because this ruling seeks to address the import of the Court of Appeal decision in *Aprim Consultants v Parliamentary Service Commission & Another*(supra) to these proceedings, it is important I generously reproduce excerpts from the said judgment so as to distil the legal principles determined by the Court and the ratio decidendi of the decision which is binding to this court. Discussing section 175 of the Act, the Court of Appeal stated:

“We think, with respect, that the provisions of section 175 are couched in terms that are plain, and unambiguous, admitting to no interpretative wriggle. The section sets strict timelines for applicants, the High Court and this court in sequential manner... Whereas judges of the High Court have questioned and with good reason, the wisdom and practicality of the particular timelines in the Statute, the position of the court has been an express endorsement of their constitutionality.”

21. It is evident from the foregoing that the issue of the constitutionality of section 175(3) and (4) of the PPAD Act is now well settled. Gatembu, JA found in the *Al Ghurair Printing and Publishing LLC* case (supra) that there is nothing in the elaborate provisions under section 175 of the Act that goes against *the Constitution* or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Similarly, in the *Aprim Case*, the Court of Appeal stated that its position is that it has expressly endorsed the constitutionality of section 75 of the PPAD Act.



22. In view of the foregoing, I do not think that it is open for this Court to try and re-invent the wheel. A party who approaches this Court with a Judicial Review matter on public procurement matters, is duty bound to remind this Court, knock on its door as many times as possible and remind it of the timebound necessity of the matter being determined one way or the other.
23. In the present case, it is clear that the 45 days period was over by 3/1/2025. The decision of the Board had crystallized by the time this Court was seized with the matter. Any determination of the matter on merit will be in vain.
24. Based on the foregoing, I find that the Petition herein dated 8/11/2024 lacks merit and the same is hereby struck out. Since there is no evidence of wrongdoing on the part of the petitioner in the delay to determine the matter, each party will bear own costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF JULY, 2025.**

**A. MABEYA, FCI Arb.**

**JUDGE**

