



Terer v The Public Procurement Regulatory Authority & 3 others; Kenya Alliance Insurance Company Limited & 2 others (Interested Parties) (Constitutional Petition E002 of 2024) [2025] KEHC 13116 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E002 OF 2024**

**RK LIMO, J
SEPTEMBER 23, 2025**

BETWEEN

TABITHA CHEPKOECH TERER PETITIONER

AND

**THE PUBLIC PROCUREMENT REGULATORY AUTHORITY 1ST
RESPONDENT**

**THE DIRECTOR GENERAL PUBLIC PROCUREMENT REGULATORY
AUTHORITY 2ND RESPONDENT**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD 3RD RESPONDENT**

COUNTY GOVERNMENT OF TRANS-NZOIA 4TH RESPONDENT

AND

KENYA ALLIANCE INSURANCE COMPANY LIMITED INTERESTED PARTY

AMANA INSURANCE BROKERS LIMITED INTERESTED PARTY

SCORELINE INSURANCE BROKERS LIMITED INTERESTED PARTY

JUDGMENT

1. The petitioner herein Tabitha Chepkoech Terer has lodged this petition seeking the following reliefs namely;-
 - a. A declaration that complaints by unsuccessful disgruntled Tenderes emanating from procurement and more specifically out of a Notification of Intention to Award, exclusively i.e before the Public Procurement Review Board.



- b. A declaration that the power to issue a Notification of Review and suspending of procurement proceedings prescribed under section 168 of the Public Procurement & Asset Disposal Act can only be exclusively exercised by the Public Procurement Review Board.
 - c. A declaration that the 1st and 2nd respondents' act ion or conduct of receiving 2nd and 3rd Interested Parties complaints emanating from the Notice of Intention to Award in the nature of an appeal and/or petition, suspending the procurement proceedings and setting down to review it was ultra vires and amounted to usurpation of the Public Procurement Review Board's Statutory Mandate.
 - d. A declaration that the 1st respondent's letters dated 22/1/2024 referenced PPRA/COMP/40/62/VOL 1(12), 9/2/2024 referenced PPRA/COMP/40/62/VOL 1(16) and 20/2/2024 referenced PPRA/6/1/3 /VOL 1(112) through the 2nd respondent are null and void ab initio in so far as they are ultra vires as they constitute usurpation of the 3rd respondent's power to receive complaints from unsuccessful disgruntled Tenderes upon issuance of a Notification of Intention to Award.
 - e. An order of certiorari to bring into this court for purposes of quashing the 1st respondent's letters through the 2nd respondent dated 22/1/2024 referenced PPRA/COMP/40/62/VOL 1(12), 9/2/2024 referenced PPRA/COMP/40/62/VOL 1(16) and 20/2/2024 referenced PPRA/6/1/3 /VOL 1(112) as they were issued ultra vires.
 - f. An order of prohibition prohibiting the 1st and 2nd Respondent from interfering with the subject procurement process for provision of medical insurance cover for Trans-Nzoia County Government staff ITT No.1373510-2023-2024 in so far as the same is based on complaints by the 2nd and 3rd interested parties raised on the 8/1/2024.
 - g. An order of mandamus compelling the 4th respondent to proceed with procurement process including execution/implementation of contracts consequent of the Notification of Intention to Award expeditiously and in strict compliance with the procurement procedures and laws.
 - h. Any other order that may be commendable to issue in the circumstances.
 - i. Costs of the suit.
2. The petitioner's case.
- The petitioner avers that the 4th respondent herein (the County Government of Trans-Nzoia) by a dint of its duty and mandate as a procuring entity advertised a tender for provision of a medical insurance cover for its staff vide ITT No.1373510-2023/2024 on its Public Procurement Information Portal (PPIP), the Daily Nation Newspaper of 23/11/2023 and on its Website (www.supplier.treasury.go.ke) as required under section 53 of the [Public Procurement and Asset Disposal Act](#) (hereinafter to be referred to as the [Public Procurement and Asset Disposal Act](#) for ease of reference).
3. The petitioner avers that she is a resident of Trans-Nzoia County and consumer of devolved services offered by the 4th respondent. That she is an advocate of this court and has friends and relatives working with the 4th respondent.
 4. She states that the 4th respondent initiated the cited procurement process on 23/11/23 through an open tender and that the tender bids were later opened and evaluated. That an intention to award the tender to the successful bidder, the 1st interested party (Kenya Alliance Insurance Company Limited) was then made through a Notification of Intention to Award dated 6/1/2024.



5. That upon receipt of the Notice of Intention to Award from the 4th respondent, the 2nd and 3rd interested parties namely Amana Insurance Brokers Limited and Scoreline Insurance Brokers Limited respectively approached the 1st respondent, the Public Procurement Regulatory Authority, with a complaint against the process leading upto the issuance of the said Notice of Intention to Award.
6. That the 1st respondent through the 2nd respondent upon receipt of the complaint through a letter dated 22/1/24 unlawfully suspended further processing of the subject procurement including execution and implementation of the contract pending its review.
7. The suspension of further processing of the subject procurement brought to a halt a process meant to provide medical cover for the 4th respondent's employees for the year 2024 exposing the employees and their families to untold difficulties because of lack of medical cover.
8. The petitioner claims that she was aware that the 4th respondent responded to the letter from the 1st respondent and the 2nd respondent vide a letter dated 9/2/2024 seeking for more details on the bids received and evaluation done that gave the successful bidder the tender.
9. That she is aware that the 4th respondent responded to the 1st respondent's direction through a letter dated 13/2/2024 referenced CGTN/PSM/1373510-2022/23 and that the 4th respondent sought for advice on how to proceed with the procurement process in light of the freeze placed upon it vide a 2nd respondent's letter dated 22/1/22.
10. That the 1st respondent in a surprise turn of events advised the 4th respondent to do direct procurement in favour of the loser in the disputed procurement. The petitioner has exhibited copies of letters/ correspondences to back up her claims.
11. The petitioner avers that once the Notice of Intention to Award was issued and upon notification to the winning tenderer and all participating tenderers, the remedy for aggrieved was to lodge a complaint before the Public Procurement Administrative Review Board established under section 27 of the *Public Procurement and Asset Disposal Act* pursuant to section 167 of the said Act. She faults the 2nd and 3rd interested parties for lodging their complaint in the wrong forum rather than the Public Procurement Administrative Review Board (hereinafter to be referred to as the Review Board).
12. According to the petitioner, the 1st respondent does not have the limitation or power to hear complaints emanating from issues raised by disgruntled bidders such as in the instant matter.
13. The petitioner further faults the 2nd respondent for advising the 4th respondent to enter into direct procurement and offer the contract to the 2nd interested party. She submits that the 2nd respondent artificially created an impasse with a view to award the 2nd interested party the tender through the back door. It is her contention that the action flew in the face of mandatory constitutional expectation under Article 227 of *the Constitution*.
14. The petitioner avers that the 1st and 2nd respondents' action has led to hue and cry among the employees of the 4th respondent and faults the 1st and 2nd respondent for unlawfully receiving the complaint from the 2nd and 3rd interested parties and purporting to review the same without any statutory authority and power to process the same.
15. The petitioner claims that the 1st and 2nd respondent is unlawful actions is a clear usurpation of power and functions of the Service Board.
16. She alleges that the services of the 2nd interested party in the past have been unsatisfactory and elicited several negative reviews.



17. In her written submissions dated 13/8/24 through learned counsel M/S Masaki & Gathu Advocates, the petitioner submits that the submissions by the 1st interested party, indicates that it supports the petition and her view is that this petition is unopposed.
18. The petitioner has given an outline of procedures on how she feels complaints by unsuccessful tenderers should be handled/managed and determined citing the provisions of section 167,168,169,170,171,172 and 173 of [Public Procurement and Asset Disposal Act](#).
19. The petitioner contends that she has exhibited letters from the 1st and 2nd respondents to wit exhibit TCT 4, TCT 5 and TCT 6 and that from the said letters the 1st and 2nd respondent were apparently in receipt of two complaints from the 2nd and 3rd interested parties both dated 8/1/2024. The petitioner submits that from the letter exhibited as TCT 4, there is a clear indication that the 2nd respondent was adjudicating over the complaints raised and that they went ahead to indefinitely suspend the procurement process which was at its tail.
20. The petitioner submits that the 2nd respondent acted ultra vires and purported to draw the authority from section 9 of the [Public Procurement and Asset Disposal Act](#). She submits that the mandate of the 1st and 2nd respondent is to investigate and act on the complaints received with respect to a complaint that is not subject to administrative review.
21. The petitioner prays for the reliefs sought in the petition stating that her petition is merited. She also prays for costs arguing that costs should follow the event and relies on the authority in Judicial Hints on Civil Procedure 2nd Edition by Richard Kuloba.
22. The 1st interested party's case.

In this matter, the 1st interested party through Linda Njenga, its legal Manager has filed an affidavit sworn on 4/3/24 in response to the petition herein. The 1st interested party avers that on 23/11/23, the 4th respondent invited qualified persons to bid for an open competitive tender for the "provision of medical insurance cover for County Staff" with the deadline for submitting tenders indicated to be 7/12/2023 at 12 noon.
23. The 1st interested party avers that it presented its bid timely and complied with all the requirements stipulated under the tender documents from the 4th respondent. That the 2nd and 3rd interested parties also submitted their respective bids.
24. That after evaluation and consideration of all the tenders, the 4th respondent notified them that the 1st interested party's bid had succeeded vide a Notification to Award the tender dated 6/1/24. It has exhibited a copy of the same in the affidavit.
25. The 1st interested party avers that while section 167(1) of [Public Procurement and Asset Disposal Act](#) provides that a party dissatisfied with the decision of the procurement entity should apply to review such decision before the 3rd respondent (Review Board) within 14 days of Notification no such review was lodged.
26. That contrary to the provisions of section 167 of the Act, the 2nd and 3rd interested parties lodged their complaints with the 1st respondent and that the 1st respondent purported to consider the 2nd and 3rd interested parties appeal which appeal in their view was incompetent. That the 1st and 2nd respondent acted ultra vires and proceeded to issue illegitimate, unconstitutional and illegal decision to suspend the tendering process vide their letters dated 22/1/2024 and 20/2/2024.



27. The 1st interested party faults the actions/decision of the 1st and 2nd respondents' on the following grounds:-
- a. That it had no jurisdiction to entertain grievances from unsuccessful bidders and that the 3rd respondent is the right body to do so.
 - b. That prior to making the impugned decision, the 1st respondent did not afford the 1st interested party, an opportunity to be heard contrary to Article 47 of *the Constitution* and section 4(4) of the Fair Administrative Actions Act.
 - c. That the 1st respondent flouted the provision of Article 227(1) of *the Constitution* and section 3(h) of the *Public Procurement and Asset Disposal Act*.
28. In its written submission dated 12/2/24 done through learned counsel M/S E. Owiti & Co Advocates the 1st interested party reiterates the above averments. It adds that the 1st and 2nd respondents acted without jurisdiction and relies on the case of Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989)eKLR where the court held that jurisdiction is everything without which a court cannot continue with proceedings. The 1st interested party submits that the 1st respondent's decisions were unlawful and should be invalidated for want of jurisdiction.
29. The 1st and 2nd respondents' case.
- The 1st and 2nd respondents through its Ag Director Complaints and Investigations Directorate has sworn an affidavit dated 7/3/24 in response to the petition herein.
30. The 1st and 2nd respondents aver that section 35 of the Act gives them the mandate to undertake investigations and examine records and accounts of the procuring entity for purpose of determining whether there is a breach of the Act or Regulations made thereunder.
31. They state that the impugned investigations were carried out following the complaints received on 8/1/2024 from the 2nd and 3rd interested parties.
32. That upon receipt of the complaints the 2nd respondent wrote to the 4th respondent suspending the procurement process to pave way for investigations and requested for documents pertaining the subject procurement process.
33. That in order to secure cover for its staff following suspension of procurement proceedings, the 2nd respondent wrote to the 4th respondent recommending a direct procurement to the previous service provider in the interests of the welfare of its staff.
34. The 1st and 2nd respondents take the position that in light of the conservatory order issued staying their decisions and ordering the procurement process to go on, there is nothing to be litigated anymore as the rest in their view is an academic exercise.
35. They insist that they acted within the mandate given to them by section 35 of the *Public Procurement and Asset Disposal Act* and hold the view that where *the Constitution* allocates certain functions to a body, the body should be given leeway to discharge its mandate.
36. In their written submissions dated 19/2/2025 through learned counsel M/S Raphael M Ngalatu, the 1st and 2nd respondents reiterate that they acted within the law and that section 35 of the *Public Procurement and Asset Disposal Act* gives them the mandate to investigate complaints. Their position is that there was nothing unprocedural or unlawful in their conduct.



37. They aver that there is a specialized body exercising a statutory mandate and that courts can only interfere if the decision or administrative action is tainted with illegality, irrationality or procedural impropriety. They rely on the case of Kenya Pipeline Company Limited –vs- Hyosung Ebara Company Limited & 2 Others (2012)eKLR.
38. They submit that in light of the impugned actions the role of this court should only be a supervisory one to check if there is any illegality in the actions taken. They rely on R –vs- Public Procurement Regulatory Authority & Anor; Auditor General & Anor (Interested Party) (Judicial Review 55 of 2022(2022)KEHC 10782(KLR) Judicial Review (27th May 2022).
39. They urge this court not to interfere with the mandate given by law to the 1st respondent. They contend that if the petitioner is aggrieved she can utilize the appellate mechanism provided by law to challenge the same.
40. This court has laid out the petitioner’s and the 1st interested party’s case. I have also highlighted the 1st and 2nd respondents’ position or response to the petition.
41. The main issues in this petition are;-
- (i) Whether the 1st and 2nd respondents acted ultra vires in suspending the procurement process.
 - (ii) Whether the mandate to receive and act on complaints/disputes arising from procurement process exclusively belongs to the 3rd respondent.
- 42.
- (i) Whether the 1st and 2nd respondents acted ultra vires
- The petitioner herein has impugned the decisions made by the 1st and 2nd respondents and the main subject of the complaint is the 2nd respondent’s letters dated 22/1/24 and 20/2/24 respectively.
43. The impugned letter dated 22/1/2024 was authored by the 2nd respondent and the subject of the letters exhibited in this petition are two complaints raised by the 2nd and 3rd interested parties in their respective letter both dated 8/1/24 addressed to the 1st respondent.
44. The 2nd respondent in the letter raises concerns from the 2nd and 3rd interested parties who believed that the 4th respondent unfairly awarded the 1st interested party the tender for provision of medical insurance cover ITT No.1373510-2023-2024. The 2nd respondent asked the 4th respondent to furnish them with the responses to the allegations made by the two unsuccessful bidders and documentary evidence detailing status of the subject procurement.
45. The letter further instructed the 4th respondent to respond by 29/1/2024. The 2nd respondent further states that in order to safeguard public resources and to forestall any loss of public funds, it was “suspending/putting on hold” further processing of the subject procurement including execution/implementation of the contract “pending review”.
46. In the 2nd letter dated 22/2/2024 the 2nd respondent advised the 4th respondent that the “review process” was in progress and that as a stop gap measure it should process a direct procurement of the immediate service provider to ensure that the welfare of the County staff was not compromised pending conclusion of the review of the complaints made by the 2 participating bidders.



47. The petitioner and the 1st interested party have faulted the 2nd respondent for two impugned actions which are one to suspend/put on hold the process of the subject procurement and the advise to the 4th respondent to directly procure the services of the previous service provider.
48. In order to examine and determine whether the 1st and 2nd respondents acted beyond their scope in the said impugned actions, this court will take a look at what the relevant Statute provides.
49. The provisions of section 8 of the *Public Procurement and Asset Disposal Act* establishes the 1st respondent. It states:
1. There is established an authority to be known as the Public Procurement Regulatory Authority which shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of—
 - (a) suing and being sued;
 - (b) acquiring, safeguarding, holding, charging and disposing of moveable and immovable property; and
 - (c) doing or performing all such other things or acts for the proper discharge of its functions under this Act, which may be lawfully done by a body corporate.
50. Section 9 of the Act provides the functions as follows:-
The functions of the Authority shall be to—
- “(a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of *the Constitution*, including Article 227 and make recommendations for improvements;
 - (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements
 - ;(c) enforce any standards developed under this Act;
 - (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
 - (e) monitor the implementation of the preference and reservation schemes by procuring entities;
 - (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
 - (g) provide advice and technical support upon request;
 - (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.....”
51. The provisions of section 10 set up the Public Procurement Regulatory Board.
- (1) The management of the Authority shall vest in a board to be known as the Public Procurement Regulatory Board which shall consist of—
 - a) a chairperson nominated by the Cabinet Secretary and appointed by the President;



- b) two members who shall be appointed by the Cabinet Secretary after nomination, through a fair process by—
 - SUBPARA (i) the Institute of Certified Public Accountants of Kenya, and
 - SUBPARA (ii) the Kenya Institute of Supplies Management;
- (c) deleted by Act No. 15 of 2017, s. 55;
- (d) the Cabinet Secretary or his or her representative; (e) the Attorney-General or his or her representative; and (f) four other persons appointed by the Cabinet Secretary.

52. The functions of the above body is stipulated under section 12 as follows.

The Board shall—

- “(a) ensure the proper and effective performance of the functions of the Authority;
- (b) approve and ratify the policies of the Authority;
- (c) oversee the management, control and administration of the assets of the Authority in a manner and for purposes that promote the object and purpose of the Authority.....”

53. The office of the 2nd respondent is established under section 15 of the Act and the Director General is the Chief Executive Officer of the Authority and the Secretary to the Board (Public Procurement Regulatory Board). The functions of the Director General is day to day management of the Affairs of the Authority and is answerable to the Board.

54. The Act also establishes a body known as Public Procurement Review Board under section 27 of the Act. Section 27 provides;

- (1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.
- (2) The Review Board shall ensure reasonable access to its services in all parts of the Republic, as far as it is appropriate to do so.

Section 28 sets out the functions of the Board 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.

55. The above provisions in my view is marred by lack of clarity between the functions of the Authority under section 9 vis a vis the functions/mandate of the Review Board under section 28. Section 9(h) of the Act attempted to delineate the functions of the two bodies by providing that the Authority shall not investigate and act on a complaint received if the same is a subject of administrative review.

56. There is no evidence placed before this court that demonstrates that the issue raised by the 2nd and 3rd interested parties to the 1st and 2nd respondents in their letters dated 8/1/24 and referenced by 2nd respondent in its letter dated 22/1/24 was or had been placed before the Review Board. As a matter of fact the petitioner faults the 2 parties for filing the complaint in the wrong forum meaning before the 1st respondent. It does appear therefore from my reading of section 9(h) with regard to the functions of the 1st respondent donated by law include not just “investigation” of “complaints” received but acting



on them save for any complaint the subject of administrative review under section 28(1) of the Act. That in my view presents a problematic legal issue because the question posed is what is the meaning of “complaint”. Under section 9(h) that falls under the mandate of 1st respondent as opposed to a “dispute” within the meaning of section 28(1) that falls squarely under the mandate of the Review Board. This court finds it better to leave that issue for now because the same is a subject of interrogation in the next issue for determination in this judgment. I deliberately skip this issue for now so that we do not lose track of the issue at hand.

57. It is apparent therefore that the 1st and 2nd respondents fell into error by sidestepping a significant procedural step in addressing the concerns raised by the 2nd and 3rd interested parties. The 2nd respondent acted ultra vires by acting outside his scope by entertaining a complaint that was a preserve of the 3rd respondent. As provided under section 28 of the Act given the stage the procuring process had reached.

58. The 2nd respondent has cited the provisions of section 35 of the Act, to justify its impugned actions. Section 35 provides as follows;-

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

The purpose of the investigation going by the above provisions is to find out if there is compliance in the procurement of goods/services or disposal of public assets or if there is a breach of the law or regulations stipulated under Public Procurement and Asset Disposal Act. The investigation contemplated is done before an intention to award is made.

59. The 1st interested party has faulted the 2nd respondent for not according it a chance to be heard before he suspended the procurement process.

60. That concern in my considered view is legitimate because under section 38(2) the Director General is required by law to give a chance to be heard. The section provides

2. Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—

(a) the procuring entity; and

(b) any other person whose legal rights the Director-General believes may be adversely affected by the order.

61. The Constitution which is the supreme law of the land clearly protects the right to a fair administrative action which includes a right to be given a hearing. Article 47 provides;

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



- (2) If a right or fundamental freedom of a person has been or is *Constitution of Kenya, 2010* 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
62. Parliament in furtherance of that right enacted Fair Administrative Actions Act. Section 4(3)(b) of the Act provides before any administrative action is taken, any person that is likely to be adversely affected must be given an opportunity to be heard. Section 4(4) is even more explicit. It provides.
- The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
 - (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
63. It is therefore a legal imperative for any public authority or person making a decision to give a party likely to be adversely affected a chance to be heard. That right is a fundamental right and cannot be disregarded.
64. Now let us examine the impugned action/decision made by the 2nd respondent vide its letter dated 21/1/24 (i.e. a suspension of procurement including execution and implementation of the contract) and dated 22/2/24 (i.e. advising the 4th respondent to carry out direct procurement and hand over the contract to the immediate service provider). The two letters obviously adversely affected the winner of the tendering process carried out by the 4th respondent. The 1st interested party was going to be adversely affected by suspension of the tendering process after being given Notice of Intention to Award it the tender. The suspension was also certainly going to adversely affect the employees of the 4th respondent. The question therefore posed is whether the 1st interested party and the 4th respondent were given a chance to be heard before the decision contained in the letter dated 22/1/24 was reached by the 2nd respondent. The answer to that question certainly is in the negative. The 2nd respondent breached a fundamental right of the 1st interested party and to some extent the employees of the 4th respondent through their employer the 4th respondent herein.
65. It is also apparent that going by the 2nd respondent's letter dated 20/2/24 (TCT6) the beneficiary of the direct procurement advised was going to be the 2nd interested party herein who was an unsuccessful bidder in the tendering process won by the 1st interested party. The 1st interested party is therefore justified to feel that the 2nd interested party was being facilitated through a back door to be given a tender it had failed to win in the open tendering system. That in my view may have been an oversight by the



2nd respondent but what is clear is that the advice it gave fell short of the guiding principles stipulated under section 3 of the Act and Article 227 of *the Constitution*. The procurement of goods and services by any public entity must always be fair, equitable, transparent, competitive and cost effective. The instructions given by the 2nd respondent vide its letter dated 20/2/2024 fell short of these requirements.

66. The petitioner has faulted the 2nd interested party for the services it had previously been contracted to give stating on oath that there was hue and cry from the employees of the 4th respondent because of poor services. The allegations were not challenged by the 2nd interested party and therefore in light of the provisions of Article 227, the 4th respondent was well placed to reject its bid for the subsequent medical services that was the subject of the procurement.
67. The other procedural misstep by the 2nd respondent is that upon receiving the complaint, as the Chief Executive Officer of the Authority, he was required to place before the Public Procurement Regulatory Authority Board established under section 8 of the Act who would then restart investigations under section 9(g) and proceed as provided under section 35 by first appointing an investigator if they felt the complaint warranted investigations. The investigator would then carry out the investigations and file its report as stipulated under section 37 of the Act. Once the Board considers the report and is satisfied upon hearing all the concerned parties, the Director General is then empowered to take any of the steps stipulated under section 38.
68. It is apparent that the 2nd respondent sidestepped all the above stipulated procedures by invoking section 38 and suspending the procurement process. He contends that he was exercising its mandate under section 35 but section 35 involves an appointed investigator and it limits the actions to only carrying out investigations. The powers under section 35 do not include suspension of procurement process. The 2nd respondent in short acted prematurely and circumvented the due process I have highlighted above. The action by the 2nd respondent was therefore tainted with procedural illegality and failed the test on rationality and proportionality.
69. In such circumstances this court is empowered under Article 165(3) of *the Constitution* to step in to forestall the illegality with a view promoting the rule of law. *The Constitution* empowers this court in such instances to step in and I am not persuaded by the respondents' contention that it is an overreach.
- 70.
- (ii) Whether the mandate/role to receive complaints/disputes arising from procurement exclusively belongs to the Review Board.
- The 3rd respondent herein never responded to this petition and therefore did not do the needful in assisting this court to determine where their role vis a vis the role of the 1st respondent begins and ends.
71. There is however no doubt looking at the role of 1st respondent as well as that of the Review Board going by the Act that there is a grey area which can be a potential of conflict in terms of roles that appear on the face to be cross cutting between the said 2 bodies in some sections.
72. The basis of my finding is that the role of the Authority as provided under section 9(h) as highlighted above include not just investigating a complaint raised but acting on the complaint in the manner provided under section 35, 36,37 and 38 of the Act. The 2nd respondent herein has cited section 35(1) of the Act as a basis for his impugned action. Section 35(1) of the Act provides as follows:
1. The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a



procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

The above provision in my considered view relates to complaints touching on “procurement proceedings” and procurement under section 2 of the Act is defined as “acquisition by purchase, rental.... or by any other contractual means of any type of works, assets, services or goods.... planning and processing in the supply chain system”.

73. The Act further provides a party aggrieved by an order of the Director General to apply for Judicial Review in the High Court within 14 days after the order is made.
74. On the other hand, the role/mandate of the Review Board as established under section 27 is clearly provided under section 28(1) of the Act as;
- (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.
75. It is clear from my reading that the disputes contemplated above relate to “tendering” which occurs after all the procurement procedures are finalized. “Tendering” is defined under section 2 of the Act as;
- “An offer in writing by a candidate to supply goods, services or works.... pursuant to invitation to tender, request for quotation, or proposal by a procuring entity”.
76. The functions of the Review Board as contemplated under section 27(1) is to act as a Central Independent Procurement Appeals Board and their function is to inter alia review, hear and determine disputes arising from tendering and asset disposal.
77. The issues raised by the 2nd and 3rd interested parties touched on Notification of Intention to Award the contested tender to the 1st interested party which is done pursuant to the provisions of section 87 of the Act.
78. This court takes the view that once the tendering is done, evaluation and shortlisting follows. If any tenderer is aggrieved by the process of evaluation and the awarding of tender, then the available avenue is approach the Review Board who would then exercise their mandate under section 28 and review the complaint. Any other complaint relating to procurement before evaluation and awarding of tender lies with the Authority as provided under section 9 of the Act.
79. As a matter of law section 167 of the Act gives a clear perspective on the role of the Review Board and the nature of the complaints. The complaints contemplated arise from the process provided under Part IX of the Act. The complaint raised by the 2nd and 3rd interested parties going by reaction of the 2nd respondent in his letter dated 22/1/24 falls under the said Part which means that the Review Board under section 167(1) was the right body to inquire into the same and render itself. Section 167(1) of the Act states:
- 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.



(Emphasis added)

The stage the tendering process had reached indicates that the dispute/complaints raised by 2nd and 3rd interested parties, should have been placed at the doorstep of the 3rd respondent.

The Review Board under the provisions of section 173 can take any appropriate action. Section 173 provides:

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.

Any party aggrieved by the decision of the Board can apply to this court for Review as provided under section 175.

80. The powers of the 1st respondent is limited under section 40 which provides that the Regulatory Authority shall not touch any matter pending under the Review Board or decided by the latter.
81. The provision that creates problems is section 9 as read with section 38 of the Act. The powers given to 1st respondent upon finding merit on a complaint after investigations under section 36 can stop the procurement process pending the determination of the complaint. Section 38 further provides that the Director General may terminate the procurement. The Review Board under section 173 is also given the same powers and that is where the crosscutting mandate is but as I have observed above the distinction is where the role of 1st respondent begins and ends. I have already given the position taken by this court.
82. This court further finds that the 1st and 2nd respondents are correct to some extent to state that the issue before this court currently is now moot or academic because the matter has obviously been overtaken by events. We are in 2025 and the subject procurement was in respect to 2024 and 2025 financial year. The substratum of the petition is spent. Suffice to state that in light of my above finding this court finds merit to this petition and the same is allowed in the following terms:-
 - a. A declaration is hereby made that complaints by unsuccessful or disgruntled tenderers emanating out of procurement procedures and specifically out of Notification of Intention to Award lie before Procurement Review Board.
 - b. A declaration is hereby made that the 1st respondent's letter dated 20/1/24 referenced PPRA/COMP/40/62/VOL (12) and 20/2/24 referenced PPRA 6/1/3 VOL 1(112) through the 2nd respondent are void ab initio for infringing or violating the provisions of Article 47 of *the Constitution*, section 38(2) of *Public Procurement and Asset Disposal Act* and section 4(4) of Fair Administrative Actions Act.



- c. An order of certiorari is hereby issued to bring into this court for purposes of quashing forthwith. The 1st respondent's letter through the 2nd respondent dated 22/1/24 and 20/2/24 for they are tainted with illegality and procedural unfairness.

Prayers (F) and (G) have been overtaken by events so it is an academic exercise to grant them.

This is a public interest litigation so I made no order as to costs. Each party to pay own costs.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD . DAY OF SEPTEMBER , 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Omaiyo & Njau for the Petitioner

Jeruto holding brief for Otieno for the 4th Respondent

Akinyi holding brief for Mulanya for 2nd Interested Party

Tambo & Owiti for 1st Interested Party

Duke/Chemosop-Court assistants

