



**Omao v Nyariki & 2 others (Constitutional Petition 12 of 2023)
[2024] KEHC 3370 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION 12 OF 2023**

JM CHIGITI, J

MARCH 8, 2024

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

**DANIEL NYARIKI, PRINCIPAL, KISII NATIONAL POLYTECHNIC 1ST
RESPONDENT**

**GOVERNING COUNCIL, KISII NATIONAL POLYTECHNIC 2ND
RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF VOCATIONAL AND
TECHNICAL TRAINING 3RD RESPONDENT**

JUDGMENT

Brief background

1. The Petitioner is described as a law abiding citizen, public spirited individual and defender of human rights currently residing in Kisii County Government within the Republic of Kenya.
2. The 1st Respondent is identified as the head and principal of Kisii National Polytechnic.
3. The 2nd Respondent is said to be the Governing Council of the Kisii Polytechnic.
4. The 3rd Respondent is described as the Accounting Officer and Authorized Officer of the State Department in charge of implementing government policies and the Strategic Plan for the State Department; facilitating the achievement of the goals and objectives of Government and Inter-Governmental programmes and projects.



The Petition

5. The Petitioner herein, Vincent Mariita Omas, filed a Petition dated 2nd October, 2023 together with an evenly dated Supporting Affidavit. The Petition is based on the grounds on its face and on the further grounds set out in an affidavit in support thereof sworn by the Petitioner. In advancing the Petition, he also filed submissions.
6. He seeks for the following orders:
 - a. An order of injunction be issued restraining the Respondents herein jointly and severally by themselves or through their agents or representatives, or any person claiming through them, from continuing with the procurement and implementation of the proposed projects for the financial year, 2023/2024.
 - b. A mandatory order of mandamus be issued directing the Ethics and Anti-Corruption Commission (EACC) and all the relevant Government agencies to investigate and, if culpable, criminally prosecute the 1st Respondent and the members of the 2nd Respondent and or any other officer involved in the shambolic and fraudulent procurement process.
 - c. A Declaration be issued that the 1st and 2nd Respondent as procuring entities are subject to the provisions of Articles 10, 201 and 227 of *the Constitution* of Kenya, 2010.
 - d. An order of certiorari against the Respondents to file in court certified copies of all the advertisements for tenders, list of all the prequalified companies, bank statements on the payment of sitting allowances in favour of the Governing council, memoranda relied upon in the decision to advertise tenders, tender evaluation reports for purposes of quashing.
 - e. An order for suspension of the 2nd Respondent and the same be reconstituted the Parent Ministry.
 - f. An Order for cancellation and or suspension of proposed a number of projects for the financial year 2023/2024 amounting to Kes. 349,907,991.56.
 - g. An order of certiorari be issued to remove to this Honourable Court and quash the award of proposed contracts for supply of goods, works and services for the financial year 2023/2024.
 - h. That this Honourable Court gives any other orders required to advance the cause of justice and the rule of law in this case.
 - i. That the costs of this Petition be borne jointly and severally by the Respondents.
7. The Petitioner pleaded that Article 10, 226(1), 227 of *the Constitution*; and Section 31(1(b)), 31(3), 87, 88 and 135 of the Public Procurement and Disposal Act, 2015 have been violated by the Respondents in undertaking procurement process for Kisii National Polytechnic.
8. That the procurement process was fraudulent and non-transparent to wit; that none of the proprietor of the tender winning entity signed the respective contractual documents, and allowing fraudulent unit pricing which results in substantial loss to the institution.
9. Further, the Petitioner is apprehensive that the continued illegal withdrawals of funds in allowances, and illegal award of tenders to non-responsive firms by the Respondents will cause the general public great financial loss.
10. The Respondents did not file any response to the Petition.



The Petitioner's Case

11. The learned counsel for the Petitioner filed his written submissions wherein he submitted that he is contesting the unlawful awards of tenders for the supply of goods and services at the 2nd Respondent's Institution.
12. It is also averred that the impugned tendering has been carried out in a manner that is illegal, unlawful, and contrary to the laid down procurement processes: in particular, contravening the Constitution, and the Public Procurement and Disposal Act, 2015.
13. The Petitioner maintains that the averments set out in the Petition have not been controverted and or rebutted by the Respondents.
14. To the Petitioner, his Petition demonstrates apparent illegalities and irregularities in the procurement for services and goods by the Respondents, at the Kisii National Polytechnic.
15. It is posited that the actions of the Respondents of misuse and misappropriation of public money through opaque and un-approved projects amount to breach of the provisions of Article 201 of the Constitution of Kenya, and particularly the principles set out thereunder - which includes inter alia; openness and accountability, and use of public money in a prudent and responsible way.
16. Relying on the case of *Okoti v James R. Njenga, Steward Madzayo, Hellen Kombo, Alice Kalya, Benson Kaaria, Achiya Echakara Rhoda Ahonobadhaand Jeremia Kianga (Sued as the Registered Trustees of the Agricultural Society of Kenya) & 19 others (Petition 33 of 2019) [2022] KEHC 74 (KLR) (26 January 2022) (Judgment)* the Petitioner argued that the procuring entity [Kisii Polytechnic] receives public funds and thus are obligated to account for the utilization of the same to the Public.

Issues for Determination

17. After examining the pleadings, annexures, and submissions from the record, this court formulated the following as issues for determination:
 - i. Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court.
 - ii. Whether this court has jurisdiction to hear and determine this suit.

Analysis and Determination

18. On the first issue, the Petitioner contended that the Petition meets the threshold of a competent Constitutional Petition. That thus, the jurisdiction of this court is properly invoked.
19. The various facets of the doctrine of jurisdiction have been the subject of many decisions. Jurisdiction of a Court or tribunal can be impugned on many fronts including the successful raising of the lack of precision *judicata*.
20. In Nairobi High Court Constitutional Petition No. E008 of 2022, *Okiya Omtatah Okoti v Attorney General & another [2022] eKLR*, the Court briefly discussed the operational dimensions of the doctrine of jurisdiction. This Court rendered itself thus: -

“22. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another



vs. Eric Cheruiyot & 15 Others(unreported) in a decision rendered on 8th February, 2022 spoke to the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saundersin “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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 in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In Samuel Kamau Machariaand Another v. KenyaCommercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court



reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). 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 itself jurisdiction exceeding that which is conferred upon it by law."

21. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions.

22. Rule 10 thereof provides seven key contents of a Petition as follows:

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.

23. Rule 10(3) and (4) of the Mutunga Rules also has a bearing on the form of Petitions. It provides as follows: -

“(3)Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.



(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

24. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

25. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following in the manner in which constitutional Petitions ought to be presented before Court for adjudication: -

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeruvs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

26. But what is a constitutional issue? In *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

“*The Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State... the interpretation, application and upholding of *the Constitution* are also constitutional issues? So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights? If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...”

27. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

28. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and



the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -

“... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...”

29. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. ManjitSingh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
30. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others vs. Attorney General & Others* (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to Constitutional violations.
31. Having perused the Petition, it has clearly noted the Constitutional Articles relied upon, Petitioner has illustrated locus, Petitioner has linked the violation and infringements of his rights and freedoms to the alleged actions of the Respondents.
32. The format of the Petition has incorporated six parts: the description of the parties, the Petitioner’s locus standi, the background of the Petition, the facts of the Petition, the legal foundation of the Petition and the violation of *the constitution* by the Respondents and the reliefs sought.
33. This Court affirms that indeed the Petition is clear on the alleged constitutional violations, how they are alleged to have been occasioned and by who and the reliefs sought as a result of the alleged violations.
34. It is this Court’s position that the Petition fully complied with Rule 10 of the Mutunga Rules as well as the requirements in *Communications Commission* case(supra). As the first issue is answered in the affirmative this Court will now deal with the issue of jurisdiction.
35. The Petitioner is contesting the legality of the award of tenders for the supply of goods and services at the 2nd Respondent’s Institution.
36. The Petitioner pleads that Article 10, 226(1), 227 of *the Constitution*; and Section 31(1(b)), 31(3), 87, 88 and 135 of the Public Procurement and Disposal Act, 2015 have been violated by the Respondents in undertaking procurement process for Kisii National Polytechnic.
37. It is the his case that the impugned tendering was carried out in a manner that is illegal, unlawful, and contrary to the laid down procurement processes: in particular, contravening *the Constitution*, and the Public Procurement and Disposal Act, 2015.
38. The Petitioner also seeks for a mandatory order of mandamus be issued directing the Ethics and Anti-Corruption Commission (EACC) and all the relevant Government agencies to investigate and, if culpable, criminally prosecute the 1st Respondent and the members of the 2nd Respondent and or any other officer involved in the shambolic and fraudulent procurement process.
39. The court must address the question whether or not it has the requisite jurisdiction to get into the merits or proceed to hear and determine the petition. The issue of jurisdiction is so fundamental, a limitation on the authority of the court, to the extent that it can be raised at any stage of the proceedings by any party or even by the court suo motu.



40. I have proceeded to raise the question of jurisdiction suo Motu. Section 27 of the [Public Procurement and Asset Disposal Act](#), 2015 provides for the establishment of the Public Procurement Administrative Review Board as follows: -

“(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative

(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.” No doubt this extends to the local jurisdiction of Kisii where the cause of action herein arose.

Section 35 (1) of The [Public Procurement And Asset Disposal Act](#) provides that 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.

41. The Petitioner was neither a candidate nor tenderer in the Tender floated by the Respondent.

42. It is this court’s finding and I so hold that the petitioner had the locus standi to lodge a complaint under Section 35 (2) the [Public Procurement and Asset Disposal Act](#), 2015 for investigations. He did not exercise the right by initiating the investigations process.

43. The issue of jurisdiction is also alive from the [Fair Administrative Action Act](#). Section 7 of The [Fair Administrative Action Act](#) provides for the institution of judicial review proceedings as follows:-

“(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

a. A court in accordance with section 8; or

b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.”

44. Section 9 of The [Fair Administrative Action Act](#), 2015 provides for the procedure for judicial review as follows: -

“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of [the Constitution](#).

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms



including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

45. Under Section 9 (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
46. Section 9 (4) stipulates that, notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
47. In *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

“59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others* [2017] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus: “What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High:

Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitutional law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

48. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
49. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of



audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.

50. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.
51. In the case before this court, the petitioner has not tendered any evidence to show whether or not he invoked Section 35 (2) of The PPAD Act by lodging a complaint or the Anti-corruption complaint.
52. He has not tendered any evidence to show that the PPAD or the Anti-corruption authorities refused to receive or hear his complaint to date.
53. The Petitioner did not file an application seeking to be exempted from exhausting other avenues of redress before filing this suit.
54. There is no evidence from the Petitioner that can help this court to exercise its discretion to exempt the Petitioner from the Application of Section 7 of The *Fair Administrative Action Act*.
55. The decision to grant or not to grant a party leave to be exempted from the obligation to exhaust the available alternative dispute resolution mechanisms before approaching this court can only be made by the court under The *Fair Administrative Action Act*.

The Petitioner's prayer for a mandatory order of mandamus be issued directing the Ethics and Anti-Corruption Commission (EACC) and all the relevant Government agencies to investigate and, if culpable, criminally prosecute the 1st Respondent and the members of the 2nd Respondent and or any other officer involved in the shambolic and fraudulent procurement process is not ripe.

At the minimum the petitioner should have lodged a complaint with the police given that according to him a crime had been committed. He further had an avenue of approaching the Anti-Corruption Commission (EACC). The foregoing would have not barred him from approaching the public procurement authority which has powers to investigate allegations like the ones he raises. The Petitioners did not exhaust these redress avenues.

Article 35 of *the Constitution* as read alongside Section 4 of the *access to information Act* provides that

- (1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - (a) the State; and
 - (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
- (2) Subject to this Act, every citizen's right to access information is not affected
 - (a) any reason the person gives for seeking access; or



- (b) the public entity's belief as to what are the person's reasons for seeking access.
 - (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
56. Part III of the *Access to Information Act* has set out a very elaborate procedure for requesting for information and provided for redress in case the information sought is not provided.
57. The Act provides for the Processing of an application for information.
58. Section 9 (1) stipulates that Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application
- (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.
 - (3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—
 - (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or
 - (b) consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.
 - (4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating —
 - (a) whether or not the public entity or private body holds the information sought;
 - (b) whether the request for information is approved;
 - (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and
 - (d) if the request is declined, a statement about how the requester may appeal to the Commission";
 - (5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.
 - (6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.



59. The Petitioner did not tender any evidence to the effect that he was unable to access this alternative avenue to access the information that he is seeking to access through the court.

The prayer for an order of certiorari against the Respondents to file in court certified copies of all the advertisements for tenders, a list of all the prequalified companies, bank statements on the payment of sitting allowances in favour of the Governing council, memoranda relied upon in the decision to advertise tenders, tender evaluation reports for purposes of quashing would have been achieved through the [Access to information Act](#).

60. The PPADA has comprehensive statutory framework for addressing any complaints relating to public procurement.
61. The Public Procurement Regulatory Authority (PPRA) has extensive powers to investigate and act on complaints received from any individual. The PPRA has wide and sweeping powers, including termination of procurement proceedings, among others.
62. This court finds that the Petitioner did not exhaust the alternative dispute resolution mechanisms and this court lacks jurisdiction to hear the suit.

Disposition:

63. This court is bound by the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".
64. The petitioner has not exhausted the available alternative dispute resolution mechanisms.

Order:

65. The Petition is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MARCH, 2024

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J. CHIGITI (SC)
JUDGE

