



**Okoiti v Kenya Ports Authority & 5 others; Portside Freight Terminals Limited & 8 others (Interested Parties) (Petition E045 of 2021 & E018 of 2022 (Consolidated)) [2023] KEHC 20571 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E045 OF 2021 & E018 OF 2022 (CONSOLIDATED)**

**JN ONYIEGO, J  
JULY 18, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF NATIONAL TREASURY &  
PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PORTSIDE FREIGHT TERMINALS LIMITED ..... INTERESTED PARTY  
KILINDINI TERMINALS LIMITED ..... INTERESTED PARTY  
MOMBASA GRAIN TERMINAL LIMITED ..... INTERESTED PARTY  
KAPA OIL REFINERY ..... INTERESTED PARTY  
AFRICA PORTS AND TERMINALS ..... INTERESTED PARTY  
MULTISHIP INTERNATIONAL ..... INTERESTED PARTY  
KIPEVU INLAND CONTAINER EPZ LIMITED ..... INTERESTED PARTY  
DOCK WORKERS UNION ..... INTERESTED PARTY  
KATIBA INSTITUTE ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH  
PETITION E018 OF 2022**

**BETWEEN**



OKIYAH OMUTATAH OKOITI ..... PETITIONER

AND

KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT

PORTSIDE FREIGHT TERMINALS LIMITED ..... 2<sup>ND</sup> RESPONDENT

PORTSIDE CFS LIMITED ..... 3<sup>RD</sup> RESPONDENT

HEARTLAND TERMINALS LIMITED ..... 4<sup>TH</sup> RESPONDENT

## JUDGMENT

### Background

1. On 16<sup>th</sup> August, 2021, the Petitioner, Okiya Omtatah Okoiti, who describes himself at paragraph 1 of the Petition, as a law-abiding citizen and a human rights defender, lodged a Petition dated 12<sup>th</sup> August 2021 in which he alleged contravention of fundamental rights and freedoms under Articles 10, 27, 47, 201 and 227 of *the Constitution* of Kenya 2010.
2. The 1<sup>st</sup> respondent is a state corporation established by an Act of parliament cap 391 laws of Kenya whose responsibility is to maintain, operate, improve and regulate all scheduled seaports' activities within the country. Its principle role among others is to provide and aid navigation, pilotage, tuggage, mooring, stevedoring and shore handling.
3. The second respondent is the cabinet secretary ministry of National treasury and planning appointed pursuant to *the constitution* of Kenya and for purposes of this case the *public finance management Act* of 2012.
4. The 1<sup>st</sup> to 7<sup>th</sup> interested parties are limited liability companies variously incorporated under the *companies Act* performing their respective businesses as per their individual Memorandum of Association and Articles of Association.
5. The 8<sup>th</sup> interested party is a union representing all workers at the port of Mombasa hence cited as the interested.
6. The 9<sup>th</sup> interested party is a civil society organization which describes itself as a champion of public interest litigation.
7. The Petitioner is seeking the following substantive orders;
  - a) A Declaration that the decision of the 1<sup>st</sup> Respondent's Board of Directors contained in the letter dated 11<sup>th</sup> March 2021 to approve the grant of license for the operation of the second bulk grain facility rests with the management and is not a decision of the Board.
  - b) A Declaration that the 1<sup>st</sup> Respondent's Board of Directors acted ultra vires, without jurisdiction and usurped the powers conferred to the management and the accounting officer with respect to the tendering process in purporting to approve and grant the 1st Interested Party a license to operate a second bulk grain handling facility.
  - c) A Declaration that the 1<sup>st</sup> Respondent took into account irrelevant factors and consideration that the 1st Interested Party's proposal was attractive due its "uniqueness and creativity deployed" thus meriting the consideration.



- d. A Declaration that the 1<sup>st</sup> Respondent's Board of Director's decision dated 11<sup>th</sup> March 2021 purporting to approve a proposal that sought to construct a facility outside the approved location under the Master Plan is excessive, abuse of power and irrational.
- e. A Declaration that the decision dated 11<sup>th</sup> March 2021 to invoke the use of Specially Permitted Procurement Procedure under Section 114A of the PPAD is in violation of *the Constitution* and does not lie with the Board of Directors but with the Accounting Officer who initiates and undertakes the entire procurement process for a state corporation.
- f. A Declaration that the decisions and /or action of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents dated 11<sup>th</sup> March 2021 and 28<sup>th</sup> June 2021 in so far as they purport to use Specifically Permitted Procurement Procedures in favour of the interested Party, is unconstitutional, illegal and/or irregular as it contravenes the provisions of *the Constitution* and regulation 107(3) of the Procurement Regulations.
- g. A Declaration that the Respondents' decision to solely consider the 1<sup>st</sup> Interested Party's proposal, despite the same being in conflict with the Master Plan, proceed to approve the same and adopt the use of Specially Permitted Procurement Procedure in its favor is unlawful, illegal, irrational and ultra vires.
- h. A Declaration that its wrongful and un-procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by the 1<sup>o</sup> Respondent's Port Master Plan, which Master Plan is yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.
- i. A Declaration that the 1<sup>st</sup> Respondent's intended award of contract and license to the 1<sup>st</sup> Interested Party for the development of the Second bulk grain handling facility gravely violates Articles 10, 201 and 227 of *the Constitution* of Kenya 2010.
- j. A Declaration that the procurement and license for development of a second bulk grain handling facility has to be procured through competitive bidding as required by *the Constitution* and the laws of Kenya.
- k. An order of certiorari to remove into this Court and quashing the decision of the 2<sup>nd</sup> Respondent contained in the letter dated 28<sup>th</sup> June 2021 granting the 1<sup>st</sup> Respondent's approval to use Specially Permitted Procurement Procedure for the Procurement of a second bulk grain handler facility in favor of the 1<sup>st</sup> Interested Party be and is hereby issued.
- l. A mandatory Order be and is hereby issued compelling the Respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa must be undertaken strictly in accordance with the law, including through competitive bidding.
- m. An Order of Prohibition to restrain the Respondents from implementing the decision contained in the letter dated 28<sup>th</sup> June 2021 approving the use of Specially Permitted Procurement procedure to award the 1<sup>st</sup> Interested Party the contract for development of the second bulk grain handling facility be and is hereby issued.
- n. An Order of Prohibition to restrain the Respondents from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the public procurement laws be and is hereby issued.



- o. That the costs of this petition be provided for.
  - p. That such further and other reliefs that this Honourable Court may deem just and expedient to grant in the circumstances.
8. The petition herein is based on particulars set out on the face of it and an affidavit in support sworn by the petitioner on the same date. The genesis of this petition according to the petitioner stretches as far as back as the year 2004 when the 1<sup>st</sup> respondent allegedly developed its first master plan which was later reviewed in the year 2009. That due to ever evolving maritime industry and changes in government policy, the 1<sup>st</sup> respondent on 7<sup>th</sup> August 2019 launched its master plan for the period 2017-2047 which was a blue print to define its development mandate and activities for the next 30 years.
  9. That among the flagship activities outlined in the said master plan was the establishment and development of a second grain bulk handling facility by the year 2023. The plan was allegedly geared towards taking advantage of the development of Dongo Kundu as a special Economic Zone, the Lamu port and the revitalized Kisumu port.
  10. It is the petitioner's case that, according to the said master plan, the 1<sup>st</sup> respondent identified and projected that the second grain handling facility was to be located at either Dongo Kundu or Lamu Port.
  11. The petitioner further stated that, contrary to the 1<sup>st</sup> respondent's master plan, the 1<sup>st</sup> interested party submitted its application and proposal to the 1<sup>st</sup> respondent vide its letter dated 6<sup>th</sup> April 2020 proposing to construct a new berth (green field project) which was outside the 1<sup>st</sup> respondent's master plan and which proposal fell outside the earmarked areas of Lamu or Ndongo Kundu.
  12. It was the petitioner's averment that the 1<sup>st</sup> interested party's letter, had proposed that; the license for the bulk handling grains was to facilitate adequate capacity in handling grains for Kenya; a way leave to be issued for the development of an over-head conveyor belt through the g-section area of the port of about 450 metres length to the portside facility; a counter-part team to be formed to work with the 1<sup>st</sup> interested party in developing an island berth which they will finance; the counter-part team to be engaged in forming technical specifications including routing of overhead conveyors and the life of the project. That the team to work closely with the 1<sup>st</sup> interested party's management team in developing designs and doing financial analysis of the project to ensure smooth timely roll out and knowledge transfer.
  13. That after the technical team appointed by the 1<sup>st</sup> respondent reviewed the proposal by the 1<sup>st</sup> interested party it found the same not in conformity with its master plan as it was proposing to put the facility outside Ndongo Kundu zone and outside the land not utilized by the 1<sup>st</sup> respondent. That at the same time, the 2<sup>nd</sup> to 6<sup>th</sup> interested parties had submitted their respective proposals which were in conformity with the 1<sup>st</sup> respondent's master plan and that the 1<sup>st</sup> respondent's board had approved that they be subjected to competitive bidding by the 1<sup>st</sup> respondent.
  14. The petitioner further stated that, the 1<sup>st</sup> respondent vide its letter dated 23<sup>rd</sup> October 2017, approved the 1<sup>st</sup> interested party thus granting it a wayleave to operate at berth 11 subject to; the conformation of the SGR port relief line operations; 1<sup>st</sup> respondent's berth 11-14 rehabilitation designs and development besides the fulfilment of the PPP Act 2013.
  15. That without any basis and in flagrant violation, abuse, and breach of its own master plan, the 1<sup>st</sup> respondent board through its memorandum No. 33 of 2020 proceeded to review the 1<sup>st</sup> interested party's proposal by recommending the master plan to be amended to accommodate the 1<sup>st</sup> interested



- party's proposal which it described as unique. The petitioner argued that by the board purporting to approve the establishment of a facility outside its master plan while considering irrelevant factors amounted to acting in excess and abuse of its power and in contravention of *the constitution*.
16. He averred that pursuant to the 1<sup>st</sup> respondent's letter dated 11<sup>th</sup> March 2021 addressed to the cabinet secretary ministry of national treasury and planning seeking permission to invoke specially permitted procurement procedure under Section 114A of the PP&AD Act and regulation 107 of the regulations thereof to award the tender to the 1<sup>st</sup> interested party which was permitted by the respondent vide its letter dated 28<sup>th</sup> June 2021, the same was illegal and unconstitutional. He went further to state that, the process of initiating specially permitted procurement is the role of the accounting officer of KPA and not the KPA Board.
  17. It was the petitioner's position that the application of the specially permitted procurement was discriminatory to other bidders whose bids were not subjected to competitive bidding. That the procurement process where the 1<sup>st</sup> interested party was accorded preferential treatment without the entire process subjected to competition was unjust and unfair. That there was no equity, transparency and competitive bidding hence unconstitutional, unreasonable and unjustified to warrant exercise of this court's intervention and grant of reliefs provided under Article 165 (3) of *the constitution*.
  18. Contemporaneously filed with the petition was the notice of motion of even date seeking conservatory orders pending hearing and determination of the application and subsequently the petition. Upon being served with both the petition and the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 1<sup>st</sup> interested party filed their respective preliminary objections seeking dismissal of the application and petition on grounds that the court lacked jurisdiction as the matter properly lay with the public procurement review board. After canvassing the application, the court dismissed the Preliminary objections on 20<sup>th</sup> April 2022 thus holding that the court has jurisdiction.
  19. Meanwhile, during the pendency of the hearing of the petition, the petitioner herein filed another petition being Petition number E018 of 2022 dated 28<sup>th</sup> April 2022 against Kenya ports Authority (1<sup>st</sup> respondent), Portside Freight Terminals Limited (2<sup>nd</sup> respondent), portside CFS limited (3<sup>rd</sup> respondent), heartland terminals Limited (4<sup>th</sup> Respondent) and Dock workers Union (interested party). That the 3<sup>rd</sup> and 4<sup>th</sup> respondents are subsidiary companies of the 2<sup>nd</sup> respondent herein.
  20. The petition is premised upon grounds set out on the face of it and averments contained in the affidavit in support sworn by the petition on 28<sup>th</sup> April 2022. The petitioner's case is to the effect that, while petition No. E045 of 2021 was pending with conservatory orders in place, the 1<sup>st</sup> respondent herein who are also the 1<sup>st</sup> respondents in Petition No.E045 of 2021 went ahead to award a license to portside freight Terminals ltd the 2<sup>nd</sup> respondent in this petition (E018/ 2022) who are also the 1<sup>st</sup> interested party in petition no.E045 of 2021 and heartland terminals ltd the 4<sup>th</sup> respondent in this petition to develop a second bulk grain handling facility which facility was also the subject of petition no e045 of 2021 and in respect of which there was a conservatory order.
  21. That despite seeking clarification under what circumstances the award was made against executive order No.2 of 2018 which required all tenders or procurement of all public goods or works be published through government public portal, the 1<sup>st</sup> respondent was adamant. The petitioner went ahead to state that his effort vide letters dated 14<sup>th</sup> March 2022 and 16<sup>th</sup> March 2022 to get documentation in respect of the said tender did not bear any fruit hence contravening the right to *access to information Act* No.31 of 2016 and Article 35 of *the constitution*; violation of Article 19 of the international convention on civil and political rights on the right to freedom of expression and Article



9 of the African charter on human and people's rights to express the position that everyone has the right to receive information.

22. The court was therefore urged to determine the following questions; Whether by failure to publish the permit /license in question through the public portal, the 1<sup>st</sup> respondent violated executive order no. 2 of 2018; whether failure to allow the petitioner to access the subject permit/license amounts to violation of *the constitution*; whether this honorable court should compel the respondents to give the petitioner the license in question and; Whether the petitioner is entitled to damages to the tune of 10m for violation and contravention of his rights.
23. Consequently, the petitioner particularized the constitutional violations as follows ; failure to publish the tender award through public procurement portal; failure to respond to the petitioner's letters for information thus violating Article 47(1) of *the constitution* which requires efficient, expeditious, lawful, reasonable and fair action; awarding an award in respect of the same subject while fully aware of the obtaining conservatory order in respect of the same subject issued in Petition No.E045 of 2021; that the license was issued in contravention of Regulation 4(2) of the environment impact assessment and audit regulations 2003. That the impugned permit was issued contrary to the prevailing conservatory order issued in Petition No. E045 of 2021 which barred the 1<sup>st</sup> respondent not to Act the way it did.

#### **8<sup>th</sup> interested party's response**

24. In response to both petitions, the 8<sup>th</sup> interested party filed a replying affidavit sworn on 27<sup>th</sup> July 2022 through its secretary general Simon Sang basically associating themselves with the petitioner's position. He averred that the award of special license in the manner analyzed by the petitioner was contrary to KPA master plan 2017 to 2047 which could only be reviewed through public participation and engagement and not the KPA board through board room resolution.
25. It was averred that the arbitrary award of the special licence to the 1<sup>st</sup> interested party in petition No. E045 of 2021 and 2<sup>nd</sup> respondent in petition No. E018 of 2022 was in total disregard to other applications eyeing the same permit which were never considered hence a violation of *the constitution*. It was further averred that the 1<sup>st</sup> respondent's action amounted to blatant abuse of office power and an act in excess of authority. That no procurement process was initiated by the accounting officer hence failure to uphold the minimum procurement rules in particular the criteria set out under Section 114A of the PP &AD Act 2015 as no exceptional circumstances prevailed to warrant use of the specially permitted process of procurement.
26. That as a union, their effort to complain towards the irregular award was ignored hence their support to this petition. Mr. Sang deponed that any changes to develop a second bulk grain handling facility would only apply within the parameters of the prevailing KPA master plan and the identified area.

#### **9<sup>th</sup> interested party's response**

27. The 9<sup>th</sup> interested party filed a replying affidavit sworn on 19<sup>th</sup> October 2022 by Mr.Kerkering describing himself as a public interested litigation manager thus supporting the petition. It is his averment that the award of the contract and license to the 1<sup>st</sup> interested party was a procurement for goods and services within the PP&AD Act hence compliance with section 44 and 227 of the PP&AD Act and Sections 2(1) and 67(1) was necessary.

#### **1<sup>st</sup> respondent's response.**

28. The 1<sup>st</sup> respondent filed its response through a replying affidavit sworn on 19<sup>th</sup> July 2022 by Turasha Kinyanjui General Manager, Board and legal services KPA (1<sup>st</sup> respondent). He averred that the KPA



- Act does not provide for development of a master plan hence the responsibility of the board as a policy decision. It was deposed that the petition is devoid of factual basis hence a misconstruction of the role of the board.
29. It was averred that although there was a master plan developed by KPA contemplated to run for 30 years, the same was subject to amendments anytime or even done away with and any infringement thereof cannot attract any constitutional redress in the manner prayed for by the petitioner. That failure to adhere to a policy document cannot raise a constitutional issue.
  30. That the initial plan to construct a second grain bulky handling facility at Ndongo Kundu or port of Lamu was informed by the presumption that the land for setting up the facility was to be provided by KPA; Ndongo was attractive due its proximity to EPZ and Lamu port because of availability of land.
  31. He went further to depose that; it was contemplated in the KPA master plan that any prospective stake holder or developer could table a proposal for review to the KPA board for consideration just as it happened in 1992 when the 1<sup>st</sup> grain bulk handlers limited (GBHL) did apply for review of the then prevailing license to accommodate acquisition of a way leave. That subsequently, the year 2018, GBHL did make several requests for review of the license to accommodate prevailing special circumstances which the board allowed hence nothing unusual with review of license some of which technically affected the sub strum of the master plan hence review of the same.
  32. At paragraph 22, he deposed that there is no pre-set limit by KPA on the number of grain handlers that should be set up at any of its ports as long as the proposed project meets KPA standards.
  33. That in a bit to enhance competition and efficiency in grain handling at the port, there was need to have other prayers on board by making provision in the 2019 approved master plan to run for 30 years. It was deposed that KPA did receive several unsolicited proposals from various interested parties a move that precipitated the establishment of a technical committee on 14<sup>th</sup> July 2020 to evaluate the proposals on merit. That it was therefore necessary that some proposals had to attract review or amendment of the masterplan. He went further to state that after evaluation, the technical committee found the proposal attractive, viable, reasonable and in compliance with the master plan for expansion of the port to the west end as provided at page 41 of the master plan.
  34. That the technical committee found the proposal unique and viable as the port will not spend any money towards its establishment since the proponent was ready to bear the cost at 100% hence no need for any procurement method to apply.
  35. It was contended that the benefits of the project are cost effective and enormous which then saves the government revenue. According to the deponent, each proposal was or will be evaluated independently and licenses issued on merit. In his view, KPA properly and legally recommended the 1<sup>st</sup> interested party for the license as its proposal was viable.
  36. The court was urged to find that the evaluation of the 1<sup>st</sup> interested party's proposal does not mean that that was a public procurement method involved to warrant court's intervention. That the KPA board in compliance with Section 10 of the KPA Act properly forwarded the proposal to the Cabinet secretary national treasury and planning explaining reasons why they had recommended issuance of the license to the 1<sup>st</sup> interested party. That grant of the permit by the CS was procedurally done.
  37. He averred that it was on the basis of the special permission that the 1<sup>st</sup> interested party submitted its proposal on 15<sup>th</sup> July 2021 and KPA opened the same on the same day which the tender evaluation committee found responsive after opening and subsequently evaluated the same on 27<sup>th</sup> July 2021 and then the award made. That the role of the board terminated upon the CS granting the license.



38. That the procurement processes were followed by the AG MD who constituted the tendering committee.
39. Regarding the license issued to the second respondent in petition no E.018 of 2022, the same was allegedly issued 2017 to build and handle grain handling facility and was renewed the year 2018.
40. Concerning the claim that the 1<sup>st</sup> respondent failed to supply information sought for, it was averred that there was no proof that the petitioner applied for the same and instead the petitioner attached an exhibit showing it was applied for by an organization known as KEJUDE. That the petitioner lacks capacity to seek any redress as he has never sought for any information from KPA. He went further to state that the right to access information is personal and not corporate. That KPA has since made available all documents requested for by KEJUDE trust (Exh.DA 1-5).
41. That upon evaluating the 1<sup>st</sup> interested party's proposal, the technical committee made recommendations on the review of the master plan.

#### **2<sup>nd</sup> respondent's response**

42. The second respondent filed a replying affidavit sworn by Julius M. Muia the principal secretary National treasury. He averred that under Section 114A of the PP and ADA 2015 and regulation 107 of 2020 of the ADA, it allows an accounting officer of a procuring entity to seek National treasury approval to use specially permitted procurement procedure for procurement of goods and services.
43. That the accounting officer of KPA while requesting for procurement of a second bulk grain handler had stated that there existed exceptional requirements that made it impossible and uneconomical to comply with PP & AD Act 2015. That the 1<sup>st</sup> interested party had expressed interest to put up a berth and auxiliary facility for common use at its own cost hence special ground for KPA to explore the opportunity of private partnership. He further averred that the port of Mombasa being a sensitive security area, it was imperative that proper vetting be done to accommodate national security consideration in the selection process.

#### **4<sup>th</sup> Respondent's response**

44. In response to both petitions, the 4<sup>th</sup> respondent filed a replying affidavit sworn on 9<sup>th</sup> December 2022 through Yusuf Abubakar being its director thus responding on behalf of the 1<sup>st</sup> interested party in petition No E045 of 2021 and 4<sup>th</sup> respondent in petition no E018 of 2022. He averred that they were also interested parties (1<sup>st</sup> interested party) in petition no. E045 of 2021. His averment basically expressed the position that the 2<sup>nd</sup> respondent, 4<sup>th</sup> respondent and 1<sup>st</sup> interested party does support the response advanced by the 1<sup>st</sup> respondent that the 1<sup>st</sup> respondent acted lawfully in recommending to the CS National treasury for issuance of a permit to the 1<sup>st</sup> interested party.
45. He questioned the studious silence and absence of the 2<sup>nd</sup> to 7<sup>th</sup> interested parties yet the petitioner claimed that they were discriminated against in the award of the contract or license. He further deposed that the petitions herein are devoid of merit, lacks substance and filed for self-enrichment. It was further stated that the award of the contract to the second respondent was procedurally done and that nobody has complained. That petition No. E018 of 2022 was just but a fishing expedition.
46. It is worth noting that the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> to 7<sup>th</sup> interested parties did not file any response to both petitions.



## Rejoinder by the petitioner

47. In his rejoinder, the petitioner filed a further affidavit sworn on 26<sup>th</sup> day July 2022 wherein he stated that the KPA master plan was a public document developed after extensive consultation and stake holders' engagement which consumed huge public money hence cannot be reviewed in a boardroom by ignoring the same.
48. That the masterplan having not be altered or reviewed, the impugned license cannot issue. It was averred that KPA was bound by Article 10 and 232 (1) (d(e) & (f) to be accountable, transparent and promote transparency. That no invitation was floated inviting interested investors to consider setting up a grain bulk handling facilities on private land adjacent to the port. That the denial that there was no procurement process deployed was defeated by KPA's own admission at paragraphs 39,40, and 41 where they explained how they processed tender documents to award the tender to the 1<sup>st</sup> interested party.
49. When the matter came up for directions, parties agreed to file submissions to dispose both petitions.

## Petitioner's Submissions

50. The petitioner via his submissions dated 05.12.2022 submitted that when the Master Plan was launched, the KPA had a duty of care to stakeholders and other members of the public who relied on the document to make decisions about the state corporation. That Kenya Ports Authority, hereinafter KPA owed a duty of care to 3<sup>rd</sup> parties they knew or ought to have known would rely on the Master Plan to make investment decisions. In the same breadth, that KPA had an obligation to be transparent and to provide timely, accurate information pursuant to article 232(1)(f) of *the constitution*.
51. The petitioner contended that the involvement of the KPA's Board voided the procurement process in that the same went contrary to sections 44 - 46 of the *Public Procurement and Asset Disposal Act*, hereinafter PP &AD Act which sections tasked the KPA Accounting Officer to undertake all procurement processes as per the Act. It was reiterated that the State Corporation's Board plays no role in procurement under the Act. The petitioner placed reliance on sections 5 of the PPAD Act and 30 of the *Public Finance Management Act* to reiterate the fact that the said sections could not be overridden by sections 10 and 12 of the Act. Further reliance was placed on the cases of Tom v Director of Public Prosecutions & 2 Others; Kenya National Highways Authority & Another (Interested Party) Petition No. E021 of 2021 [2022] where the High Court at Mombasa, Mativo J. (as he then was) noted that:

“... the object of the Act is articulated in section 3, which is to ensure a). public finances are managed at both the national and the county levels of government in accordance with the principles set out in *the constitution*, and b) public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies”.
52. The petitioner thus contended that the decision of the KPA Board of directors to approve grant of license for the operation of the second bulk grain handling facility to the 1<sup>st</sup> interested party was null and void since such a decision rested with the accounting Officer and not the Board.
53. On the decision to use Specially Permitted Procurement Procedure, (hereinafter SPPP), it was contended that the public participation is a constitutional imperative that espouses transparency and accountability in public procurement; that the same facilitates public oversight in procurement. That however, the same can only be effective when the public has access to relevant information in order to objectively evaluate procurement. Reliance to support this proposition was placed on the case of



- Poverty Alleviation Network & Others v President of South Africa & 19 Others and further on article 10(2) of *the constitution* wherein the principle is grounded.
54. Further, the petitioner argued that the respondents did not undertake the public procurement as required under articles 10,27,47(1) and 227(1) of *the constitution* and the PPAD Act, 2015. That it cannot be denied that the KPA ignored several other unsolicited proposals which sought to establish the facility in compliance with the KPA's Master Plan but however approved the one which violated the said Master Plan.
  55. The petitioner contended that in as much as KPA Board submitted the unsolicited proposal by the 1<sup>st</sup> interested party to a technical committee formed specifically to consider the same, no evidence was produced to show that the other unsolicited proposals were treated in similar manner. That the only reason evaluation reports on the other proposals were not released was because there was none;
  56. Similarly, that the respondents did not annex any evidence to overwhelm the fact that the decision to use the SPPP as provided for under Section 114 A of the PPAD Act was subjected to public participation. The petitioner relied on the case of Kenya Human Rights Commission –Vs- Attorney General & Another [2018] eKLR to wit that once a petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the respondent is under legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. It was therefore submitted that the KPA's purported use of the SPPP under section 114A of the PPAD Act was both unlawful, unconstitutional and, therefore null and void.
  57. That KPA plainly and arbitrarily awarded the contract to the 1<sup>st</sup> interested party who did not satisfy the prescribed condition of eligibility in the Master Plan thus denying other entities with similar proposals but which were suited within the Master Plan from tendering for the contract.
  58. The petitioner contended that his legitimate expectations were violated by the respondents who were charged with the process of procurement of the project herein. He relied inter alia on the case of Kevin K. Mwiti & Others v Kenya School of Law & 2 Others (2015) eKLR where the principle of legitimate expectation was extensively discussed to wit that the protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.
  59. He further stated that the executive Order No. 2 of 2018 and his rights to access to information were violated to wit that the said order required all procuring public entities to publish tender opportunities and contract awards through the Public Procurement Information Portal at [www.tenders.go.ke](http://www.tenders.go.ke) and further, the refusal to supply the requested information by the petitioner went contrary to the provision of article 33(1)(a) of *the constitution*. To buttress his allegation, the petitioner relied inter alia on the cases of Trusted Society of Human rights Alliance & 3Others v Judicial Service Commission [2016] eKLR and Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others.
  60. On costs, the petitioner urged this court while relying on the case of Erick Okeyo v County Government of Kisumu & 2 Others (2004) eKLR that this being a case that was filed by a private citizen against a public entity in public interest, with utmost good faith for general good of the public to advance a legitimate public interest and not aimed at giving the petitioner personal gain, the respondents should be condemned to pay costs of the suit to the petitioner. Reliance to support the same was drawn from the cases of Trustees for the time being of the Biowatch Trust Vs Registrar, Genetic Resources and Others case cct 80/08 [2009] zacc14 and John Harun Mwau and 3 Others v Attorney General and 2 others [2012] eKLR. This court was therefore urged to grant the prayers sought.



## Submissions by the 1<sup>st</sup> respondent in both petitions

61. The firm of Muriu Mungai and Advocates for the 1<sup>st</sup> respondent filed submissions dated 23.01.2023 in reference to the two petitions as filed by the petitioner wherein they coined four issues for determination as follows:
- i. Whether the Petitions satisfies the threshold required for a constitutional petition.
  - ii. Whether the 1<sup>st</sup> Respondent Board's engagement in the proceedings was ultra vires;
  - iii. Whether the KPA issuance of a second bulk grain handling license to Portside was lawfully undertaken; and
  - iv. Whether the KPA violated the Petitioner's right to access to information in failure to respond to the Petitioner's request for information.
62. It was submitted that the Petitions did not meet the threshold set out for a constitutional petition since the alleged violations related to failure to comply with a policy document, the Port Master Plan.
63. In reference to Petition No. E018 of 2022, the 1<sup>st</sup> respondent submitted that the petitioner lacked jurisdiction to sue on behalf of a body corporate as the right that the petitioner sought to invoke, rely on, or ventilate was a personal right endowed on the corporate body of KEJUDE Trust thus the same was incapable of being pursued by a third party save for in exceptional circumstances which were not disclosed in the instant petition. The 1<sup>st</sup> respondent relied on the supreme court case of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 to express the position that Jurisdiction of courts in Kenya is regulated by *the constitution*, statute and principles laid out in judicial precedent.
64. That from the petition, the petitioner challenges a procurement process that according to him was devoid of merit and flew in the face of a policy document, the Port Master Plan. It was argued that while constitutional provisions have been quoted liberally in the petition, one could not avoid the fact that the entire petition was a challenge to the KPA's alleged non-compliance with the Port Master Plan and not a constitutional violation. The 1<sup>st</sup> respondent relied inter alia on the case of Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others [2018] eKLR wherein it was stated that:
- “...there must be a real infringement, denial of rights or threat to violation that calls for interpretation of *the constitution* vis avis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court,”
65. In regards to Petition No. E 018 of 2022, it was submitted that the petitioner lacked standing to institute the suit herein as the alleged request for information was submitted by a body corporate with powers to sue and be sued; that whereas the claimant may be an officer of the KEJUDE Trust, the petitioner in his own capacity could not allege a violation as the right to access to information is a personal right that was individually invoked by KEJUDE Trust; that without prejudice, the request for information was never received by the KPA and therefore, KPA cannot be held liable for failure to respond to a request it never received.
66. Further, it was contended that the documentation provided by the petitioner in Petition No. E018 of 2022, the request by KEJUDE Trust, that the same provided no indication to whether or not it was received by the KPA.
67. It was submitted that, even if KPA failed to respond, the petitioner had a duty to adhere to the provisions of the primary statute and seek recourse within the statutory landscape prior to filing



a constitutional petition. Reliance thus was placed on the case of Coast Legal Aid & Resource Foundation (CLARF) v Coast Water Board Services & 2 Others [2021] eKLR wherein it was held that:

“...the petitioner still had to exhaust all the avenues of dispute resolution mechanism under the Access to Information Act before approaching this court by way of a constitutional petition. Section 14 of the Act provides the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is required.”

68. That such a failure to exhaust the dispute resolution mechanism provided for by the statute rendered the petition inadmissible and fatally defective.
69. On the issue of the KPA’s Board role in amending, varying or altering the Port Master Plan, it was submitted in reference to sections 8 of the KPA Act and 5 of the PPAD Act that the role of the Board was solely limited to preparatory works necessary to inform a change in the policy position and to offer guidance to management on how to engage on a strategic and long term project that had a significant ramification on the financial sustainability of the KPA and its operations. A further clarification was made to the effect that once the procurement process was instigated on receipt of the National Treasury approval for KPA to utilize a Specially Permitted Procurement Procedure, the KPA Board had no further engagement or role in the procurement process as the same was now left in the exclusive hands of the KPA Management.
70. On whether the KPA issuance of the license to Portside was lawfully undertaken, it was submitted that the starting point in the matter lay on the fact that section 114A of the PPAD Act expressly authorizes the utilization of the Specially Permitted Procurement Procedure by any government agency upon seeking authorization of the National Treasury. That in as much as the petitioner contended that the 1<sup>st</sup> respondent ought to have sought public participation prior to utilizing the Specially Permitted Procurement Procedure, section 114 A of the PPAD Act having been enacted through public participation, there was no need therefore to further seek for public participation.
71. On the allegation that the procurement process was discriminative, the 1<sup>st</sup> respondent sought to enquire under what basis did the petition allege that the other proposals were discriminated against? Reference was made to article 27 of the constitution and the case of Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) and 3 others [2016] eKLR Civil Appeal No. 22 of 2015 to support their contention that there ought not be a contest in respect of utilizing a Specially Permitted Procurement Procedure under article 27 (4) of the constitution and therefore, the petitioner should not be heard alleging discrimination.
72. In the same breadth, the 1<sup>st</sup> respondent supported its stand by stating that article 27 (4) of the constitution is not an absolute right and the same can be constitutionally limited in accordance with article 24 of the constitution. As a result, the 1<sup>st</sup> respondent argued that section 114 A invariably leads to alleged discrimination but the same is lawful and permitted under the PPAD Act. That the 1<sup>st</sup> interested party’s proposal was unique and different from the rest of the proposals as the party intended to use its own land and fully finance the project. Further, that without prejudice, there were inter alia, cogent and valid reasons provided to the KPA Board as the executive arm to review and arrive at a determination that a strategic decision was necessary to amend, review or depart from the provisions of the Port Master Plan.
73. On the alleged non-compliance with the Executive Order No. 2 of 2018, it was submitted that the same was not an issue that was previously raised by the petitioner and therefore, the same ought to not be raised at this juncture. That parties are bound by their pleadings and therefore, they ought not introduce a new issue during submission. Reliance to support this view was placed on the case



of Independent Electoral and boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR. The above notwithstanding, the 1<sup>st</sup> respondent nevertheless stated that the said Executive Order, was merely a policy position and not a statutory or constitutional requirement. That policy could not override or impliedly amend an express statutory provision as stipulated in the section 114A of the PPAD Act.

74. On the averment that the KPA's review of Portside Proposal was ultra vires, it was urged that as a starting point, the Port Master Plan is merely a policy document and not a creature of legislation or bylaws. That it is an internal tool and strategic roadmap of the KPA' a roadmap for consistent development of the Port that seeks to achieve integrated development aligned with the KPA vision and the Republic's vision.
75. That the said Port Master Plan was informed by the prevailing conditions and assumptions that prevailed at that time and therefore it could only influence but not bind the actions of the KPA. That KPA Technical Committee that reviewed the Portside proposal provided, justifications and sufficient explanation on how the proposal integrated with the Port Master Plan, met the KPA's strategic considerations as the same was financially, technically and strategically in the best interests of the KPA. Reliance to support the position that KPA acted in a rational, objective, evidence-led and considering relevant considerations in reviewing Portside proposal vis avis the Master Plan was placed on Petition 266 of 2015 Federation of women Lawyers (Fida -Kenya) & 3 Others v Attorney General & 2 Others.
76. On the issue of legitimate expectation, it was contended that no such expectation could have arisen on the procurement modality to be used by the KPA or the amendment to the Port Master Plan. That the petitioner did not have locus standi, to claim legitimate expectation as he was not one of the parties that submitted the unsolicited proposal to the KPA for consideration and therefore, he did not stand to benefit directly or draw any advantage from the process. That in the Supreme Court decision in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR, the court stated that; a party that seeks to rely on the doctrine of legitimate expectation has to show that it has locus standi to make a claim on the basis of legitimate expectation.
77. That the fact that by complying with the statutory provision in seeking and getting authorization to use a Specially Permitted Procurement Procedure, the KPA approach cannot be impugned by the petitioner thereof. Further, that the operations of the Port and facilities under the purview of the 1<sup>st</sup> respondent are always changing and some of these changes are unforeseeable because they are dependent on various factors including socio-economic factors which cannot be controlled".
78. On whether the petitioner is entitled to compensation and costs of the suit, it was argued that the petitioner lacks standing to allege that their rights were affected or violated. Equally, the petitioner did not demonstrate the liability, damage or loss occasioned to them by failing to provide the information. Reliance therefore was placed on the case of Josphat Koli Nanok & Another v Ethics and Anti-Corruption Commission [2018] eKLR where the court was of the view that:

...there being no proof of liability, there can be no basis or occasion for award of damages for the petitioners as prayed, or otherwise.

79. This court was therefore urged to invoke its inherent jurisdiction and dismiss this petition with costs as the same did not disclose any justifiable cause of action.

### **The 2<sup>nd</sup> respondent's submissions in relation to petition No. E045 of 2021**

80. The Honourable Attorney General representing the 2<sup>nd</sup> respondent in petition No. E045 of 2021 filed submissions dated 17.11.2022 wherein he framed up two issues for determination as follows:



- i. Whether the National Treasury can allow the use of Specially Permitted Procedure for Procurement of goods and services.
  - ii. Whether the National Treasury followed the prescribed procedure when allowing the use of Specially Permitted Procedure for Procurement of goods and services.
81. On the 1<sup>st</sup> issue, it was submitted that article 227 of *the constitution* requires that 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. That transparency, competitiveness and cost effectiveness are at the core of a procurement process and must be infused in any process of procurement depending on the nature of the procurement in question. Reliance to buttress the said principle was placed inter alia on the case of Republic v Public Procurement Administrative Review Board & 7 others Ex Parte SGS Kenya Limited [2017] eKLR where it was stated that:
- “...*the constitution* obliges organs of the state to ensure that a procurement process is fair, equitable, transparent, competitive and cost effective. Where the procurement process is shown not to be so, courts have the power to intervene”.
82. It was argued that section 114 A (2) of the PP&AD Act 2015 allows an Accounting Officer of a procuring entity to seek National Treasury approval to use Specially Permitted Procedure for Procurement in some given scenarios as provided for in the Act. That the 2<sup>nd</sup> respondent considered the said section to seek for approval from the National Treasury to use Specially Permitted Procedure for Procurement where the exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and Regulations.
83. On the 2<sup>nd</sup> issue, the 2<sup>nd</sup> respondent placed reliance on Regulation 107 of the Public Procurement and Disposal Regulations, 2020 which provides that pursuant to section 114A (2) (f), the National Treasury may permit Specially Permitted Procurement Procedure where such a procedure is in the Public Interest or interest of national security. That the Accounting Officer of the KPA while requesting for a procurement of a second bulk grain handler stated that, ‘there were exceptional requirements that made it impossible, impracticable and uneconomical to comply with the *Public Procurement and Asset Disposal Act*, 2015 and the attendant Regulations thereof

**Submissions for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in relation to petition no E018 of 2022 and the 1<sup>st</sup> interested party in Petition No E 045 of 2021**

84. The firm of A.B Patel & Patel through Mr. Khangram representing the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> respondents in petition No. E018 of 2022 and the 1<sup>st</sup> interested party in Petition No. E045 of 2021 filed submissions dated 13.12.2022 in respect to both Petitions wherein it was stated that the petitions are without substance or any legal foundation but instead, a fishing expedition exercise for collateral purposes.
85. From the onset, the 2<sup>nd</sup> respondent submitted that the petitions offend the exhaustion doctrine as set out by this Honourable Court in the case of William Odhiambo Ramogi & 3 Others v Attorney General and 4 Others and Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR. That the same principle was further emphasized in the case of Okiya Omtata Okioti & another v Kenya Power & Lighting Company Limited (KPLC) & 4 Others [2020] eKLR to which it was stated that:
- “... the petitioners cannot be allowed to overlook a clearly laid out procedures and processes, that exists for resolution of disputes. Such processes must be exhausted first, before a party approaches a court. The mere fact that the constitutional provisions are cited or



*the constitution* is invoked is not sufficient reason to elevate the matter to a constitutional status...”

86. It was their case that Part XV of the *Public Procurement and Asset Disposal Act* No. 33 of 2015 – authority ‘5’ specifically lays out the procedure for Administrative Review of Procurement & Disposal Proceedings and under Section 170 thereof, there is a wide range of persons who can be parties to a review.
87. That when considered very closely, the petitions herein are nothing more than a fishing expedition since the petitioner acknowledges the availability in law of an alternative Specially Permitted Procurement Procedure process but further states that this was utilized to the prejudice of and discriminated against the interested parties. That none of the parties joined in the petitions herein either objected to the grant of the license to the 2<sup>nd</sup> respondent or claimed to have been discriminated against. Reliance to support this view was placed on the case of *Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others* [2020] eKLR – authority ‘7’ where the court considered a matter invoking an allegation of discrimination and held that:
- “...the petitioners in the instant case bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of the 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall on to the 1<sup>st</sup> respondent to the contrary...”
88. It was argued that, there was no evidence adduced to show that the grant of the license to the 2<sup>nd</sup> respondent was not fair, equitable, transparent, competitive and cost effective. To support this averment, this court’s attention was drawn to the KPA’s affidavit to wit that not only was the process lawful but that it was undertaken in a transparent and competitive manner for cost effective purposes. That in particular, an island berth intended to be developed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents will be a common user facility.
89. In reference to the allegation that no information was availed to the petitioner, it was argued that it was quite evident that no formal request was made by the petitioner prior to the filing of the Petition No. E045 of 202. That his allegation runs afoul the fact that he was able to access substantial documents relating to the grant of the license as evidenced from his affidavits filed. That the petitioner did not show that he followed the laid down procedures in law under the Access to Information Access Act in order to obtain the requisite information.

**Submissions for the 8<sup>th</sup> interested party in petition No. E045 of 2021 also interested party in petition No. E018 of 2022**

90. The 8<sup>th</sup> interested party represented by the firm of Marende & Nyaundi Advocates filed submissions dated 07.12.2022 supporting the petition on three issues itemized as follows:
- i. Whether the 1<sup>st</sup> respondent’s Board of Directors decision to review and approve the grant of license to the 1<sup>st</sup> interested party is ultra vires.
  - ii. Whether the procurement process leading to the grant of license to the 1<sup>st</sup> interested party for the second bulk grain facility meets the threshold contemplated under *the constitution*.
  - iii. Whether the petitioner is entitled to the reliefs sought in Petition No. E018 of 2022.
  - iv. Who should bear the costs of the Petition.



91. On the 1<sup>st</sup> issue, it was submitted that the 1<sup>st</sup> respondent in unveiling the Port Master Plan for the years 2017 to 2043 on the development of a second bulk grain handling facility, they failed to comply with the provisions of articles 227 and 232 of *the constitution* 2020 and the relevant provisions of the PPAD Act. It was stated that the insignificant role played by the Accounting Officer implies that the Procurement Committee was used as a rubber stamp to sanitize the irregular procurement process which had already been done by the Board of Directors. That the 1<sup>st</sup> interested party's proposal with respect to the location of the second grain facility contradicted what had been proposed by the Port Master Plan. In their view, the Board was expected to vary the Port Master Plan to accommodate different plans prior to approving any proposal.
92. That due to the fact that the Port Master Plan was never amended to accommodate the 1<sup>st</sup> interested party's proposal, the same was an abuse of the stakeholder's participation in the organization and projections of port activities. Learned counsel contended that the Port Master Plan was never unilaterally developed by the 1<sup>st</sup> respondent's Board of Directors but rather after engaging many port operation sectors and therefore, the 1<sup>st</sup> respondent could not in good faith seek to review it unilaterally.
93. On the 2<sup>nd</sup> issue, it was submitted that under Article 227 of *the constitution*, the same establishes the minimum threshold of what is considered to be a constitutional and legal procurement process. That when a state organ or any public entity contracts for goods or services, it is expected to do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
94. That article 201 further provides on the principles of public finance that guide all aspects of public finance in the republic among them openness and accountability including public participation in financial matters and that public money shall be used in a prudent and responsible way. Counsel contended that the said principles are reiterated under section 3 of the PP & AD Act 2015 and of importance to note is the fact that this minimum constitutional threshold that the 1<sup>st</sup> respondent was mandated to be bound by in the impugned procurement process was ignored and therefore, the entire procedure from the involvement of the Board of Directors and the resultant license did not meet this constitutionally expected threshold.
95. It was submitted that the respondents violated the right to natural justice owed as a public duty to the persons who had applied before the 1<sup>st</sup> interested party in that it was incumbent upon the respondents to invite these interested parties to apply for the license before making the purported award. Reliance to support this proposition was made inter alia on the cases of David Oloo Onyango v Attorney General [1987] E.A.456 and Republic v Chief Justice of Kenya & Others ex parte Moijo Mataiya ole Keiwua [2010] eKLR where in essence, it was held that:

“...a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio”
96. On the 3<sup>rd</sup> issue, it was contended that article 35 of *the constitution* provides that every citizen has the right of access to information held by the state. Further, the state is obligated to publish and publicize any important information affecting the nation. That where there is violation of Article 35, the petitioner is guaranteed by the provisions of Article 22 on the right to institute court proceedings claiming that a right has been denied, violated, infringed or is threatened.
97. It was argued that the respondent failed to respond to the petitioner's request to access the documents within the statutory timelines which meant that they rejected the request of access to the documents.



That the petition was rightly before the court in that the petitioner sought to enforce his rights which should be allowed.

98. On costs, it was submitted that the respondents ought to be condemned to bear the costs of the petition for failure to adhere to the law.

### **The 9<sup>th</sup> interested party's submissions**

99. The 9<sup>th</sup> interested party represented by Christine Nkonge Advocate filed their submissions dated 20.01.2023 citing three issues for determination as follows:
- i. Whether the Board of directors of the 1<sup>st</sup> respondent violated article 227(2) as read with section 44 of the PPAD?
  - ii. Whether the Board of Directors of the 1<sup>st</sup> respondent acted unlawfully in varying the Master Plan 2017-2014?
  - iii. Whether there was a breach of the principle of legitimate expectation to the 2<sup>nd</sup> -7<sup>th</sup> interested parties when the respondents awarded the contract and license to develop a second bulk grain handling facility at the Port of Mombasa?
100. On the 1<sup>st</sup> issue, it was submitted that at the heart of the petition herein is the need to provide effective management of public finances from a culture of impunity and favoritism to a culture of justification, openness and fair competition in the procurement of public goods and services. That in reference to article 227 and 10 of *the constitution* and section 46 of the PPAD Act, it was outright that the actions of the Board of Directors of the 1<sup>st</sup> respondent on purporting to constitute a Procurement Committee appointing a Technical Committee to evaluate the 1<sup>st</sup> interested party's proposal and application was against the law as the said function belonged to the Accounting Officer.
101. That the interested parties have admitted that they all tendered unsolicited proposals and applications for licensing to develop the dry bulk grain handling facility in contravention of public procurement laws. In fact, the law requires that the process be fair, transparent and competitive and that all tenders be publicly advertised. That to the extent that the 1<sup>st</sup> respondent's Board of Directors did not have the power to initiate and conduct the impugned procurement process and were acting ultra vires, the whole contract award ought to fail for being unconstitutional. Reliance to support that view was placed on the case of Republic v Kenya Maritime Authority & Another where the court stated that:
- “while determining the legality of administrative actions, courts generally consider compliance with both substantive law and procedural rules because any administrative decision-making process involved the exercise of legally conferred powers and the observation of legally prescribed procedures. The rules were beyond question....”
102. This court was therefore urged to hold that the Board of Directors of the 1<sup>st</sup> respondent acted ultra vires contrary to *the constitution* and PPAD Act when it granted the award and licensing contract to the 1<sup>st</sup> interested party.
103. On the 2<sup>nd</sup> and 3<sup>rd</sup> issues, it was submitted that the 9<sup>th</sup> interested party had a legitimate expectation of fair treatment and consideration and that the procurement method ought not to have circumvented the constitutional and statutory considerations of fairness and equality. That the overarching principle in a procurement process is to ensure the best value for money and that the same can only be achieved based on a competitive process based on openness, equality, fairness and transparency.



104. It was argued that the 2<sup>nd</sup> -8<sup>th</sup> interest parties had a legitimate expectation of having their proposals evaluated as per the initial bid to wit Dongo Kundu and Lamu as was in the Master Plan. That the decision to vary the Master Plan was not only improper but the same was done after the 2<sup>nd</sup> - 8<sup>th</sup> interested parties had already submitted their proposals. Further, that it was disingenuous for the 1<sup>st</sup> respondent to attempt to cure the breach by writing to the 2<sup>nd</sup> respondent on 11.03.2021 seeking permission to invoke the use of Specially Permitted Procurement Procedures under section 114A of the PPAD when the 1<sup>st</sup> respondent had already appointed a Technical Committee on 14.07.2020 to review the 1<sup>st</sup> interested party's proposal and had already approved the grant of license vide Memorandum No. 33 of 2020. Reliance was placed on the cases of Republic v Public Procurement Administrative Review Board Ex Parte Meru University of Science and Technology where the court held that:

“First, in public procurement regulation, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents...”

105. Similarly, the 9<sup>th</sup> interested party in condemning the actions of the respondents as null and void abinitio relied on the holding in the case of Suleiman Siad Shabhalv Independent Electoral & Boundaries Commission & 3 Others, CA Civ Appeal 42 of 2018, where it was stated that:

“If an act is void, then it is a nullity in law. It is not only bad, but incurably bad...”

106. That the fact that the site for the said second grain handling facility was changed to Mombasa was not just a minor deviation as it materially deviated from the stipulations as per the Master Plan. In the end, this court was urged to find that article 23 provides that a court may grant appropriate relief including a declaration of rights when the court is presented with evidence that those rights have been violated. It was prayed therefore that the prayers sought in the petition be allowed.

### **Analysis and determination**

107. I have considered the petitions herein and parties' respective responses thereof. I have also considered the illuminating and well researched submissions by counsel. Issues that stand out for consideration are;

- a. Whether the petitions herein have met the threshold of a constitutional petition.
- b. Whether the petitioner has locus standii to file the petitions herein.
- c. Whether the 1<sup>st</sup> respondent's Board of Directors' decision to review and approve the grant of license to the 1<sup>st</sup> interested party was unlawful and therefore ultravires.
- d. Whether the procurement process by the 1<sup>st</sup> respondent leading to the grant of a license to the 1<sup>st</sup> interested party to establish a second bulk grain handling facility at the port of Mombasa meets the relevant statutory and constitutional legal threshold.
- e. Whether the petitioner's constitutional right of Access to Public information was violated or denied.
- f. Whether the petitioner is entitled to the reliefs sought.
- g. Who bears the costs



108. The foundation of the petitions herein is anchored on the question whether the 1<sup>st</sup> Respondent's decision undertaken to award the 1<sup>st</sup> Interested Party the contract and license of development of a second grain bulk handling facility at the port of Mombasa by use of Specially Permitted Procurement Procedure was unconstitutional and in contravention of Section 114A of the PP &AD Act and regulation 107(3) of the Regulations thereof.
109. Before I embark on addressing the salient issues at hand, I wish to state that the issue touching on this court lacking jurisdiction as claimed by the 1<sup>st</sup> interested party was settled at the preliminary stage through a ruling delivered on 20<sup>th</sup> April 2022. I will therefore not revisit the issue again as the same is already determined.
110. From the pleadings and the submissions thereof, it is clear that the 1<sup>st</sup> interested party and the respondents are contending that the petitions herein do not with precision bring out the petitioner's rights that have been violated, threatened or likely to be infringed. On the other hand, the petitioner denied that assertion thus maintaining that the subject of the petitions herein revolves around public interest litigation.
111. I cannot but emphasize the importance of precise claims in due process and substantive justice. Precision must remain a requirement in as much as it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated or infringed. In the most celebrated case of Anarita Karimi Njeru v Republic (1979) eKLR, it was held that a party seeking constitutional redress ought to express himself or herself with a reasonable degree of precision the nature and extent of constitutional rights violated or threatened or likely to be infringed.
112. In the instant case, the petitioner has approached this court claiming to represent public interest in protecting violation of *the constitution* in particular Articles 10 of *the constitution* on the right to public participation, transparency and accountability, Article 227 on the right to fairness, equity, and competitive procurement thus challenging the award of the license issued to the 1<sup>st</sup> interested party to the exclusion of other interested parties hence discrimination under Article 27 of *the constitution*.
113. Under the said provisions, the petitioner need not establish a violation or infringement of his personal rights strictly but rather, a breach of *the constitution* to which any citizen can institute proceedings for redress under Article 258. That is how liberal our constitution is to the extent that in Sollo Nzuki vs Salaries and remuneration Commission & 2 others (2019) eKRL the petitioner an ordinary Kenyan citizen had to institute a suit claiming that Judges who joined the bench from private practice were discriminated against by getting lower salary as compared to their counter parts who joined from within the bench hence an act of discrimination under Article 27. The court upheld his claim and salaries were harmonized. Guided by the above case law and constitutional dictates, I am satisfied that the petitioner has met the threshold to institute these proceedings for constitutional redress.
114. The respondent and 1<sup>st</sup> interested party did argue that the petitioner has no locus to institute these proceedings and that he is advancing a case for masked people behind him and for his selfish interest and enrichment. In the case of Alfred Njau & others v City Council of Nairobi (1982) KAR 229, locus standi was defined thus;

“The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such proceedings.”



115. Further, in the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court, Civil Case No 464 of 2000 it was held that:

“If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

116. The law on locus standi in constitutional petitions is envisaged under article 22 and 258 of *the Constitution*. Article 22 of *the Constitution* provides that:

“22. Enforcement of Bill of Rights

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by
  - a) person acting on behalf of another person who cannot act in their own name;
  - b) a person acting as a member of, or in the interest of, a group or class of persons;
  - c) a person acting in the public interest; or
  - d) an association acting in the interest of one or more of its members.”

117. Under Article 258 of *the Constitution*, any person can institute a suit seeking redress on violation of *the constitution*. For avoidance of doubt, I wish to reproduce the said provision which provides as follows:

- “(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.”



118. The law on locus standi was aptly considered by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR as follows;

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of *the Constitution* by necessity and logic broadens access to the courts.

In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258.

119. Similarly, in the case of Sollo Nzuki v Salaries and Remuneration Commission & 2 others [supra] , a member of the public filed a petition on behalf of High Court judges and judges of courts of equal status. The court, while placing reliance on several decisions, held thus: -

“It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that *the Constitution* is under threat ought to be welcome...”

120. In view of the above case law and the underpinning constitutional provisions, it is clear that the petitioner like any other member of society has a right to question certain constitutional violations or threats which in this case is the award of a controversial license and subsequently a tender in violation of Article 227 of *the constitution*.

121. The petitioner challenged the violation of *the constitution* by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in that, without any basis and in flagrant violation, abuse, and breach of its own master plan, the 1<sup>st</sup> respondent’s board through its memorandum No. 33 of 2020 proceeded to review the 1<sup>st</sup> interested party’s proposal by recommending the master plan to be amended to accommodate its proposal which was described as unique. The petitioner argued that by the board purporting to approve the establishment of a facility outside its master plan while considering irrelevant factors amounted to acting in excess and abuse of its power and in contravention of *the constitution*. In light of such allegations, I cannot fault the petitioner for instituting these proceedings and I hold that he was within his rights to commence the same. As to whether his case is merited is another matter that I shall determine in due course.

122. But of importance, this court echoes the holding in the Court of Appeal case in Civil Appeal No. 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [supra] where that court underscored the need that:

“procedure is also the handmaiden of just determination of cases. That cases cannot be dealt with justly unless the parties and the court know the issues in controversy. That pleadings



assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party”.

123. It is against this backdrop that this court lays emphasis on the fact that in as much as *the constitution* provides such wide-ranging leeway in litigation by parties and more particularly for persons acting on public interest, courts must be vigilant to determine on what actually amounts to denial, violation, infringement or threat to a fundamental right enshrined in the bill of rights so as to attract public interest litigation. Concerning the issue whether the petitioner is indeed advancing public interest litigation, guidance can be drawn from a myriad of case law which have defined what constitutes public interest litigation. See *Mumo Matemu vs trusted society of human rights Alliance and 5 others* (2014) eKLR where the supreme court held that;

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance”

124. Having perused the pleadings herein carefully and parties’ submissions, the petitioner alleged that the 1<sup>st</sup> respondent discriminated against a certain class of people in society from participating in the provision or supply of goods or services to the port of Mombasa which is a public entity. That competitive bidding would have determined the true forces of market demand and supply instead of personalized and exclusive unilateral preferential treatment. That Article 227 of *the constitution* regarding procurement of goods and services to any state organ ought to be done in a transparent, equitable, fair, competitive and cost-effective manner.
125. Guided by the above constitutional imperatives and case law, the petitioner has demonstrated that the suit is one of those that falls under public interest litigation. The fact that some parties who may have been directly affected like the silent interested parties who did not institute any proceedings does not strip off any other Kenyan the power to institute civil proceedings to enforce the implementation of *the Constitution* through court proceedings. In that regard, am satisfied that the petitioner has locus to institute these proceedings.
126. I will now turn to issue number three and four which are intertwined. The crux of the matter is whether the approval and subsequent award of the contract to the 1<sup>st</sup> interested party before amendment of KPA master plan through public participation and subjecting the contract thereof to competitive bidding was lawful.
127. There is no dispute that the 1<sup>st</sup> respondent had sometime in the year 2019 approved a master plan for KPA to run from 2017 to 2047 translating to 30-year period. This was after extensive engagement with the stake holders among them state and private agencies with a view to promoting and enhancing infrastructural capacity of the Indian Ocean Port Network.
128. With that concept in mind and considering that the only existing Grain Bulk Handlers Limited (GBHL) was overstretched leading to time wastage and overcrowding, the new master plan made



provision for the establishment or development of a Second Grain Bulk Handling facility to be established.

129. That according to the KPA Master Plan, such second facility was to be developed either at Dongo Kundu due to its proximity to the EPZ zone so as to leverage on tax collection or port of Lamu due to the availability of land owned by KPA which was cheaper and less capital intensive. With this in mind, the 1<sup>st</sup> interested party ( Pet.E045/2021) and also second respondent (Pet.No. E018/22) submitted what the 1<sup>st</sup> respondent described as a unique and more innovative proposal requesting to be allowed to develop the second grain bulk handling facility on its own land and at its own cost.
130. This proposal however deviated from the Master Plan projection because it meant that the facility if allowed was to be set up at a place outside Dongo Kundu or Lamu Port as envisaged in the Master Plan hence the need for amendment or review of the Master Plan to accommodate the 1<sup>st</sup> interested party's project.
131. Confronted by this attractive proposal against other proposals, the KPA Board in exercise of its mandate pursuant to section 8 and 10 of the KPA Act established a technical evaluation committee on 14<sup>th</sup> July 2020 to study the proposal and advise on its viability. Having submitted a report recommending the said proposal, the Board approved and forwarded a request to the Cabinet Secretary National Treasury to grant permission to use Specially Permitted Procurement Procedure pursuant to section 114A of the PP&AD Act 2015.
132. According to paragraph 32 (d) vii of the replying affidavit sworn on 19<sup>th</sup> July 2022 by Turasha Kinyanjui, KPA was not procuring anything as the project was 100% financed by the proponent such that the issues of procurement method could not apply. The question which begs for an answer is whether the specially permitted procurement procedure being requested was not "a procurement method" under the PP&AD Act. The heading of Section 114A reads as follows "specially permitted procurement".
133. For avoidance of doubt, I wish to reproduce section 114A of the PP&AD Act which provides as follows;

“Specially permitted procurement procedure-

- (1) A procuring entity may use a procurement procedure specially permitted by the National Treasury.
- (2) The National Treasury may allow the use of specially permitted procedure—
  - (a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations;
  - (b) where the market conditions or behavior do not allow the effective application of the Act and Regulations made under the Act;
  - (c) for specialized or particular requirements which are regulated or governed by harmonized international standards or practices;
  - (d) where strategic partnership sourcing is applied;
  - (e) where credit financing procurement is applied; or



(f) in such other circumstances as may be prescribed.

(3) The Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurements under this section.

134. Under the above provision, the institution or office mandated to apply for the permission/authority/license is the procuring entity. A procuring entity under section 2 of the PP & AD Act means “a public entity making a procurement or asset disposal to which this Act applies”. For all purposes and intents, the KPA Board was not a procurement entity for purposes of seeking a special permission to use specially permitted process which is the preserve of the accounting officer. The KPA board’s mandate was to evaluate proposals for establishment of a second grain bulk handling facility only to inform and guide on policy direction and implementation but not to engage in procurement process which is the mandate of the accounting officer in this case the KPA MD.

135. The mandate of the KPA Board is clearly spelt out in Section 8 of the KPA cap 391 which provides;

“General duty of the Board

(1) It shall be the duty of the Board to provide by means of the undertaking of the Authority a coordinated system of ports and facilities relating thereto.

(2) The performance of the duty referred to in subsection (1) shall include a general duty to secure—

(a) the fullest development, consistent with economy, of the undertaking of the Authority;

(b) that the undertaking of the Authority is operated efficiently, economically and with due regard to safety;

(c) that the financial administration of the Authority is conducted in accordance with Part V;

(d) that the Authority provides all reasonable facilities for handling and warehousing of cargo and other goods; and

(e) that no particular person or body is given any undue preference or is subjected to any undue disadvantage.

136. A critical look at Sections 8 and 10 of the KPA Act would reveal that the general power to oversee efficient and economical operation and use of the port lies with the Board and those powers extend and include in my view amendment, review or alteration of the master Plan as it may be deemed necessary or relevant from time to time. Indeed, the master plan is not cast in stone hence meant to serve its users effectively depending on changing circumstances. However, such changes must not be done in a board room without engaging other stakeholders. I do agree with the 1<sup>st</sup> respondent to the extent that the board has powers to amend or review the master plan. However, the same should not be done unilaterally to suit a specific isolated case or interest just as it happened in this case.

137. Article 227 of *the constitution*, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be *the constitution*. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and



cost-effectiveness. In other words, any other stipulation whether in an enactment or in the tender document can only be secondary to the said constitutional dictates.

138. In the case of PPRB v KRA Misc.Civil Application No. 540 of 2008, eKLR the court had this to say:

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel.”

139. There is no doubt that the issues of procurement are the preserve of the KPA management and not the board and that is why after the license was issued by the minister, the AG MD KPA proceeded to constitute a tender committee and on 15<sup>th</sup> July 2021 issued invitation to tender to the 1<sup>st</sup> interested party who re-submitted its proposal on 26<sup>th</sup> July 2021. On 27<sup>th</sup> July 2021 Technical Evaluation Committee was undertaken which found the proposal responsive and on 28<sup>th</sup> July 2021 invited the tenderer for negotiation which was held on 29<sup>th</sup> July 2021 and the same accepted and awarded on 2<sup>nd</sup> August 2021. What was being awarded if not a contract to render services in the name of grain handling facility.

140. From the above chronology of events, it is clear that the whole process was redone at a lightning speed. In fact, within 4 days everything was done and the contract awarded. In a nutshell, it is my holding that the specially permitted procurement method is one of the prescribed methods of procurement to which the KPA Board had no mandate to evaluate any proposal for that purpose other than for policy direction or implementation. To enter into the arena of procurement amounted to exercise of authority in excess of the power donated by the KPA Act hence ultravires. See Federation of Women Lawyers (Fida – Kenya) & 3 Others v Attorney General & 2 Others; East Africa Center for Law & Justice & 6 Others (Interested Party) & Women’s Link worldwide & 2 Others (Amicus Curiae) [2019] eKLR where it was held that:

“...it is now recognized that arbitrary exercise of power, even where it exists, is a ground to grant judicial review relief which is one of the reliefs under article 23(3) of *the constitution*”.

141. Although the KPA Board has the mandate to review and alter or amend the KPA master plan as already stated above, it is bound by the law among them Article 10 of *the constitution* which requires among other things good governance, integrity, transparency and accountability from public officers or state organs. We were not told of the outcome of the performance of the other proposals and reasons why they did not qualify as a requirement under Article 47 of *the constitution* and *fair administrative Action Act*. In Misc Application No. 261 of 2015 Republic v Public Procurement Administrative Review Board & 2 Others ex parte Numerical Machining Complex the court had this to say:

“Therefore, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative innovation...”

142. By virtue of the Board approving the 1<sup>st</sup> interested party for the award of the contract which was to run the whole period of 30 years, it created a second monopoly outside the parameters of the existing master



- plan and before amendment subject to public participation. It is therefore clear that the Board acted ultra vires by discriminating against the rest of the Kenyans the petitioner and the 1<sup>st</sup> – 9<sup>th</sup> interested parties included thus dashing away their legitimate expectation to not only participate but also benefit from such an opportunity to open a 2<sup>nd</sup> Bulk Grain Handling facility.
143. In *James Nyasora Nyarangi & 3others v Attorney General* [2008] eKLR Nyamu J. (as he then was) while discussing discrimination stated: - “Discrimination which is forbidden by *the Constitution* involves an element of unfavorable bias. Thus, firstly on unfavorable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in Section 82 of *the Constitution*. Both discrimination by substantive law and by procedural law, is forbidden by *the constitution*”.
144. Further, in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi* [2007] eKLR the Court dealt with the doctrine as follows: -“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”
145. Thus, it is trite that the Kenyan public, the petitioner and the 1<sup>st</sup> – 9<sup>th</sup> interested parties’ legitimate expectations were violated by the respondents who were charged with the process of procurement of the project herein.
146. On the question of whether the specially permitted procedure was regularly, procedurally and lawfully granted, one would have to look at the circumstances under which the recommendation for issuance of such permit was made and whether the eventual tender award to the 1<sup>st</sup> interested party was properly awarded without subjecting the process to competitive bidding after advertisement of the tender to render services of second bulk handling facility.
147. The 9<sup>th</sup> interested party equally submitted that it was disingenuous for the 1<sup>st</sup> respondent to attempt to cure the breach by writing to the 2<sup>nd</sup> respondent on 11.03.2021 seeking permission to invoke the use of Specially Permitted Procurement Procedures under section 114A of the PPAD when the 1<sup>st</sup> respondent had already appointed a Technical Committee on 14.07.2020 to review the 1<sup>st</sup> interested party’s proposal and had already approved the grant of license vide Memorandum No. 33 of 2020.
148. It is apparent that, the Board had no intention of opening the door to competition pursuant to article 227 of *the constitution*. What was difficult in amending the master plan after public participation and then float the tender to the public and if it turned out to be non-responsive then result to specially permitted procedure. In a situation where there are interested people willing to render same services within the parameters provided under the master plan, why open a new avenue which is non-compliant to the master plan. I am convinced beyond imagination that the 1<sup>st</sup> respondent acted beyond its powers, irrationally, illegally, unjustly, and in bad faith in acting in the manner they did. Equally, the second respondent acted improperly and irrationally by issuing a license before being satisfied that due process was followed.



149. To that extent, the license issued to the 1<sup>st</sup> interested party was null and void and nothing can cure it. See *Mcfoy Limited vs African Co. Ltd* (1961) 3 All ER 1169 where it was held that if an act is void then it is in law a nullity. It is my holding that the KPA board's approval of the 1<sup>st</sup> interested party to establish a second grain bulk handling facility before amending the KPA master plan and subsequent issuance of the license by the second respondent and later the tender award by the KPA management was *ultravires*, and *void abinitio*.
150. Further, the petitioner under petition no. E018 of 2022 alleged that contrary to the Executive Order, the 1<sup>st</sup> respondent did not publish on the portal a copy of the said license/permit which it granted to the 2<sup>nd</sup> and 4<sup>th</sup> respondents. That the said Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities ( The Executive Order) requires all procuring entities to publish tender opportunities and contract awards through the Public Procurement Information Portal at [www.tenders.go.ke](http://www.tenders.go.ke). This court would categorically state that the said Order in my view was a policy direction breach of which does not amount to a constitutional violation to warrant redress in a constitutional court.
151. Of importance to note is the fact that the petitioner under petition no E018 of 2022 further sought for orders suspending the license/permit issued by the 1<sup>st</sup> respondent to Portside Freight Terminals Limited and Heartland Terminals Limited and any other person or agent to develop the Bulk Grain Handling facility in Mombasa. It goes without saying that, any license that may have been issued under similar circumstances during the pendency of the proceedings under petition No E045 of 2021 and in particular the conservatory orders in place is null and void.
152. In the same breadth, the petitioner averred that his right to access to information was violated by the fact that the 1<sup>st</sup> respondent did not avail the information necessary in regards to how the license in the case herein was awarded. That he dispatched letters to the respondents severally by G4S courier on 16.03.2022 but the respondents refused and/or failed to give the petitioner a copy of the license/permit issued by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 4<sup>th</sup> respondents.
153. That the said license was meant to enshrine the defence enshrined in the Bill of Rights. In response, the 1<sup>st</sup> respondent submitted that the petitioner lacked standing to institute the suit herein as the alleged request for information was submitted by a body corporate with powers to sue and be sued; that whereas the claimant may be an officer of the KEJUDE Trust, the petitioner in his own capacity could not allege a violation as the right to access to information is a personal right that was individually invoked by KEJUDE Trust; that without prejudice, the request for information was never received by the KPA and therefore, KPA cannot be held liable for failure to respond to a request it never received.
154. Article 35 of *the Constitution* of Kenya, 2010 states that:
- (1) Every citizen has the right of access to—
    - (a) information held by the State; and
    - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
155. Section 3 of the *Access to Information Act* 2016 provides that:
- The object and purpose of this Act is to—
- (a) give effect to the right of access to information by citizens as provided under Article 35 of *the Constitution*;



156. In *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, the Supreme Court expressed itself as follows on the right of access to information:

“ Article 35(1)(a) and (b) of *the Constitution*, read with Section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the IEBC”

157. Similar sentiments had been expressed in *Rev. Timothy Njoya v Attorney General & Another* [2014] eKLR, where the Court stated inter alia –

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest ... this, I believe, is the import of Article 35(3) of *the Constitution* of Kenya which imposes an obligation on the state to 'publish and publicize any important information affecting the nation, but also to provide open access to such specific information as people may require from the state.'”

158. This court has independently perused the record and notes that indeed Exhibit 1 as annexed by the petitioner bears the name of KEJUDE Trust For Justice and Development and the same addressed to the Managing Director of the Kenya Ports Authority, The C.E.O. of Portside Freight Terminals Ltd; The Chief Executive Officer Portside CFS Ltd and the Chief Executive Officer Heartland Terminals Ltd requesting for a copy of the license/permit issued to the 2<sup>nd</sup> and 4<sup>th</sup> respondents in reference to the 2<sup>nd</sup> Bulk Grain Handling Facility at the Port of Mombasa.

159. In the obtaining circumstances, could the petitioner authoritatively claim that his right to information was indeed violated having in mind the 1<sup>st</sup> respondent's contention that whereas the claimant may be an officer of the KEJUDE Trust, the petitioner in his own capacity could not allege a violation as the right to access to information is a personal right that was individually invoked by KEJUDE Trust; that without prejudice, the request for information was never received by the KPA and therefore, KPA cannot be held liable for failure to respond to a request it never received.

160. Article 260 of *the constitution* defines a person as:

“Person” includes a company, association or other body of persons whether incorporated or unincorporated.”

161. In the case of: *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992 Justice Bosire* (as he then was) stated thus:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.”

162. It is not disputed that the petitioner herein was the Executive Director of the said KEJUDE Trust. Having further perused Petition No E045 where the petitioner described himself as an individual, I am obliged to find that indeed, the Managing Director of the Kenya Ports Authority, The C.E.O.



of Portside Freight Terminals Ltd; The Chief Executive Officer Portside CFS Ltd and the Chief Executive Officer Heartland Terminals Ltd could only address KEJUDE Trust over the same and not the petitioner as an individual for the reason that they are different persons. It is indeed KEJUDE Trust that sought for the information and not the petitioner. As such, I agree with the 1<sup>st</sup> respondent that the petitioner's right to information was not violated.

163. On the aspect of damages, the petitioner urged the court to consider awarding the same but fell short of specifying the nature of the injury suffered. This being a public interest litigation, the petitioner cannot purport to benefit from it. Public interest litigation cannot confer a benefit upon the petitioner otherwise it will turn out to be a commercial enterprise.

164. On costs, Section 27 of the *Civil Procedure Act* provides: -

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(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

(22) In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

165. Lastly, the petitioner prayed for costs. It is trite law that costs are at the discretion of the court, yet, follows the event. See the Halsbury's Laws of England; 4<sup>th</sup> Edition (Re-issue), {2010}, Vol.10. para 16

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).”

166. This being a public interest matter, I am inclined that the same was done to the benefit of all. It is in the norm that in such a matter, each party should bear its own cost and so I also find.

167. As a consequence of the above finding, it is my holding that prayers b, e, f, g, h, i and j of Petition No. E 045 of 2021 do issue and as a consequence of the same:

i. A declaration be and is hereby issued that the 1<sup>st</sup> respondent's Board of Directors' decision dated 11.03.2021 to invoke the use of Specially Permitted Procurement Procedure under



Section 114A of the PPAD Act was in violation of the constitution and does not lie with the Board of Directors but with the Accounting Officer who initiates the entire procurement process for a state corporation

- ii. A declaration be and is hereby issued that the decision dated 11<sup>th</sup> March, 2021 to invoke the use of Specially Permitted Procurement Procedure under Section 114A of the PPAD is in violation of the Constitution and does not lie with the Board of Directors but with the Accounting officer who initiates and undertakes the entire procurement process for a state corporation.
  - iii. A declaration be and is hereby issued that the decisions and/or action of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 11<sup>th</sup> March, 2021 and 28<sup>th</sup> June, 2021 in so far as they purport to use Specifically Permitted Procurement Procedures in favour of the interested party, is unconstitutional, illegal and/or irregular as it contravenes the provisions of the Constitution and regulations 107 (3) of the Procurement Regulations.
  - iv. A declaration be and is hereby issued that the Respondents' decision to solely consider the 1<sup>st</sup> Interested Party's proposal, despite the same being in conflict with the Master Plan, proceeded to approve the same and adopt the use of Specially Permitted Procurement Procedure in its favour is unlawful, illegal, irrational and ultra vires.
  - v. A declaration be and is hereby issued that its wrongful and procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by the 1<sup>st</sup> Respondent's Port Master Plan, which Master Plan is yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.
  - vi. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent's intended award of contract and license to the 1<sup>st</sup> Interested Party for the development of the Second bulk grain handling facility gravely violates Articles 10, 201 and 227 of the Constitution of Kenya, 2010.
  - vii. A declaration be and is hereby issued that the procurement and license for development of a second bulk grain handling facility has to be procured through competitive bidding as required by the Constitution and the laws of Kenya.
168. Having made the above declaration, the followings orders shall issue.
1. An Order of Certiorari to remove into this Court and quash the decision of the 2<sup>nd</sup> respondent contained in the letter dated 28.06.2021 granting the 1<sup>st</sup> respondent approval to use of Specially Permitted Procurement Procedure for the procurement of a second bulk grain handler facility in favour of the 1<sup>st</sup> interested party be and is hereby issued.
  2. A mandatory Order be and is hereby issued compelling the respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa be undertaken strictly in accordance with the law through competitive bidding.
  3. An Order of Prohibition to restrain the respondents from implementing the decision contained in the letter dated 28.06.2021 approving the use of Specially permitted Procurement Procedure to award the 1<sup>st</sup> interested party the contract for development of the second bulk grain handling facility be and is hereby issued.
  4. An Order of Prohibition to restrain the respondents from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the Public Procurement Laws be and is hereby issued.



5. This being a Public Interest matter, each party shall therefore bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 18<sup>TH</sup> DAY OF JULY, 2023**

**J. N. ONYIEGO**

**JUDGE**

