Okoiti v Kenya Power and Lighting Company PLC (Constitutional Petition E307 of 2021) [2024] KEHC 6893 (KLR) (Constitutional and Human Rights) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6893 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E307 OF 2021

AC MRIMA, J

JUNE 11, 2024

BETWEEN

OKIYA OMTATA OKOITI ..... PETITIONER

AND

KENYA POWER AND LIGHTING COMPANY PLC ..... RESPONDENT

RULING

Background

1. On 20th July 2021, Kenya Power and Lighting Company Limited (hereinafter referred to as 'the Respondent' or 'KPLC') invited bids for KPLC Tender No. KP1/9A.2/OT/001/INS/21-22 for Pre-Qualification of Insurance Brokerage Firms for Professional Indemnity Cover (hereinafter 'the impugned tender').

2. Okiya Okoiti Omtatah, the Petitioner herein, was aggrieved that bidder eligibility requirement in the tender document had been changed from its original form as was in the first tender in an unlawful, unreasonable, oppressive, unfair, opaque and discriminatory manner to defeat the provisions of Article 227(1) of *the Constitution*.

3. The Petitioner contended that the subsequent tender document imposed unacceptable and unreasonable bidder eligibility requirement of a valid Professional Indemnity Cover of a minimum of Kshs. 1 Billion in place of the first tender which set the minimum indemnity cover of Kshs. 200 Million.

4. The Petitioner was aggrieved that the impugned requirements discriminated directly in favour of very large firms against local players in violation of Article 27 of *the Constitution*.

5. He pleaded further that the impugned tender had not been subjected to public participation and had no provision for affirmative action under the Access to Government Procurement Opportunities (AGPO).

6. The Petitioner prayed of the following reliefs;

   i. A Declaration That the raising in KPLC Tender No. KP1/9A.2/OT/001/INS/21-22 for Pre-Qualification of Insurance Brokerage Firms for Professional Indemnity Cover from a minimum Kshs 200 million, and territorial limit within Kenya, to a minimum Kshs 1 Billion is unlawful, unreasonable, oppressive, unfair, opaque, discriminatory and, therefore, unconstitutional, null and void ab initio.

   ii. A Declaration That raising in KPLC Tender No. KP1/9A.2/OT/001/INS/21-22 for Pre-Qualification of Insurance Brokerage Firms of the total premium turnover for years 2019 and 2020 from an optimal Kshs 500 million to an Optimal Kshs 2 Billion (excluding KPLC), is totally outrageous and oppressive and, therefore, unconstitutional, null and void ab initio.

   iii. A Declaration That tenders issued by the KPLC must have provision for 30% affirmative action under the Access to Government Procurement Opportunities (AGPO) programme.

   iv. A Declaration That the KPLC Tender No. KP1/9A.2/OT/001/INS/21-22 for Prequalification of Insurance Brokerage Firms, is unconstitutional and, therefore, invalid, null and void ab initio.

   v. An order quashing the KPLC Tender No. KP1/9A.2/OT/001/INS/21-22 for Prequalification of Insurance Brokerage Firms.

   vi. An Order Compelling the Respondent to conclude the processing of Tender No. KP1/9A.2/OT/065/INS/20-21 - Pre-Qualification of Insurance Brokerage Firms for the Period 1st September, 2021 to 31st August 2023.

   vii. AN ORDER THAT the respondent pays the petitioner's costs of this suit.

   viii. Any other relief the court may deem just to grant

7. It is against this background that the Respondent raised an objection on this Court's jurisdiction.

The Preliminary objection:

8. The Preliminary Objection was dated 21st September 2021. It was couched in the following manner: -

   1. The gravamen of the suit is a tender and procurement process governed by the *Public Procurement and Asset Disposal Act*, 2015 ("the Act") which specifically reserves public procurement disputes to be determined by the Public Procurement Administrative Review Board (PPARB), as a specialized tribunal, in the first instance.

   2. The Honourable Court lacks jurisdiction to entertain a public procurement dispute of this nature as a first instance court, in the absence of an appeal or judicial review of a decision of the PPARB under sections 28, 167 and 175 of the Act.

   3. Furthermore, the subject matter is currently under review and investigation by the Public Procurement Regulatory Authority, under sections 9 and 35 of the Act because of a complaint by the Association of Insurance Brokers of Kenya, and the suit is therefore not only premature but also offensive to the spirit of the implementation of the Act.

4. In all, the Honourable Court lacks jurisdiction as a first instance Court to entertain a dispute of nature set out in the suit herein reserved for a specialized tribunal under Articles 159(1) and 169(1)(d) of *the Constitution*

The submissions:

5. In its submissions dated 31st December 2021, the Respondent was emphatic that the High Court was not the appropriate forum in view of Section 10 of the *Public Procurement and Asset Disposal Act* (hereinafter referred to as 'the Procurement Act' or 'the PPAD Act') which establishes Public Procurement and Regulatory Review Board, a body that has the powers to hear and determine such complaints.

6. The Respondent drew support from the decision in Inter Tropical Timber Trading Limited & another v Rural Electrification and Renewable Energy Corporation & 19 others [2021] eKLR.

7. It was the Respondent's further submission that although there are some constitutional issues for interpretation in the Petition filed by the Petitioner, the High Court is not the appropriate first forum.

8. To buttress the need to exhaust the administrative remedies, the Respondent cited he Court of Appeal decision in Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others [2015] eKLR where it was observed;

> ..... 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen

9. In a separate line of argument, the Respondent claimed that the Petitioner was neither a candidate nor tenderer in its tender process and therefore has no locus standi before this Court. The decision in Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR was relied upon where it was observed;

> .... The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated.

The Response:

10. The Petitioner challenged the objection through Grounds of Opposition dated 25th October 2021.

11. It was his case that the Objection was incompetent and an abuse of court process since this Court has jurisdiction even if the Petitioner was not a bidder in the impugned tender.

12. The Petitioner asserted that the mandate of Public Procurement Administrative Review Board under section 28(1)(a) and 167(1) of the *Public Procurement and Asset Disposal Act*, 2015 is limited to "reviewing, hearing and determining tendering and asset disposal disputes" between "a candidate or a tenderer and a procuring entity.

13. It, therefore, was its case that he was automatically eliminated and did not have audience as an aggrieved a party before the PPARB.

14. It was its case that it did not have locus standi to move the PPARB for redress pursuant to Section 167(1) of the PPADA. He pleaded that under Articles 22 and 258 of *the Constitution* he and members of the public had locus to move this Court in public interest.

15. The Petitioner asserted that jurisdiction of PPARB under Section 28(1) (a) and 167(1) of PPADA does not oust this Honourable Court's jurisdiction on constitutional infractions.

16. In conclusion, the Petitioner urged this Court to dismiss the Preliminary Objection.

The submissions:

17. The Petitioner filed written submissions dated 17th January 2022.

18. It was his case that that the doctrine of exhaustion of other remedies is not a blanket one. In reference to the decision in Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR, it was his case that it is subject to exceptions. In the case it was observed;

> ...What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly...

19. The Petitioner maintained that the instant dispute exuded exceptional circumstances that warranted this Court's interference. The South African decision in Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) para 39 were exceptional circumstances was discussed as follows;

> .... What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile....

20. As in his Grounds of Opposition, the Petitioner reiterated that the alternative process provided for by section 167, 169 and 170 of the PPAD Act excluded him from participating in the process before the Board.

21. While arguing the Doctrine of Ripeness, the Petitioner submitted that the Court should take notice of the fact that, whereas the Board only has jurisdiction where 'notification of award' has been made, the instant Petition's cause of action arose before any bids had been processed and a 'notification of award# made.

22. The Petitioner argued that since the 'notification of award' was a condition precedent to the exercise of the Board's jurisdiction, the Board does not have jurisdiction to entertain the issues in the Petition due to the doctrine of ripeness.

23. The Petitioner submitted that by requiring under section 167(2) and 169 of the PPDA a mandatory refundable deposit and by requiring at section 190(c) of the Act that the tenderer be notified as successful by the procuring entity a necessary party to proceedings before the Board, a justiciable controversy only matures before the Board where the procuring entity has evaluated bids and made a notification of award.

24. In making its case on locus standi the Petitioner submitted that since did not fall within the categories provided for under section 170 of the PPDA then he lacked jurisdiction to approach the Review Board.

25. In justifying that the Petition was a public interest litigation, the Petitioner submitted that given that a party moving the Board is required to pay a mandatory refundable deposit that is not less than ten per cent of the cost of the contract, it is submitted that proceedings before the Board undermine the principle of public interest litigation which is enshrined in Articles 22 and 258 of *the Constitution*.

26. It further was its case that by providing that a request for review shall be accompanied by a refundable deposit of not less than ten per cent of the cost of the contract, sections 167(2) and 169 of the Act are an absolute bar to public interest litigants, such as the Petitioner.

27. On the foregoing, the Petitioner submitted that the mandatory deposit impedes public interest litigation and as such, public interest litigants like him cannot be expected to litigate before the Board.

28. The Petitioner further rejected the contention that the Public Procurement Regulatory Authority established under section 8 of the PPD Act lacked the jurisdiction to hear and determine the issues raised in the Petition. It was his case that under section 9(1)(h) the function of said authority is 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.

29. In conclusion, the Petitioner submitted that this Court has jurisdiction as the Court of first instance and could not get redress anywhere else. It urged the Court to find that the Preliminary Objection was meritless.

Analysis:

30. Having appreciated the factual and legal foundation of the objection, there is only one issue for determination and it is whether the objection is merited.

31. As the contention revolves on the issue of jurisdiction, it is imperative to briefly interrogate the concept and its significance.

32. In Nairobi High Court Petition No. E282 of 2020 David Ndii and & 4 Others -vs- The Attorney General & Others, this Court comprehensively discussed the issue of jurisdiction and a reproduction thereof follows: -

> 21. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
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> 22. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:
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> By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

23. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

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...

24. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

1) .....

2) The jurisdiction either exists or does not ab initio ...

3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

25. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

26. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent ....

27. Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -

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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction

of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

28. And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, the Court of Appeal further stated:

> (44) .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

29. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from *the Constitution*, an Act of Parliament or a settled judicial precedent.

33. The Respondent sought to oust the jurisdiction of this Court based on the argument that Sections 28, 167 and 175 of the PPD Act provided avenues that ought to first address the issues before this Court assumes jurisdiction.

34. The objection hinges on the doctrine of exhaustion also known as the Constitutional Avoidance doctrine which is among the three doctrines forming the concept of non-justiciability.

35. It will, therefore, in order to, in the first instance, have a brief look at the doctrine.

36. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution. In that constitutional spirit, laws have been developed to guide how such mechanisms are to be achieved. Likewise, Courts have developed jurisprudence in support of the position that Courts must be the final arbiter in instances where alternative dispute resolution avenues are provided for in law. As said earlier, one such avenue is the doctrine of exhaustion.

37. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

> 52. 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

42. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

> 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. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

38. The Court also 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 R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), 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 Constitution* or 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. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. 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.

61. 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. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. 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.

39. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

40. Further, in Civil Appeal No. 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are

enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

41. Having had a glimpse on the doctrine, the next consideration is whether the Petitioner had audience or the requisite locus standi before the Public Procurement Administrative Review Board (hereinafter referred to as 'the Review Board').

42. For ease of this discussion, this Court will reproduce Part XV of the PPAD Act, and as under: -

> Part Xv – Administrative Review Of Procurement And Disposal Proceedings
>
> 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.
>
> (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 62 of this Act; and
>
> (c) where a contract is signed in accordance with section 135 of this Act.
>
> 168. Notification of review and suspension of proceedings
>
> Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.
>
> 169. Rejection of requests by Review Board Secretariat

The Review Board Secretariat shall reject a request for a review where no appeal fees were paid within the prescribed time.

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.

171. Completion of review

(1) The Review Board shall complete its review within twenty one days after receiving the request for the review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

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.

174. Right to review is additional right

The right to request a review under this Part is in addition to any other legal remedy a person may have.

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.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty- five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

43. There is no doubt that the foregoing Part XV of the Procurement Act deals with dispute resolution mechanisms.

44. The preamble to the Procurement Act describes it 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

45. Article 227 of *the Constitution* provides as under: -

Procurement of public goods and services

(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.

46. Section 3 of the Procurement Act provides the values and principles that ought to guide public procurement and asset disposal. The provision states as follows: -

3. Guiding principles
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*, 2012 (No. 19 of 2012);

(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) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors.

47. It is, therefore, apparent that the Procurement Act fuses the relevant aspects of *the Constitution* such that whenever the Procurement Act is applied, that can only be within the confines of *the Constitution*. It also means that the Review Board, being a creature of the Procurement Act must, in discharging its mandate, uphold and defend *the Constitution* and the law. Of course, that calling is expressly so provided for in Article 3 of *the Constitution* to the extent that every person, as defined in Article 260 of *the Constitution*, has an obligation to respect, uphold and defend *the Constitution*.

48. Putting it more succinctly, the Review Board has the jurisdiction to determine whether *the Constitution* and the law were violated by a procuring public entity in respect to public procurement and assets disposal proceedings.

49. This Court, therefore, takes great exception to the position that Tribunals, quasi-judicial bodies, State organs or any person, except Courts of law, cannot determine whether *the Constitution* and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of *the Constitution* and in mandatory terms, obligates every person, as defined in Article 260 of *the Constitution*, to respect, uphold and defend *the Constitution*.

50. Further, the people of Kenya expressly demanded that *the Constitution* applies to and be applied by the current and future generations. In its Preamble *the Constitution* states as follows: -

We, the people of Kenya-

Acknowledging .....

Honouring .....

Proud ....

Respectful ....

Committed .....

Recognising ....

Exercising .....

Adopt, Enact and give this Constitution to ourselves and to our future generations.

51. In discharging the said constitutional-calling, the persons, which include Tribunals and quasi-judicial bodies, must apply *the Constitution* and the law. A body which applies *the Constitution* and the law definitely has the capacity to understand and ascertain whether the very Constitution and law it is supposed to uphold is infringed. That can be the only reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend *the Constitution* and the law. Such a finding will be in itself unconstitutional.

52. It is, hence, the finding and holding of this Court, that the Review Board has unfettered jurisdiction to determine whether *the Constitution* and the law is infringed in procurement and disposal proceedings by public entities.

53. Having so found, I return to the germane question as to whether the Petitioner had audience before the Review Board.

54. Section 170 of the Procurement Act provides for the parties to a review. The parties are as follows: -

    (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.

55. There is no doubt that the Petitioner did not fall within the first three categories of the parties. That is because was not the person who requested for the review neither was he the accounting officer of the entity and nor was he the tenderer notified as successful by the Respondent. The Petitioner is a public-spirited Kenyan desirous of defending *the Constitution* and public interest.

56. Could the Petitioner, therefore, be falling within the last category of the parties to a review under Section 170 of the Procurement Act? That category is 'such other persons as the Review Board may determine'.

57. In order to appreciate all those who have access to the Review Board under the Procurement Act, Part XV thereof ought to be read holistically. The provision must be read conjunctively as opposed to disjunctively. I say so because there is a danger of limiting those having access to the Review Board to the two categories of persons named in Section 167(1) of the Procurement Act who are a candidate or a tenderer.

58. A reading of Section 170 of the Procurement Act introduces two other categories of person with access to the Review Board. They are the accounting officer of the procuring entity and such other persons as the Review Board may determine.

59. As it has been demonstrated above that the Review Board has powers to determine whether *the Constitution* and the law is infringed, then the first port of call whenever a party is challenging a procurement or a disposal process by a public entity on the basis of *the Constitution* and the law, is the Review Board.

60. The only exception to the foregoing requirement is when a party demonstrates that any of the exceptions to the doctrine of exhaustion apply to the instant dispute. It is only in such instances that the Review Board will lack jurisdiction.

61. There is, therefore, the need to ascertain if the Petitioner in this case fell under the persons contemplated under the category of 'such other persons as the Review Board may determine'.

62. In order to understand the context in which the term ''such other persons as the Review Board may determine' is used in Section 170 of the Procurement Act, there is need to look at one of the rules of interpretation. That is the ejus dem generis rule.

63. The ejus dem generis rule is an interpretational principle in law. It is a rule of construction that guides Courts in reconciling any incompatibility between specific and general words.

64. Stroud's Judicial Dictionary 3rd Edition, defines the principle as follows:

> Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejus dem generis with, and not of a quality superior to, or different from, those specifically enumerated.

65. The Black's Law Dictionary, Garner A. Bryan, 9th Edition, Thomson Reuters 2009 at page 594 defines the doctrine in the following manner: -

> A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals –despite its seeming breadth- would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

66. Therefore, where general words follow specific words in an enumeration describing the legal subject, ejus dem generis principle requires that the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.

67. The rule, therefore, accomplishes the purpose of giving effect to both the specific and the general words by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.

68. In his treatise titled Sutherland Statutory Construction 3rd Edition, 1984, Horrack Sutherland states at paragraph 4910 that for the doctrine to apply, the following conditions must exist: -

i. That statute contains an enumeration by specific words;

ii. The members of the enumeration constitute a class;

iii. The class is not exhausted by the enumeration;

iv. A general term follows the enumeration; and

v. There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

69. The Court of Appeal in Nairobi Civil Appeal 351 of 2012 Commissioner for the Implementation of *the Constitution* -vs- Attorney General & 2 others [2013] eKLR clearly brought out the application of the doctrine. Before it, was the question whether 'the marginalized' fell within the category of persons named in Article 97(1)(c) of *the Constitution*. The said Article is in respect of Membership of the National Assembly and states as follows: -

97.

(1) The National Assembly consists of-

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

70. The Learned Judges of Appeal spoke to ejus dem generis in reference to the High Court decision in Rangal Lemeguran & Others -vs- Attorney General & 2006 eKLR, where in interpreting the term special interests the High Court observed as follows: -

> Although *the Constitution* does not define special interests contemplated by Section 33(1) [of the former Constitution] they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all-in a democracy. In other words, the special interests mean those interests which the normal electioneering process has failed to capture and represent.

71. The Judges then agreed with the proposition that 'the marginalized' fell into the group anticipated by the Article 97(1)(c) of *the Constitution*. The Judges had the following to say on the doctrine: -

.... there are some clear categories of people that qualify to be viewed as representing special interests, namely:

i. ethnic minorities

ii. the youth;

iii. the blind;

iv. the deaf;

v. the physically disabled.

We can on our part add that religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while *the Constitution* has also

in the wisdom of the framers and the people of Kenya made inclusion of "workers" as a special interest group.

From what we have said so far, it should be obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalization and disadvantage keeping them away from the centre of the political process. That, to us, is the logical, rational nexus that at once attracts and glues such a class into proper location in both Section 34(9) of the *Elections Act* and Article 97(1) (c) of *the Constitution*.

That being our view of the matter, we agree with the appellant that an interpretation of Article 97(1)(c) of *the Constitution* invites the application of the ejus dem generis rule. The youth, persons with disabilities and workers clearly fall in the category of the marginalized, the disadvantaged and the vulnerable-those not sufficiently empowered to muscle their way, generally speaking, into the inner sanctums of political and state power. They are the natural underdogs in the rough and tumble of the political jungle more likely than not to be elbowed out of the centre and off the field unless special affirmative and protective measures be taken to aid them.

72. Drawing from the foregoing, the category of persons contemplated as 'such other persons as the Review Board may determine', in Section 170 of the Act could only mean such persons who have an identifiable interest or stake in the procurement or disposal process. I say so because if a person has no meaningful interest or stake in a procurement or disposal process, then such a person has no business appearing before the Review Board.

73. A person considering himself, herself or itself, as having identifiable interest or stake in a procurement or disposal process and who is not among the person who requested for the review, or is not the accounting officer of the procuring entity and is not the tenderer notified as successful by the procuring entity, has the right to seek audience and demonstrate its interest before the Review Board. It, however, remains the discretion of the Review Board to either allow such a person to participate in the proceedings before it or not.

74. In making the decision as to whether a party may be allowed to take part in the review, the Review Board will consider, among other issues, whether any of the exceptions to the doctrine of exhaustion apply in respect of the party's interest.

75. Section 28 provides for functions of the Board as follows;

28. Functions and powers of the Review Board

(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.

76. Section 167 of the said Act provides as follows;

67. 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.

77. On the basis that the Procurement Act establishes the Review Board which has powers to determine whether any public procurement or disposal process is undertaken within *the Constitution* and the law, then, this Court would have to exercise restraint in dealing with this matter unless the Petitioner demonstrates any of the exceptions to the doctrine of exhaustion.

78. In discharging that burden, the Petitioner urged this Court to find that the Petition raised constitutional issues beyond the scope of the Board. Indeed, that is a holding argument. However, this Court will have to ascertain its veracity.

79. The prayers sought in the instant Petition have already been reproduced above. They are declarations that the raising of the Tenderers' Professional Indemnity Cover from a minimum Kshs 200 million to a minimum Kshs 1 Billion and that the raising of the total premium turnover for years 2019 and 2020 from an optimal Kshs 500 million to an Optimal Kshs 2 Billion was unlawful, unreasonable, oppressive, unfair, opaque, discriminatory and, therefore, unconstitutional, null and void ab initio. There were also other declarations that the tender be subject to affirmative action and that the tenders which had been issued by the Respondent as at the institution of this Petition and which called for bids were unconstitutional.

80. The Petitioner went into detail in pleading the manner in which *the Constitution* and the law were allegedly infringed as a basis of the above remedies. Several Articles of *the Constitution* and provisions of the law were cited in support.

81. In his submissions, the Petitioner further submitted that given that a party moving the Board was required to pay a mandatory refundable deposit that is not less than ten per cent of the cost of the contract, then the proceedings before the Board undermine the principle of public interest litigation which is enshrined in Articles 22 and 258 of *the Constitution*. Even though the argument raised a

serious constitutional issue, the instant Petition did not seek to challenge the constitutionality of the said provision.

82. The upshot is, hence, that all the reliefs sought in the Petition were readily available before the Board where the Petitioner was to first seek audience.

83. The Petitioner was of the erroneous view that he did not qualify to invoke the jurisdiction of the Board and, as such, declined to make such positive move. Equally, the Petitioner did not demonstrate how the Board will not be able to uphold the purpose, values and principles of *the Constitution*.

84. Having failed to demonstrate any of the exceptions to the doctrine of exhaustion, this Court finds that the Petition herein suffers a false start.

85. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that the Court file was among those that were misplaced during the Court's transfer from the Division which involved movement of so many files within quite a short time. Apologies galore.

86. In the end, the following orders hereby issue: -

    a. The Notice of Preliminary Objection dated 21st September 2021 is hereby upheld.

    b. This Court lacks the jurisdiction to deal with the Petition on the basis of the doctrine of exhaustion also known as the Constitutional Avoidance Doctrine. The Petition is hereby struck out.

    c. In view of the fact that it is a public interest litigation, each party shall bear their own costs

87. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF JUNE, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

N/A for Okiya Omtatah Okoiti, Petitioner in person.

Mr. Otieno, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.