



**Parbat Siyani Construction Limited v Kenyatta International Convention Centre (Constitutional Petition E397 of 2021) [2023] KEHC 1603 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1603 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E397 OF 2021**

**AC MRIMA, J**

**MARCH 10, 2023**

**BETWEEN**

**PARBAT SIYANI CONSTRUCTION LIMITED ..... PETITIONER**

**AND**

**KENYATTA INTERNATIONAL CONVENTION CENTRE ..... RESPONDENT**

**RULING**

**Background**

1. The genesis of this matter has been clearly captured by both parties in their written submissions. As a recap, I will adopt the background favoured by the Respondent for it is tendered in Word format as opposed to the Petitioner who instead scanned its submissions.

2. The summary of the case as, rightly so, captured by the Respondent is as follows: -

The petitioner alleges as follows:

1. That on or about December 24, 2018, the Respondent herein published a tender on the local dailies and on its portal for the submission of bids in respect of Tender Reference No KICC/49/18-19. The tender invitation was for the proposed provision and installation of a prefabricated exhibition Centre at KICC Grounds.
2. That the petitioner's representative attended a site visit at the Respondent's premises on January 7, 2019 and after receiving a response and clarification to queries from the chief architect, Ministry of Public Works, Housing and Development, it submitted its tender on January 14, 2019.



3. That by a letter dated January 31, 2019, the petitioner received a letter of regret that its bid was not successful.
4. That on February 18, 2019, the tender was re-advertised in the local dailies and the Respondent's portal in respect of Tender Reference No KICC/52/18-19 and the petitioner submitted its bid.
5. That by a letter dated April 1, 2019, the respondent informed the petitioner that it had passed the technical stage and that the financial bids would be open for evaluation on April 3, 2019 and on April 5, 2019 after the financial bids had been evaluated, the petitioner received a letter from the respondent requesting for clarification on specifications.
6. That by a letter dated April 11, 2019, the petitioner received a notification of award from the Respondent in respect of Tender Ref No KICC/52/18/2020 at a price of Kshs 799,015,957.78 inclusive of all taxes. And the petitioner went ahead to accept the award by its letter dated April 23, 2019 there being no appeal filed at the review board.
7. That the respondent invited the petitioner for contract negotiations and presentation of the proposed design for May 13, 2019. The formal contract signing was scheduled for signing on May 16, 2019 but due to further negotiations on the conditions of the contract which were to be incorporated into the final draft, the contract signing was rescheduled.
8. That the respondent called the petitioner's representatives for an urgent meeting on May 27, 2019 but no formal contract was signed.
9. That subsequent to the notification of award and approval of the design by the respondent, the petitioner commenced post award implementation of the contract whereby it expended significant cost.
10. On April 8, 2020 the respondent wrote to the petitioner informing the petitioner that due to circumstances beyond their control, they were not in a position to continue the undertaking of the project.

The Petitioner therefore prays for the following:

1. A declaration that the Respondent's purported decision to terminate the tender award vide the letter dated April 8, 2020 is irrational and unreasonable.
2. A declaration that the Respondent's decision to arbitrarily terminate the tender award without providing justifiable reasons contravenes Article 227 of the Constitution.
3. A declaration that the Respondent was in breach of the petitioner's right to fair administrative action under Article 47(1) of the Constitution and the petitioner's legitimate expectation that the Respondent would formalize the contract as required under Section 134 and 135 of the Public Procurement and Asset Disposal Act, 2015
4. A declaration that the petitioner is entitled to compensation for violation of Articles 10, 47 and 227 of the Constitution as read together with Section 3, 134 and 135 of the Public Procurement and Asset Disposal Act, 2015.
5. An order for the Respondent to pay the petitioner the sum of Kshs 339,295,223.52 as compensation as set out in Paragraph 59 of the petition.
6. Costs of the petition.



## Response to the Petition

In response to the petition, the Respondent filed a Notice of Preliminary Objection dated November 16, 2021.

It is the respondent's case that:

1. There are no constitutional issues raised in the petition for the court's determination.
2. The events leading to this matter are based on the proposed tender for installation of Prefabricated Exhibition and Conference and the process of procurement was followed, this Court should therefore invoke the doctrine of constitutional avoidance.
3. The Petitioner has not demonstrated before the Honourable Court how the Respondents have violated his Constitutional Rights as it is well settled law that the petitioners ought to demonstrate how the respondents' conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. This was established in the case of [\*Anarita Karimi Njeri vs R \(1976-1980\) KLR 1272\*](#)
4. This Honourable Court lacks the jurisdiction to entertain the suit due to the following reasons:
  - a) Due process, Laws and Regulations as set out in the [\*Public Procurement and Asset Disposal Act, 2015\*](#) were followed in procuring and eventual cancellation of the proposed tender for installation of Prefabricated Exhibition and Conference at KICC Grounds-KICC/52/18-19.
  - b) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.
  - c) The law requires parties to the contract to have it signed within 30 days from the date of notification of contract award unless there is an administrative review request.
  - d) The petitioner never made any request to the Public Administrative Review Board requesting for review of a decision by the Corporation if he felt aggrieved by their decision.
  - e) The Public Administrative Review Board has the mandate of reviewing, hearing and determining tendering and asset disposal disputes.
  - f) The tender validity period for the proposed tender for installation of Prefabricated Exhibition and Conference at KICC Grounds-KICC/52/18- 19 was One Hundred and Eighty (180) days, a period which the petitioner ought to have instituted any claim against the Respondent should he have felt aggrieved by their decision.
  - g) The petitioner has not disclosed why it took so long to bring this petition to court from the date of award of tender and is therefore guilty of laches.
5. At the point of cancellation of the award, no contract had been signed between the petitioner and the Respondent as envisioned under the Section 87 (1) & (4) and Section 135 (1) & (4) of the Public Procurement and Assets Disposal Act of 2015.



6. The petitioner has not met the requirements for successful reliance on the doctrine of legitimate expectation.
  7. The Petition offends the provisions of Sections 106 and 107 of the *Evidence Act* on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence on the special damages sought and hence the Petition is fundamentally defective.
  8. No resolution had been passed authorizing the proceedings in this case yet it is required that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes.
3. The parties herein also filed extensive submissions and cited several decisions in support of their rival positions.

**Analysis:**

4. Given the length and nature of the submissions tendered, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein. The Court remains grateful to the parties for their comprehensive submissions.
5. Having carefully considered this matter, I find that the following issues are for determination: -
  - a. Whether the principle of constitutional avoidance applies in this matter by dint of the exhaustion doctrine.
  - b. If the answer to (a) above is in the negative, whether the Petition raises any constitutional issues for determination.
6. I will begin with the first issue.

**a. Whether the principle of constitutional avoidance applies in this matter by dint of the exhaustion doctrine:**

7. The Court in *Kiriro wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR* dealt extensively with the larger concept of non-justiciability. It remarked that the concept of non-justiciability is comprised of three doctrines namely the Political Question Doctrine, the Constitutional-Avoidance Doctrine (also referred to as the Constitutional-Avoidance Rule or the doctrine of exhaustion) and the Ripeness Doctrine.
8. On the Constitutional-Avoidance Doctrine, the Court had the following to say: -
  105. The doctrine is at times referred to as the Constitutional-Avoidance Rule. *Black's Law Dictionary, 10th Edition* at page 377 defines it as:  
The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.
  106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR* held:



(256) The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

9. The doctrine of exhaustion was also the subject in 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*.

10. 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 (IEBC) 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:

43. 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.

11. 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 (IEBC) & 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.
12. 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 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.

13. Further, in Civil Appeal 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.
14. 159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
  - (a) .
  - (b) .
  - (c) Alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.
15. Clause 3 is on traditional dispute resolution mechanisms.
16. In applying the above guidance, Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
17. In this matter, the Respondent contended that the Petitioner ought to have filed its claim before the Public Procurement Administrative Review Board (hereinafter referred to as 'the Review Board') established under Section 27 of the Public Procurement and Asset Disposal Act, No 33 of 2015 (hereinafter referred to as 'the Act').



18. The Petitioner vehemently opposed the position. It submitted at length and referred to several decisions that the jurisdiction of the Review Board did not encompass the instant matter since the current dispute was not a commercial one, but one which raised constitutional issues and as such it could only be determined by the High Court.
19. In determining whether the Petitioner had audience before the Review Board, I will begin with a reproduction of Part XV of the 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.

20. There is no doubt that Part XV deals with dispute resolution mechanisms within the Act. But, what is the Act all about? The Preamble to the Act states as follows: -

'AN ACT of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes'

21. 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.
22. Section 3 of the Act provides the values and principles that 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—
- 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.
23. It is, therefore, clear that the Act fuses the relevant aspects of the *Constitution* such that whenever the Act is applied, that can only be within the confines of the *Constitution*. It, hence, means that the Review Board, being a creature of the Act must, in discharging its mandate, uphold and defend the *Constitution*. 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*.
24. Echoing the position that the Review Board has the jurisdiction to determine whether a certain provision of the *Constitution* is infringed was the High Court of Kenya at Nairobi in *Constitutional Petition No E488 of 2021 (Consolidated with Petition No E465 of 2021) Stephen Moseo Mirambo and Boaz Atanga Warugu vs Independent Elections and Boundaries Commission & Others*. The decision was rendered by yours truly and I have not departed from the reasoning therein.
25. In that case, the Court analysed the provisions of the Act and the *Constitution* and in finding that the Review Board has the jurisdiction to determine whether a certain provision of the *Constitution* is infringed, but cannot interpret the *Constitution*, the Court rendered itself as follows: -



112. 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.
113. 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.
114. 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.'

115. 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.
  116. 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.
26. The Court went on to say: -
159. As I come to the end of this discussion, it is imperative to remind ourselves that Article 159(2) (c) of the Constitution vouches for alternatives modes of dispute resolution. To that end, the Constitution and Parliament have created many entities with powers to handle specific and specialized disputes.
  161. It is a well settled principle in law that where the Constitution or a statute has prescribed an alternative mode of resolution of disputes, the such mode must be strictly adhered to. The only exception should be instances where it is sufficiently demonstrated that the alternative modes are inept.



162. In this case, the Review Board is a specialized entity. It is comprised of Advocates, Arbitrators, Procurement experts, Accountants, Engineers and Architects. In fact, under Section 29(1)(a) of the Procurement Act, the Chairperson must possess qualifications and experience as that of a Judge of the High Court. With such a carefully chosen composition, the Review Board may be more expertly endowed than the contemporary Courts in matters procurement and disposal in public entities.
163. To, therefore, contend that such a body whose Chairperson is one with qualifications and experience equivalent to a Judge of the High Court cannot determine if the Constitution and the law is properly or otherwise complied with in a given set of circumstances, is not only unimaginable, but tantamount to opening a floodgate to litigants pouring out all manner of matters which call for special expertise into the Courts. It also leads to defeating the very purpose in Article 159 of the Constitution.
164. In sum, Courts must remain vigilant and alive to the wider doctrine of non-justiciability which doctrine ought to be applied in appropriate cases.
27. As a point of emphasis, the duty to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights or if the Constitution is contravened is to be distinguished from the duty to interpret the Constitution.
28. Interpretation of the Constitution is a serious judicial function. While interpreting the Constitution, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction.
29. Unlike the High Court, Tribunals and other quasi-judicial bodies including the Review Board, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights or if a certain provision of the Constitution is contravened. That is an express Calling even in Section 3 of the Act.
30. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights or if the Constitution is contravened and interpreting the Constitution. Whereas the former is not exclusively a judicial function, the latter is.
31. There is also another issue which calls for clarification. It is the contention, which is mostly misunderstood, that the Court of Appeal in Al Ghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy & 2 Others (2017) eKLR and in other decisions held that where a party pleads issues that verge on constitutional interpretation especially where an important constitutional value is at stake, then the Review Board will not be the appropriate forum for such a dispute. Many a times, the above is taken to mean that the Review Board cannot handle any matter where a provision of the Constitution is cited.
32. That position cannot be correct. This Court wholly and respectfully agrees with the Court of Appeal on the position that where a party pleads issues that verge on constitutional interpretation especially where an important constitutional value is at stake, then the Review Board will not be the appropriate forum for such a dispute.



33. The Court of Appeal was clear that if the dispute verges on constitutional interpretation then the Review Board lacked jurisdiction. That is true and in line with Article 165(3)(d) of the Constitution. That position is contrasted with one where the Review Board is only called upon to determine whether a procurement or disposal process was in line with the Constitution and the law.
34. In fact, what the Court of Appeal was, in other words saying, was that the doctrine of exhaustion does not apply in matters calling for constitutional interpretation under Article 165(3)(d) of the Constitution. Such matters pass the exemption to the exhaustion doctrine and the Review Board cannot exercise any jurisdiction over the same. Further, the Review Board has no powers to interpret the Constitution under Article 165(3)(d) of the Constitution, but only the High Court.
35. Having so found, there is yet another important issue which calls for clarification. The issue is whether an entity with powers to determine the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights or if the Constitution is contravened, like the Review Board in this case, outrightly ousts the jurisdiction of the High Court. Indeed, that is the heart of the doctrine of exhaustion.
36. In such instances, unless the exceptions to the doctrine of exhaustion apply, the High Court will postpone judicial consideration of such disputes until after the available avenues are fully adhered to. Therefore, on one hand, in cases where a party calls upon the High Court to determine whether there is denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights or if the Constitution is contravened, and, on the other hand, a statute provides for an alternative avenue for the consideration of the dispute, then unless any of the exceptions to the doctrine of exhaustion applies, the High Court must decline jurisdiction over the matter.
37. I now return to the germane question as to whether the Petitioner had audience before the Board.
38. Section 170 of the 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.
39. There is no doubt that the Petitioner was the tenderer who was notified as successful by the Respondent.
40. In its Petition, the Petitioner prayed for the following reliefs: -
  1. A declaration that the Respondent's purported decision to terminate the tender award vide the letter dated April 8, 2020 is irrational and unreasonable.
  2. A declaration that the Respondent's decision to arbitrarily terminate the tender award without providing justifiable reasons contravenes Article 227 of the Constitution.
  3. A declaration that the Respondent was in breach of the petitioner's right to fair administrative action under Article 47(1) of the Constitution and the petitioner's legitimate expectation that the Respondent would formalize the contract as required under Section 134 and 135 of the Public Procurement and Asset Disposal Act, 2015.



4. A declaration that the petitioner is entitled to compensation for violation of Articles 10, 47 and 227 of the Constitution as read together with Section 3, 134 and 135 of the Public Procurement and Asset Disposal Act, 2015.
  5. An order for the Respondent to pay the petitioner the sum of Kshs 339,295,223.52 as compensation as set out in Paragraph 59 of the petition.
  6. Costs of the petition.
41. Section 173 of the Act accords the Review Board wide powers when dealing with a Request for Review. For instance, the Board may annul anything the accounting officer of a procuring entity has done in the procurement or disposal proceedings, including annulling the procurement or disposal proceedings in their entirety; give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings or it may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.
  42. The Review Board may also order the payment of costs as between parties to the review in accordance with the scale as prescribed and may also order termination of the procurement process and commencement of a new procurement process.
  43. This Court has already set out the nature of the reliefs sought in the Petition. They are numerous reliefs. They include declarations that the Constitution and the law were infringed, compensation for the violation and contravention of the Petitioner's rights, costs, among others.
  44. A reading of the Section 173 of the Act leaves no doubt that the Review Board has specific powers. The powers are clearly stated as much in the law. None of the powers of the Board relates to the grant of award of damages or grant of compensation for constitutional violations.
  45. If this matter were to proceed before the Review Board, still the Review Board will not be able to deal with the prayer for award of damages and compensation for the violation and contravention of the Petitioner's rights.
  46. It is, hence, apparent that, in the circumstances of this matter, the Review Board will not accord an adequate forum for the adjudication of the dispute as laid in the Petition. To that extent, the jurisdiction of the Review Board is ousted and it is the High Court which ought to deal with this matter.
  47. In other words, the principle of constitutional avoidance or the doctrine of exhaustion is not applicable in this case.
  48. As the first issue has been answered in the negative, I now proceed to deal with the next issue.

**b. Whether the Petition raises any constitutional issues for determination:**

49. It is a fact that whereas a cause of action may survive ouster under the exhaustion doctrine, it is not a guarantee that it must be finally heard and determined. One of the key considerations which this Court must always satisfy itself is whether the matter raises a constitutional issue(s) as the case may be.
50. This requirement was discussed in Nairobi High Court Constitutional *Petition No E406 of 2020 Renita Choda vs Kirit Kapur Rajput (2021) eKLR*. This is what the Court stated: -



33. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.
34. 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. 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.
35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide 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.
36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
37. The Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others case (supra) had the following on Constitutional Petitions: -

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 Njeru vs. 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.

39. Both parties are in agreement with what a constitutional issue is. They both referred to *Fredricks & Other vs MEC for Education and Training, Eastern Cape & Others* case (supra) where the 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.'

40. 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.

41. 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.'

42. 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 Manjit Singh Amrit* case (supra) 'Courts must interpret it with all liberation they can marshal'
43. 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* case (supra) where a Multi-Judge bench affirmed



the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

51. There is no need to belabour this issue. The Petition is clear on the cause of action. The Petitioner has cited the various provisions of the Constitution alleged to have been contravened and has also gone ahead to attempt to demonstrate the manifestation of contravention or infringement. What remains is for the trial Court to ascertain whether the threshold for the Petition to succeed has been attained.
52. In other words, there are defined constitutional issues for determination in the Petition.
53. As I come to the end of this ruling, there are three other issues which I wish to briefly address. The issues are, first, whether a resolution of the Petitioner company was obtained prior to instituting the instant proceedings. Second, whether there was inordinate delay in instituting the instant proceedings, and, third, the issue of legitimate expectation.
54. This Court would wish to remind the parties that it is dealing with a preliminary objection. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.
55. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) EA 696* page 700 when the Court observed as follows: -

'So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.'

56. In *Civil Suit No 85 of 1992, Oraro vs Mbaja [2005] 1 KLR 141*, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

'I think the principle is abundantly clear. A 'preliminary objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.'

57. In *Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177*, it was observed that a Court in determining a preliminary objection can look at the pleadings and other



relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

'In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.'

58. The three issues highlighted above do not pass the test of being raised as preliminary objections. They are all based on facts which are yet to be settled. Evidence ought to be called to deal with the issues. They are, hence, contested issues and as such they cannot pass as preliminary objections. Such belong to the realm of full hearing of the Petition or if they are formally raised by way of applications. Before then, none of them has any legal leg to stand on.

**Disposition:**

59. The foregoing discussion has yielded that the Petition cannot be voided on the principle of constitutional avoidance and that there are constitutional issues to be addressed.
60. Consequently, this Court hereby makes the following final orders: -
- a. The Notice of Preliminary Objection dated November 16, 2021 is unsuccessful and is hereby dismissed.
  - b. The Respondent shall bear the costs of the objection.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 virtually delivered in the presence of:

Mr. Issa, Counsel for the Petitioner.

Miss Chibole, Counsel for the Respondent.

Regina/Chemutai – Court Assistant.

