



Republic v Kenya Power & Lighting; Inhemeter Africa Company Limited & 6 others (Interested Parties); Ndungu (Exparte Applicant) (Judicial Review E065 of 2023) [2023] KEHC 19886 (KLR) (Judicial Review) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E065 OF 2023**

**JM CHIGITI, J
JULY 7, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA POWER & LIGHTING RESPONDENT

AND

INHEMETER AFRICA COMPANY LIMITED INTERESTED PARTY

SMART METER TECHNOLOGY LIMITED INTERESTED PARTY

YOCEAN GROUP LIMITED INTERESTED PARTY

MAGNATE VENTURES LIMITED INTERESTED PARTY

NUMERAL IOT LIMITED INTERESTED PARTY

SHENZHEN STAR INSTRUMENTS CO. LIMITED INTERESTED PARTY

HEXING TECHNOLOGIES LIMITED INTERESTED PARTY

AND

BENEDICT KABUGI NDUNGU EXPARTE APPLICANT

JUDGMENT

1. Before this court is Notice of Motion application dated 29th May, 2023 that has been brought under Order 53 Rule 1 of the [Civil Procedure Rules](#) and Sections 7 & 11 of the [Fair Administrative Action Act](#).



2. The Applicant is seeking the following orders;
 - 1) “An Order of *Certiorari* removing to this Honourable Court for purposes of being quashed the Addenda Numbers I, II, III, IV, V and VI issued by Kenya Power & Lighting Company PLC in respect to the Tender No. Kp1/9a.2/0t/28/22-23 For Supply Of Meters (Local Manufacturers Only) which materially altered the substance of the original tender.
 - 2) An Order of certiorari removing to this Honourable Court for purposes of being quashed the entire procurement process in tender number KP1/9A.2/0T/28/22-23 For Supply of Meters (local Manufacturers Only).
 - 3) An Order of Certiorari removing to this Honourable Court for purposes of being quashed the notification of intention to award the subject tender number KP1/9A.2/0T/28/22-23 For Supply of Meters (local Manufacturers Only) dated 2nd May 2023 and/or any notification in variation, substitution, addition, akin to or identical thereto regarding purported award of the subject tender number KP1/9A.2/0T/28/22-23 For Supply Of Meters (Local Manufacturers Only).
 - 4) An Order of Prohibition prohibiting Kenya Power & Lighting Company PLC and the purported successful bidders in the subject tender number KP1/9A.2/0T/28/22-23 For Supply of Meters (local Manufacturers Only) from executing any procurement contract with Inhemeter Africa Company Limited; Smart Meter Technology Limited; Yocean Group Limited; and Magnate Ventures Limited (the 1st to 4th Interested Parties herein).
 - 5) An Order of Mandamus compelling Kenya Power & Lighting Company PLC to undertake the procurement proceedings for supply of meters in tender number KP1/9A.2/0T/28/22-23 For Supply Of Meters (Local Manufacturers Only) without the impugned addenda numbers I, II, III, IV, V and VI.
 - 6) The costs of this application be in favour of the Applicant.”
3. The Application is supported by a Statutory Statement dated 26th May, 2023 and a Verifying Affidavit sworn by Benedict Kabugi Ndungu of even date.
4. The Applicant’s case is that on 14th March, 2022, the Respondent herein (Kenya Power and Lighting Company PLC) advertised tender number KP1/9A.3/RT/05/21-22 For Supply & Delivery Of Single Phase, Three Phase Postpaid And Prepaid Meters. The said tender attracted participation from thirty-three (33) bidders which submitted their expression of interest.
5. It is contended that through a Request for Review Application Number 31 of 2022, the Tender was challenged. In the Request for Review the following orders were sought;
 1. The Respondent Tender No. KP1/9A.3/RT/05/21-22 For Supply & Delivery Of Single Phase, Three Phase Postpaid And Prepaid Meters be quashed and/or tender clauses which has



the effect of excluding the members of the Applicants from participating in the Tender be quashed.

2. The Respondent be directed to restrict the tender No. KP1/9A.3/RT/05/21-22 For Supply & Delivery of Single Phase, Three Phase Postpaid and Prepaid Meters and/or advertise another Tender restricted to local Manufacturers and Assemblers as previously done upon removal of offending Clauses.
6. The Public Procurement Administrative Board is said to have through its decision dated 10th May,2022 struck out the Request for Review Application Number 31 of 2022. The Respondent herein was also ordered to proceed with the procurement process to conclusion in strict compliance with the law.
7. The Applicant also contends that a Request for Review Application No.45 of 2022 was also filed in regard to Tender No. KP1/9A.3/RT/05/21-22 For Supply & Delivery of Single Phase, Three Phase Postpaid And Prepaid Meters however the same was dismissed by the Review Board for want of jurisdiction as the said Application was filed out of time.
8. Similarly, the Review Application is said to have been struck out for want of jurisdiction as the Review Application was filed out of time.
9. It is the Applicant's case that there is record of award and/or manner in which the Tender No. KP1/9A.3/RT/05/21-22 FOr Supply & Delivery of Single Phase, Three Phase Postpaid And Prepaid Meters was concluded by the Respondent on the Public Procurement Information Portal.
10. The Respondent is said to have further advertised the Tender on 10th May,2022 and further that the Tender was again challenged in Review Application No. 51 of 2022 by Inhemeter Africa Company Limited, Smart Meter Technologies Limited, Shenzhen Star Instruments Company Limited and Magnate Ventures Limited which was struck out by the Public Procurement Administrative Review Board in its decision of 6th July,2022 for want of jurisdiction.
11. The Applicant contends that the substratum of the said application was as follows;
 - a. That the Respondent excluded local manufacturers and assemblers by excluding domestic preference and reservations for local contractors.
 - b. That the Respondent failed to unbundle the tender for procurement of single and three phase meters into several categories/lots.
 - c. That the Respondent provided unrealistic and discriminatory financial requirements.
 - d. That the Respondent provided discriminatory technical specifications and;
 - e. That the Respondent provided unrealistic and discriminatory tender security requirements.
12. Similarly, the Applicant contends that there is record of award and/or manner in which the Tender No. KP1/9A.3/RT/05/21-22 For Supply & Delivery of Single Phase, Three Phase Postpaid and Prepaid Meters was concluded by the Respondent on the Public Procurement Information Portal.
13. The Applicant contends that on February,2023 the Respondent advertised a new tender number KP1/9A.3/OT/28/22-23 For Supply of Meters (Local Manufacturers Only) herein after referred to as "the subject tender".
14. Seven firms are said to have participated in the subject tender as follows;
 - i. B1-M/s Inhemeter Africa Company Ltd Ksh 5,457,227,975 Inclusive of VAT;



- ii. B2-Smart Meter Technologies Ltd Ksh 4,655,935,500 Excluding VAT;
 - iii. B3-Numeral IOT Limited — Did Not Upload The Tender Form;
 - iv. B4-Yocean Group Limited Ksh 5,481,096,56420 Not Indicated VAT;
 - v. B5-Shenzhen Star Instruments Co. Ltd Ksh 4,545,123,38250 Inclusive of VAT;
 - vi. B6-Hexing Technologies Ltd Ksh 5,741,472,745 Inclusive of VAT;
 - vii. B7-Magnate Ventures Ltd Ksh 5,437,930,052.60 Inclusive of VAT.
15. It is also the Applicant’s case that in the Respondent’s tender document issued to interested bidders upon the advertising of the tender, the instructions to bidders and the eligibility criteria were initially only for local manufacturing firms.
16. However, the Applicant avers that the eligibility criteria and mandatory evaluation criteria were substantially, unlawfully and irregularly altered by the Respondent, who subsequently issued six irregular addenda in an attempt to water down the eligibility and evaluation criteria and to tailor the tender to suit predetermined bidders in what emerges to be apparent collusion between the preferred bidders and undisclosed officers of the Respondent.
17. The Applicant contends that the addenda were issued to suit the grounds upon which the subject tender was challenged by Inhemeter Africa Company Limited, Smart Meter Technologies Limited, Shenzhen Star Instruments Company Limited and Magnate Ventures Limited in Review No.51 of 2022 through the following;
- a. Addenda were issued to include local assemblers which was the substantial ground raised by the Applicants in Review No. 51 of 2022.
 - b. Addenda were issued to unbundle the tender to multiple lots which was also raised by the Applicants in Review No. 51 of 2022. The tender items were split into Six Lots each Lot comprising five items with initial quantities but through the Six Addenda, the items per lot were reduced to four (4) items with increased quantities than the quantities which were initially provided for in the original tender.
 - c. The impugned addenda watered down the financial requirements to favour the preferred bidders.
 - d. The technical specifications were watered down to favour the preferred bidders.
 - e. The tender security requirements were made optional to favour the preferred bidders.”
18. The Respondent is accused of materially watering down the substance of the original tender in breach of the provisions of section 75(1) of the *Public Procurement and Asset Disposal Act* and that on the basis of the watered- down tender document the Respondent upon evaluation of the submitted bids issued a notice of intention to award the subject tender to the following bidders;
- a. Inhemeter Africa Company Limited.
 - b. Smart Meter Technologies Limited.
 - c. Yocean Group Limited.
 - d. Magnate Venture Limited.



19. The said bidders it is urged have jointly engaged in acts of collusive practice aimed at watering down the specifications of the tender document to enable them secure the tender award as can be gleaned from the grounds upon which they jointly lodged Review Application No. 45 of 2022 and Review Application No. 51 of 2022.
20. Further that the procurement proceedings undertaken by the Respondent in the subject tender number KP1/9A.2/OT/28/22—23 For Supply of Meters (local Manufacturers) and the award decision arising therefrom are unreasonable, ultra vires, tainted with illegality, error of law, irrationality and a violation of the Applicant's legitimate expectations and therefore ought to be reviewed pursuant to Section 7 of the [*Fair Administrative Action Act*](#).
21. The Respondent it is argued manifestly failed to comply with the mandatory and material procedure prescribed by the provisions of section 96(1) & (3) of the [*Public Procurement and Asset Disposal Act*](#) and rule 85(2) of the [*Public Procurement and Asset Disposal Regulations 2020*](#) by failing to publish the tender advertisement on the dedicated Government tenders' portal (Public Procurement Information Portal).
22. It is also the Applicant's case that the Respondent's impugned decision and/or action of floating the subject tender and awarding the said subject tender to M/s Inhemeter Africa Company Ltd (Ksh 5,457,227,975 Inclusive of VAT), M/s Smart Meter Technology Ltd (Ksh 4,655,935,500 Excluding 16% VAT), Yocean Group Limited (Ksh 5,481,095,56420 VAT Not Indicated), and M/s Magnate Ventures Ltd (Ksh 5,437,930,052 Including 16% VAT) was materially influenced by an error of law, illegality, irrationality and unreasonableness.
23. According to the *Ex parte* Applicant the impugned decision was materially influenced by an error of law, illegality, irrationality and unreasonableness as the Respondent failed to publish the tender advertisement on a dedicated Government tenders portal (Public Procurement Information Portal), the Respondent failed to take account of and give effect to the provisions of section 75(1) of the [*Public Procurement and Asset Disposal Act*](#) which prohibits the Respondent as the procuring entity from issuing addenda that materially alters the substance of the original tender.
24. Also, that the Respondent awarded the subject tender to four companies that have clearly engaged in acts of collusive practice which included acts designed to establish tender prices at artificial non-competitive levels and to deprive the procuring entity of the benefits of free and open competition all of which are prohibited under section 66(1) of the [*Public Procurement and Asset Disposal Act*](#).
25. The issuing of six unlawful addenda by a company that has been procuring meters for decades, according to the *Ex parte* Applicant is not only a big red flag that the processing of the subject tender is fishy but also an indicator that it was meant to loosen the conditions of the tender to accommodate these companies and lock out others while also playing around with the quantities to make the tender lucrative.
26. Further that the condition in ITT 3.7 on page 27 that bidders with more than 50% outstanding Respondent's orders shall not be eligible to participate in the tender was not only discriminatory but also contrary to the requirements of Article 227 of the [*Constitution*](#). This requirement according to the *Ex parte* Applicant is also irrational and unreasonable.
27. The floating of a new tender for supply of meters whereas there is an existing contract for undelivered meters is also argued to be irrational and unreasonable.



28. The Respondent it is contended breached the requirements of Section 3(a) and 3(h) of the *Public Procurement and Asset Disposal Act*, 2015 which states that public procurement must adhere to the principles of public finance and, must maximize value for money.
29. According to the Ex parte Applicant it is in the public domain that the Respondent has had a dead stock problem for meters but still continues to procure for multibillion shillings tender for supply of meters contrary to Section 53(3) and Section 160(2) of the *Public Procurement and Asset Disposal Act*, 2015 which clearly states that overstocking is an offence.
30. Also, that the Respondent has demonstrated a pattern of floating tenders but fails to conclude them in a manner that is legally compliant with the requirements of the *Public Procurement and Asset Disposal Act* and the regulations thereunder.
31. The prices it is also contended awarded exceed the allocated budget and with the excess amounts having never been approved by the Board of Directors of the Respondent or the procurement plan amended to accommodate the excess amounts which is a breach of Section 53(2) and (8) of the *Act* which requires that all procurement transactions must be within approved budgets and that the Accounting Officer shall not commence procurement transactions until it is ascertained that funds have been allocated for the transaction.
32. The quantities of the meters to be procured in the initial consolidated procurement plan are also said to have been changed through the six addenda that were issued without subsequent approval by the Board of Directors which according to the Ex parte Applicant is against the provisions of Regulation 40(4) of the *Public Procurement and Asset Disposal Regulations, 2020*.
33. The Ex parte Applicant also urges that the award criteria provided in ITT 40 and which was amended in Addendum No. 4 breaches the requirements of Section 86 (1)(a) of the Act which states that the tender must be awarded to the lowest evaluated bidder/price. The award criteria stated is said to have no foundation in section 86 of the *Public Procurement and Asset Disposal Act*.
34. It is also contended that ITT 47.1 of the tender document made the requirement for 10% performance bond as optional in order to favor the same preferred bidders. This according to the Applicant is illegal and contrary to the provisions of Section 142(1) of the *Act* which provides that performance security is mandatory and not optional.
35. The Applicant further argues that ITT 32.3 of the bid document promises that the margin of preference shall be executed as detailed in Section III of the bid document, however the said section it is argued does not provide for the details referred to which is against the requirements of Section 155(2) of the Act which prescribes that materials manufactured in Kenya should be given preferential treatment and not products assembled in Kenya as Respondent provided in the tender.
36. The Applicant's case is also that it was a serious violation of the preference schemes that are provided for in section 155 of the Act for the Respondent to restrict the tender to assemblers of meters as the said section 155 prescribes that preferences should only be offered to manufacturers and not assemblers and to companies where Kenyan citizens are shareholders. The tender is said to have been unlawfully and irregularly restricted to assemblers to suit the 1st to 4th Interested Parties through their acts of collusive practice.
37. The Respondent is also said to be aware that the awarded bidders' prices in this tender were awarded to supply the meters at approximately Ksh. 7,000/= per meter while the current existing supplier of meters with Respondent supplies the same meters at Ksh. 4,000/=.



38. The Applicant avers that the Respondent's impugned conduct and award of the subject tender ought to be reviewed by this Honourable Court pursuant to the cited express provisions of section 7(2) as read with section 11 of the [Fair Administrative Action Act](#)
39. He also argues that he has pursued the only remedy available to him outside this Court process by lodging a complaint to Public Procurement Regulatory Authority under the provisions of section 35(2) of [PPAD Act](#).
40. He also seeks for the Court to exempt him from the obligation to exhaust the said remedy under section 35(2) of [PPAD Act](#) as despite lodging the complaint dated 9th May,2023 with PPRRA before the expiry of the 14 days' period as provided in the Respondent's notification of intention to award (dated 2nd May,2023), he is yet to receive any feedback.
41. The Ex parte Applicant also contends that he is apprehensive that upon the lapse of the still period, the Respondent and the 1st to 4th Interested Parties will proceed to execute procurement contracts which are founded on illegality, irrationality, error of law, unreasonableness.
42. The Ex parte Applicant's case is that there are no timelines within which the Applicant's complaint to PPRRA will be resolved hence the Respondent might proceed with awarding the subject tender in light of the obligations to do so within the tender validity period. Also, that the orders sought in these proceedings are beyond the powers conferred upon the Director General of PPRRA under section 38(1) of the [PPAD Act](#) since notification of intention to award has already been issued.
43. It is urged that the timelines under section 8 of the [Fair Administrative Action Act](#) would ensure that the remedy sought herein is granted without rendering the application a mere academic exercise. Further that this Honourable Court has wide powers to grant the relief sought and that it is in the interest of justice that the Applicant be exempted from exhausting the internal remedies under the [PPAD Act](#).
44. In conclusion the *Ex parte* Applicant contends that unless the impugned decision of the Respondent is quashed as sought herein, the Respondent would continue undeterred to waste taxpayer's money through unplanned, irregular and unlawful procurement processes.
45. The Ex parte Applicant also filed grounds of opposition in response to the 4th Interested Party's Notice of Motion dated 2nd June,2023. The following grounds are raised in opposition;
 - i. The 4th Interested Party's Application is hopelessly incompetent and bad in law as the 4th Interested Party has fatally failed to satisfy the threshold for setting aside the Honourable Court's orders granting leave to commence judicial review as well as the stay orders made on 29th May,2023.
 - ii. The 4th Interested Party's Application is hopelessly defective as it is founded on a patent misconception of the legal framework for administrative review under the [Public Procurement and Asset Disposal Act](#).
 - iii. The Ex parte Applicant's judicial review application herein was commenced without unreasonable delay as contemplated under section 9(1) of the [Fair Administrative Action Act](#).
 - iv. This Honourable Court's has jurisdiction to grant leave as sought under the Civil Procedure Rules since the Ex Parte Applicant lodged the application for leave within the six months timeline contemplated under Order 53 rule 2 of the [Civil Procedure Rules](#).



- v. This Honourable Court has the requisite jurisdiction to take cognizance of, hear and determine the Ex Parte Applicant's Judicial Review Application herein which has been lodged within time.
 - vi. The 4th Interested Party's Application is incompetent and bad in law having been founded on gross misrepresentation and distortion of facts as demonstrated below:
 - a) Contrary to the 4th Interested Party's unfounded averments on failure to disclose the existence of Miscellaneous Judicial Review Application No. E053 of 2023, Republic v Kenya Power & Lighting Company Limited, the said Application was marked as withdrawn on 25th May, 2023 and is therefore not pending.
 - b) Contrary to the patently erroneous averments of the 4th Interested Party, the Ex Parte Applicant did not seek administrative review before the purported Public Procurement Review Authority (which is a non-existent entity under the [Public Procurement and Asset Disposal Act](#)).
 - c) The Ex Parte Applicant made full and frank disclosure of having lodged a complaint with the Public Procurement Regulatory Authority pursuant to section 35(2) of the [Public Procurement and Asset Disposal Act](#). In so doing, the Ex Parte Applicant similarly sought to be exempted from exhausting the said remedy in accordance with section 9(4) of the [Fair Administrative Action Act](#).
 - vii. The 4th Interested Party has failed to disclose and demonstrate any irregularity in the orders made by the Honourable Court on 29th May, 2023.
 - viii. The Ex Parte Applicant made full, frank and fair disclosure of material facts relevant for the just determination of the Chamber Summons Application and issuance of the stay orders made by the Honourable Court on 29th May, 2023 as demonstrated hereinabove.
 - ix. The orders sought by the 4th Interested Party in its application herein are untenable as the Ex Parte Applicant's suit cannot be struck out and dismissed at the same time.
 - x. The 4th Interested Party's Application offends the overriding objectives under Section 1A and 1B of the [Civil Procedure Act](#) as the said grounds of the Application have been regurgitated in the 4th Interested Party's Replying Affidavit sworn by Robert Kinyanjui on 7th June, 2023. The said 4th Interested Party's Application is inimical to efficient disposal of the business of the Court and the efficient use of scarce judicial time.
46. The Ex parte Applicant filed written submissions dated 30th June, 2023 in support of his Notice of Motion dated 29th May, 2023; In opposition to 4th Interested Party's Notice of Motion dated 2nd June, 2023 and in opposition to the Respondent's Notice of Preliminary Objection dated 2nd June 2023.
47. In the submissions the Ex parte Applicant raises three (3) issues or determination as follows; Whether the Honourable Court lacks jurisdiction to hear and determine the Ex Parte Applicant's Application herein, Whether the procurement proceedings and the award decision arising therefrom are unreasonable, ultra vires, tainted with illegality, error of law, irrationality and violation of the Ex Parte Applicant's legitimate expectations and Whether the Ex Parte Applicant has demonstrated circumstances which warrant the Honourable Court to exercise its judicial discretion in favour of granting the judicial review orders of Certiorari, prohibition and mandamus sought herein.



48. On the first issue the Ex parte Applicant contends that section 27 of PPADA provides for establishment of the Public Procurement Administrative Review Board (“the Review Board”) while section 28 provides for the functions and powers of the Review Board. Section 167 of PPADA is said to provide for filing of administrative review before the Review Board and restricts the *locus standi* to candidates or tenderers
49. The Ex parte Applicant submits that he was neither a bidder nor a candidate and as such lacked locus standi to commence administrative review proceedings before the Review Board. It is also the Ex parte Applicant’s submission that he has a legal remedy in lodging a complaint to the Public Procurement Regulatory Authority under section 35(2) of PPADA and also under the provisions of section 7 and 11 of the Fair Administrative Action Act to apply for judicial review of the impugned administrative actions of the Respondent to this Honourable Court.
50. It is also submitted that contrary to the 4th Interested Party’s unfounded averments on failure to disclose the existence of Miscellaneous Judicial Review Application No.E053 of 2023, *Republic v Kenya Power & Lighting Company Limited*, the said Application was marked as withdrawn by this Honourable Court on 25th May,2023 and is therefore not pending and the Ex Parte Applicant had no obligation to disclose the fact of having filed the same.
51. The Ex parte Applicant cites the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR on the scope of Judicial Review.
52. It is the Ex parte Applicant’s submission that in evaluating whether a decision is illegal, this Honourable Court is called upon to construe the content and scope of the instrument (the PPADA and PPAD Regulations) conferring the duty or power upon the Respondent herein as a decision-maker.
53. In addition, that the Honourable Court as a guardian on the will of Parliament expressed under PPADA in exercising this power of construction is called upon to enforce the rule of law, by requiring the Respondent to act within the “four corners” of its powers or duties and to ensure that the exercise of the power is in accordance with the scope and purpose of Parliament’s enactments.
54. The Ex parte Applicant cites the Halsbury’s Laws of England treatise on when an error of law arises as follows;
- “ A public body will err in law if it...misinterprets a statute, or any other legal document,..... fails to follow the proper procedure required by law; or otherwise abuses its power.”
55. Section 7 (2)(a), (b),(d),(i) and (k) of the Fair Administrative Action Act is cited on this Honourable Court’s mandate to review an administrative action or decision in different circumstances.
56. On the 2nd issue it is submitted that it is common ground that judicial review orders of certiorari, mandamus and prohibition sought herein by the Ex Parte Applicant are discretionary in nature and that he has demonstrated the circumstances which warrant the Honourable Court to exercise its discretion in his favour.
57. It is also the Ex parte Applicant’s submission that as was held by the Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR an order of certiorari as sought by the Ex Parte Applicant can quash a decision already made. The Halsbury’s Laws of England is also cited on the quashing of a decision, such as the impugned administrative action and decision of the Respondent herein.



58. The case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* (*supra*) is cited on the scope and efficacy of the judicial review orders of mandamus. The case is also cited on the order of prohibition.
59. It is submitted that no valid procurement contract has been executed between the Respondent and the 1st to 4th Interested Parties in accordance with section 135 as read with section 138 of *PPADA* hence the Honourable Court can issue an order of prohibition in the circumstances to prohibit execution of any procurement contract.
60. The Ex parte Applicant also submits that even assuming, that the impugned procurement contracts have been signed, the Respondent has not complied with section 138 of *PPADA* which therefore renders the contract awards ineffective.
61. In conclusion it is submitted that having demonstrated the manifest errors of law, illegality and irrationality of the Respondent's administrative decisions in the procurement proceedings and resultant decision to award herein, this Honourable Court ought to intervene and grant the judicial review orders of certiorari, mandamus and prohibition as sought by the Ex Parte Applicant.

Respondent's Case:

62. The Respondent, in opposing the Application, filed their Replying Affidavit dated 5th June 2023. It was averred that whereas, the ex parte Applicant seeks for judicial review orders in the form of an order of certiorari, mandamus, and prohibition; the same judicial review application is fatally defective as it has not demonstrated the grounds for granting of the said orders.
63. Further, that the ex parte applicant has not demonstrated the manner the decision/actions of the Respondent illegality, error of law, irrationality and violation of the ex-parte applicant's legitimate expectations.
64. The Respondent maintained that the invitation to Tender was open to all local manufacturers/assemblers based in Kenya. That by the time the Respondent was served with the judicial review Application by the ex parte Applicant, out of the 4 framework contracts, 3 had been executed by the parties.
65. It was the Respondent's claim that there was no material alteration to the substance of the tender through the addenda. The respondent made clarifications and amendments to the principal tender document through the six (6) addenda pursuant to Section 75 of the *Public Procurement and Asset Disposal Act* 2015.
66. The Respondent stated that the condition in the Tender Document, is a standard eligibility criterion for the Respondent aimed at ensuring that the Respondent's tenders are fair to all, contrary to the allegations of discrimination; which also guarantees equity in award of procurement contracts by eliminating bidders whose intentions is to hoard orders whilst denying capable bidders who rightly deserve an opportunity to be awarded a contract.
67. The Respondent contended that the procurement of meters, and other critical items, is a continuous annual process contained in the approved procurement plan; and the procurement is adequately funded as per the budgeted funds for the two financial years. That the allegation of procurement of meters when there is an existing contract is frivolous, and made in ignorance of the Respondent's supply chain processes.
68. The Respondent averred that it (the Respondent) did not contravene Section 155 of the *Public Procurement and Asset Disposal Act* 2015 (PPADA). Section 155 (3) of the *PPADA*. That it is apparent



- that the Respondent seeks to promote local industry by giving preference to locally manufactured or assembled goods. Thus, that the tender was open to bidders who have established plants in Kenya to manufacture or assemble meters.
69. The Respondent held the position that, it is abundantly apparent that the procurement process of the Tender was executed in strict compliance to the dictates of the Constitution of Kenya, 2010; Public Procurement and Asset Disposal Act, 2015, Regulations thereunder and the tender requirements. That Article 227(1) of the Constitution obligates the Respondent to procure through a system that is fair, equitable, transparent, competitive, and cost-effective; and that the Respondent has done no wrong in its mandate
 70. To the Respondent, this judicial review application is contrary to Article 24(1)(d) of the Constitution in the sense that it seeks to limit the rights and fundamental freedoms of the Respondent and the public in a manner that is not reasonable and justifiable, by prejudicing the public interest of consumers and commercial rights of the Respondent.
 71. The Respondent's stated that the procurement process was both legally, factually correct, and upholds the provisions of the Constitution, PPADA, national interest, and rules of natural justice. That in response to the grounds of the Application; the statutory statement, and the verifying affidavit, the Applicant's assertions are fallacious and out of context and the negative publicity has adversely affected the outlook of an open and fair procurement process undertaken by the Respondent.
 72. Further, that the ex-parte Applicant has not in any way demonstrated his involvement in the subject tender and/or his authority to represent any of the 18 bidders who showed interest in this tender. The ex-parte Applicant has not demonstrated any nexus in this matter, and he is neither a candidate nor a tenderer in the subject procurement process; and he therefore lacks the locus standi to file the present judicial review Application.
 73. According to Respondent, there are no offending clauses in the Tender Document as alleged by the ex-parte Applicant; there was no material effect to the substance of the tender through the addenda issued; the Respondent has promoted the national values and principles and is supporting the local industry; and the setting out of conditions and specifications in the Tender Document is part of the tendering process as provided by the law and not a ploy to unfairly discriminate against any bidder. That the judicial review Application is bad in law and improperly before this court, and the Respondent raised a preliminary objection.
 74. That this Judicial Review Application by the ex-parte Applicant falls short on the foundational basis of instituting a Judicial Review Application pursuant to Section 7(2) of the Fair Administrative Action Act, 2015. That the requirements in the Tender Document are reasonable, fair, and crafted to competitively procure high quality meters - which are fit for the Respondent's customers' needs.
 75. That the ex parte Applicant had lodged a complaint with the PPR, alleging conspiracy to defraud, fraudulent practices and collusion on the Tender; and pursuant to sections 9(h), 34 and 35 PPADA, PPR vide a letter dated 19.5.23 and received by the Respondent on 22.5.23, required the Respondent to confer response to the stated allegations; and by a letter dated 24.5.23, the Respondent conferred response to the issues set out in the PPR letter dated 19.5.23; and in this regard this matter is therefore premature and fatally defective.
 76. That the ex-parte Applicant in a bid to frustrate the procurement of the key tools of trade of the respondent, herein being meters, had filed a Judicial Review Application dated 22nd May 2023 being Milimani High Court Judicial Review Miscellaneous Application No. E053 of 2023 *Republic v. KPLC and Benedict Kabgi Ndung (ex-parte)*.



77. The Honourable Judge having failed to grant the ex-parte Applicant the desired orders, he thus opted to abandon the same and institute this current Judicial Review Application to which stay orders were granted. The ex-parte Applicant has acted illegally and unlawfully by misrepresentations and by failure to make material full disclosure to the Honourable Court of the existence of Miscellaneous Application No. E053 of 2023.
78. That from the foregoing, it is apparent that the ex parte Applicant is abusing the court process by forum shopping with the sole aim of frustrating the Respondent's procurement process, because it is well known and established under Section 175 of the PPADA, that if a person is aggrieved with a decision of the Public Procurement Administrative Review Board, then they may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties but the ex parte Applicant has now come to this Court to re-agitate the same matter in the present petition.
79. That the ex-parte Applicant action of approaching the Public Procurement Regulatory Authority before the expiry of the 14 day's still period after notification of intention of award, is malicious and in bad faith noting that Section 167 (1) of the PPADA provides that the ex parte Applicant should have lodged his complaints with the Public Procurement Administrative Review Board.
80. That the ex-parte Applicant in his judicial review Application, has proceeded to mention the following cases which were filed at the Public Procurement Administrative Review Board for allegations that criteria issued in the tender document for procurement of meters was discriminatory towards Kenyan owned firms and that it favoured foreign companies in the specifications issued. The matters have long been determined by the High Courts and the Procurement Board and go to demonstrate that the Respondent has been intentional, fair and inclusive in the tender document in question;
- a. PPARB Application No. 31 Of 2022; *Energy Meters Assemblers & Manufacturers Association v Accounting Officer KPLC*.
 - b. PPARB Application No. 45 Of 2022; *Inhemeter Africa Company Ltd & 3others v Accounting Officer KPLC*
 - c. PPARB Application No. 51 Of 2022; *Inhemeter Africa Company Ltd & 3others v Accounting Officer KPLC*
81. To the Respondent, the instant judicial review Application is gravely incompetent, bad in law, lacks merit, incurably defective, irregular and constitutes unmitigated abuse of the Honourable Court's process and that the same ought to be dismissed with cost.
82. Through it's submissions dated 30th June, 2023, The Respondent's submitted that a close examination of the procurement proceedings - undertaken by the Respondent, and the award decision arising therefrom - of the subject Tender, demonstrate that it is fair, lawful, sound, reasonable, and it took into account all the relevant facts and the law.
83. That an assessment of the said Tender proceedings does not disclose any unreasonableness, error of law, illegality, irrationality, procedural improprieties, and ultra-vires - as alleged by the Ex-Parte Applicant. Also, that in the prevailing circumstances, the Respondent's actions were both legally, factually correct, and upholds the provisions of the Constitution, PPADA and public interest.
84. The Respondent maintains that, if the prayers sought by the Ex-Parte Applicant are granted as sought; irredeemable prejudice, grave injustice, substantial hardship, and inconvenience would be visited upon the general public and the Respondent - on account of the Respondent's inability and incapacitation to avail meters to the public consumers of electrical power. That it is this Honourable Court's



- constitutional mandate to protect and safeguard the general public's right to clean energy and socio-economic rights; and as such it is in the interests of justice and the greater public good that this Judicial Review Application be dismissed with costs to the Respondent.
85. Notably, that the import of the Respondent's Preliminary Objection is that the High Court is not the appropriate forum for the Ex-Parte Applicant to institute his claims. That the Ex-Parte Applicant ought to have first exhausted the administrative remedies provide under the PPADA, before proceeding to the High Court; thus that the Ex-Parte Applicant prematurely filed this Application.
 86. That the PPADA has comprehensive measures of addressing any complaints relating to public procurement. The jurisdiction of the Public Procurement Administrative Review Board (Review Board) emanates from sections 27, 28 and 167 of the PPADA. The Respondent submitted that the Review Board has the powers to hear and determine complaints submitted to it. Also, that the alternative forum with jurisdiction is the Public Procurement Regulatory Authority (PPRA).
 87. That the PPRA is established by statute with functions under section 9, and elaborate Powers to ensure compliance under sections 34 to 42 PPADA. That PPRA has extensive powers to investigate and act on complaints received from any individual; to ensure compliance, under section 38 PPADA, PPRA has wide and sweeping powers, including termination of procurement proceedings, among others. Further, that the PPADA clearly establishes (two) 2 ways under which a party, may raise grievances. The procedure set for lodging complaints with PPRA, or the Review Board is elaborate and clearly sufficient to deal with the issues such as the ones raised by the Ex-Parte Applicant including any complaints relating to the procurement process which should have been investigated by PPRA before any intervention by this Honourable Court.
 88. Essentially, that the claims raised by the Ex-Parte Applicant touches on the regulatory role of the PPRA. That PPRA is the sector regulator clothed with the Powers to Order as stipulated under section 38 PPADA - including terminating the procurement proceedings. The powers of PPRA under section 38 are as wide as the powers of this Honourable Court.
 89. That the Applicant only sent a complaint letter and did not make any follow ups to ascertain the investigations and actions so far undertaken by PPRA. It is noteworthy that the issues raised against the Respondent are technical and PPRA is best placed and equipped to hear the complaints as the forum of first instance. The mandate of PPRA in particular is to address all regulatory matters within the context of the public procurement and asset disposal spectrum.
 90. The Respondent stated that the Ex-parte Applicant chose to ventilate his issues in various fora. That he lodged a complaint with the PPRA, and did not exercise patience and let PPRA discharge its mandate (pursuant to section 9(h), 35 and 43 PPADA). That as this matter was still undergoing investigations, and before PPRA could act as required by law, without notice, the Ex-Parte Applicant prematurely lodged this instant Application. That PPRA has never declined to discharge its mandate, thus that this Application is therefore premature, and the court has no jurisdiction - as there is no decision from the PPRA to form the basis for this Judicial Review Application as required by section 42 PPADA.
 91. It was the Respondents submissions that there exists an alternative remedy that is sufficient, effective, expedient, and economical to resolve the issues raised by the Ex-Parte Applicant, but which the Ex-Parte Applicant has by-passed and rushed to this Court. Importantly, that the Ex-Parte Applicant claims could thus be redressed by first approaching the PPRA; instead, the Ex-Parte Applicant rushed to this Court - citing a litany of provisions in an attempt to camouflage the dispute as Judicial Review issue. The Respondents hold the view that, one must first seek redress as provided by statute, before approaching the Court.



92. It was the Respondents position that, in all procurement and asset disposal complaints, the jurisdiction of this Honourable Court only flows from sections 42 and 175 PPADA; and it is only after the Review Board or PPRA have made a determination; and that this Court can terminate any procurement contract (at any stage) found to be illegal or unlawful, as so can PPRA.
93. To the Respondent, that it is clear the Ex-parte Applicant failed to lodge his complaints with the Review Board but chose to move the PPRA; but did not exhaust the process before PPRA. That the doctrine of exhaustion imposes an obligation on parties to exhaust any. That, alternative dispute resolution mechanism before embarking on a Court Process. PPRA is capable of granting the remedies sought by the Ex-Parte Applicant.
94. The High Court dealt with a preliminary objection similar to the one before this Honourable Court. That, in compliance with Article 169(1) (d) and Article 162(2) of the Constitution, the PPADA provides for a dispute resolution procedure that has been established and therefore, the same must be followed. That this Honourable Court lacks jurisdiction to hear and determine this matter, urge the Honourable Court to dismiss this Application with costs - for want of the essential features of a Judicial Review Application.
95. The Respondent stated that the Applicant has not in any way demonstrated any of the judicial review grounds with regard to the decision of the Respondent. That the Judicial Review Application is incompetent as it challenges the merits of the decision made by the Respondent and not the process that led towards the making of the impugned decision.
96. That the Applicant incorrectly invited this Honourable Court to investigate the merits of the decision of the Respondent with regard to the Tender. The Ex-parte Applicant is inviting the Honourable Court to override the decision of the Respondent; that an investigation on the merits of a decision falls within the province of the appellate jurisdiction and not of this Honourable Court.
97. That Judicial review is not an appeal from a decision. It is a review of the decision making process and the legality of the decision itself. In judicial review the courts exclusively are concerned with the legality of the administrative action or decision in question. That the Respondent exercised its decision within the ordained legal boundaries pursuant to the PPADA, Regulations and the Constitution. Also, that considering the Tendering process in its entirety, it demonstrates that the Respondent acted objectively and therefore was fair, reasonable, just, in good faith, rules of natural justice, due regard to the prescribed procedures; and therefore urge the Honourable Court not to interfere with the decision of the Respondent and proceed to dismiss this Judicial Review Application with costs.
98. The Respondent submitted that the unsubstantiated claims by the Ex-Parte Applicant has stalled the procurement process, thereby creating the risk of the Respondent not being able to purchase meters within the required time. The Respondent contends that this contravenes public interest, as many members of the public are waiting to be supplied with meters.
99. The wider public interest pursuant to Article 46(1)(a) and (c) of the Constitution obligates the Respondent to, without delays, procure and install quality meters for its customers use; so as to improve efficiency, increase reliability, enhance security of supply and improve the quality of service to the public. That the Respondent's decision throughout this procurement process, was informed by the above Articles of the Constitution and the urgent need to mitigate its technical and commercial losses and un-served energy losses arising from the lack-of or delays in availability of meters and also to meet the steady rising number of demand of power supply from the member of the Public. In this regard this matter should be dismissed with costs.



100. The Respondent submitted that this Judicial Review Application is time barred as the breaches subject of this review occurred when the Tender Document and the last Addendum 6 were made available to the public on 31.3.23, thus this this issue goes to the jurisdiction of the Honourable Court. The law requires that a party seeking administrative review, must apply to the Review Board: within 14 days after being notified of the award; or within 14 days after the date of the occurrence of the alleged breach at any stage of the procurement process.
101. Further, that the Ex-Parte Applicant's complaint is primarily on the occurrence of a breach in the contents of the Tender Document and the Notifications of Award issued on 2.5.23. The breach complained of, is related to events which took place at the time the Tender Document and the last Addendum were made available to the public. Accordingly, that the Ex-Parte Applicant should have lodge his complaint competently within 14 days after the date of the occurrence of the alleged breach; which could not have been later than either 14.4.23.
102. To the Respondent, the Applicant's claim that this procurement processes is unreasonable, ultra vires, tainted with illegality, error of law, irrational and violation of legitimate expectation is bereft of factual basis.
103. That the legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is trite law in evidence that he who asserts must prove his case. The burden of proof lies with whoever would want the Court to find in his favour in support of what he claims (as provided by sections 107 and 108 of the Evidence Act (CAP 80)). That this Application is an abuse of the court process and dismissal with costs.
104. That Section 155 PPADA and Regulation 144(1) and (4) PPADR provides for preferences and reservations. It should not be lost to the Honourable Court that Section 157 (8) PPADA provides for various preference schemes. From these provisions, it is clear that the law has not required preference and reservations in every tender that tenderers are invited to participate in.
105. That Section 157(5) PPADA and Regulation 28 of the Preference Regulations provides that the preference and reservation envisages in Part XII of the PPADA is to the extent of the overall procurement budget and procurement plan by the Respondent. That the Respondent has fully complied with section 155, 158 PPADA and Article 10 and 227 of the Constitution. The Respondent maintains that they have not favoured any bidder, but has extensively complied with the law on preference and reservations. That the Ex-Parte Applicant's assertions in his Application herein are misconceived and misplaced.
106. That Section 5 PPADA, on the other hand, is on conflicts with other Acts. The import of section 5 is that the PPADA prevails over any other Act of Parliament or law in all aspects of procurement; including the timelines within which a procurement complaint is to be determined by the Review Board, PPR, the High Court and the Court of Appeal. The provisions of the PPADA is all encompassing by itself. To the Respondent, this matter is fully premised on the PPADA and not any other Act.
107. That the Ex-parte Applicant acted illegally and unlawfully by misrepresentations and by failure to make material full and frank disclosure to the Honourable Court of the existence of Milimani High Court Judicial Review Miscellaneous Application No. E053 of 2023, *Republic v. Kenya Power & Lighting Company, ex-parte Benedict Kabugi Ndungu* which was withdrawn. He who comes into equity must come with clean hands. The inequitable misconduct by the Ex-parte Applicant precludes him from the favours of this Honourable Court.



108. On cost, that the Ex-Parte Applicant being fully aware of the mechanisms put in place for parties to pursue reprieve in instances such as these and to ventilate the issues raised, elected to prematurely drag the Respondent to court. The Respondent has expended considerable resources in this matter and thus ought to be awarded costs as a reprieve.

2nd Interested Party's case:

Whether the Applicant has locus to institute these current proceedings?

109. The 2nd Interested Party submits that the Applicant has no locus to institute the current proceedings since he has admitted that he was neither a candidate nor tenderer in the Tender floated by the Respondent. By virtue of this reason, the Applicant has purported to bring himself within the ambit of the *Fair Administrative Action Act*, No. 4 of 2014.
110. Respectfully, the *Fair Administrative Action Act* ("the Act") was enacted to give effect to the right to just administrative action guaranteed under Article 47 (of the *Constitution* of Kenya). The Act defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.
111. According to the 2nd Interested Party, to qualify as an administrative action, the decision taken must adversely affect rights. An adverse determination of a person's rights can only be interpreted to mean that the decision must impose a burden or have a negative effect. This includes decisions that either; require someone to do something, to tolerate something or not to do something; limit or remove someone's rights; or decide someone does not have a right to something.
112. The 2nd Interested Party is also of the view that the Applicant's Verifying Affidavit and Statutory Statement neither reveals nor demonstrate how the Applicant's rights were, have been, or could possibly be affected by the Respondent's decision to award the Tender to the Interested Parties. By failing to demonstrate how his rights have been adversely affected, the Applicant is barred from calling to his aid the reliefs set out under the Act.
113. According to the 1st Interested Party, it is trite that a person seeking administrative review before the Court to challenge a process governed by the *Public Procurement and Asset Disposal Act*, 2015 should either be a candidate or a tenderer and ought to demonstrate that it suffered or risks suffering loss or damages due to breach of duty imposed on a procuring entity. Accordingly, a party who is neither a candidate nor a tenderer, such as the Applicant herein, cannot challenge the award of tender which it did not bid for.
114. This position was affirmed in *Republic v Independent Electoral & Boundaries Commission & 2 Others* (2017) eKLR where it was held that persons who do not fall in the category of persons contemplated in section 167 (1) have no locus standi to commence review proceedings. The same position was restated in *Philip Nyandieka (Suing on own behalf and on behalf of the general public) -v- National Government CDF- Bomachoge Borabu constituency* (2019) eKLR and also in the Court of Appeal case in *Al Ghurair Printing and Publishing LLC v Coalition for Reform & Democracy* (2017) eKLR.
115. On the issue of jurisdiction to hear and determine this suit: the 2nd Interested Party submits that the mechanism for judicial review contemplated under the *Fair Administrative Actions Act, 2014* is NOT any different from that envisaged under Section 175 of the *PPADA*. Principally, the Applicant is appealing, in the literal sense of the word, to this Court to interfere with the Respondent's decision.



A plea of this nature is essentially an application for judicial review which is limited to an aggrieved party and ought to be governed by Section 175 of the *PPADA*.

116. The 2nd Interested Party is urging this court to consider this matter within the rubric of Section 175 of the *PPADA* and hold that it has no jurisdiction to hear and determine this matter. This is so because the Applicant has not brought himself within the definition of an aggrieved party with locus to challenge a procurement process as read alongside the fact that this Court is divested of jurisdiction to hear any procurement dispute touching on the Tender since the Contracts have been executed. This fact has not been controverted by the Applicant.
117. On the question of the doctrine of Ripeness the 2nd Interested Party submits that the proceedings before the Court offend the sacrosanct doctrine of ripeness. The Applicant has admitted to filing a Complaint dated 9th May 2023 before the Public Procurement and Oversight Authority following the Notification of Award to the various Interested Parties. Rather than pursuing the said complaint to its logical conclusion, the Applicant catapulted his alleged gravamen to this Court even before an adjudication on the said complaint could be made. We therefore invite the Court to frown upon the Applicant's case since the same merely hypothetical, premature and/or academic. Without a decision from the PPOA, the claim is yet to mature into a justiciable controversy.
118. The 2nd Interested Party has a concern around issue of the non-disclosure of pending proceedings. As at the time of filing these proceedings, the Applicant deliberately failed to disclose that he had unsuccessfully attempted to stop the implementation of the Tender vide Milimani High Court Judicial Review Misc. Application No. E053 of 2023 *Republic v Kenya Power & Lighting Company Limited & Benedict Kabugi Ndung'u (ex Parte)*. Regrettably, the said non-disclosure hoodwinked the Court into granting the Orders sought at the ex parte stage.
119. The 2nd Interested Party submits that this Court has on numerous occasions stated that because of the special nature of the judicial review jurisdiction, a party approaching the Court for any writ under the purview of judicial review ought to demonstrate candour and candidness with the Court. It is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case.
120. Where a party is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.
121. Accordingly, the Applicant was under a solemn duty to disclose to the Court about his unsuccessful attempt to get ex parte stay orders in Milimani High Court Judicial Review Misc. Application No. E053 of 2023 notwithstanding that the said information was not to his advantage and leave it to the court to determine the merits or otherwise of his complaint on (+254) 20 3201255/99

4th Interested Party's' Case:

122. In opposition to the Ex-Parte Applicants Application, the 4th Interested Party filed a Replying Affidavit sworn on 7th June, 2023 by Robert Kinyanjui as well as written submissions dated 30th June 2023.
123. The Motion seeks in the main, the invalidation and cancellation of the tender process and award of the contract for tender number KP1/9A.3/0T/28/22-23 for the supply of meters to the Respondent.



124. According to The 4th Interested Party was one of the successful candidates in the tender and has executed a contract dated 29th May, 2023 with the Respondent in that regard while the Ex-Parte Applicant was not a candidate or tenderer in the tender.
125. Simultaneous with the reply to the Motion dated 29th May, 2023, the 4th Interested Party filed a Notice of Motion dated 2nd June, 2023 seeking the setting aside of the Order to commence this claim, made on 29th May, 2023.
126. The 4th Interested Party submitted various issues for determination namely: -
- i. Whether the Ex-Parte Applicant has locus standi to seek administrative and judicial review of the tender process.
 - ii. Whether the administrative review jurisdiction of the High Court has been properly invoked.
 - iii. Whether the claim is an abuse of the process of the Court.
 - iv. Whether the claim is capable of determination by way of judicial review.
127. On whether the Ex-Parte Applicant who was not a candidate nor tenderer in the tender process can seek administrative and judicial review of the tender process and the outcome thereof. The 4th Interested Party's premise is that neither option is available to the Ex-Parte Applicant, and for that reason leave to commence this claim ought not to have been granted, the same should be set aside and the Notice of Motion dated 29th May, 2023 by the Ex-Parte Applicant struck out and the claim dismissed.
128. The 4th Interested Party contends that the tender opening minutes exhibited to the Ex-Parte Applicant's Verifying Affidavit sworn on 26th May, 2023 as BKN-9, nine bidders are listed and the list does not include the Ex-Parte Applicant.
129. The 4th Interested Party further stated that the Ex-Parte Applicant annexed and exhibited to the Verifying Affidavit a letter dated 9th May, 2023 and marked as BKN-8 from the Ex-Parte Applicant to the Director General, Public Procurement Regulatory Authority and the Secretary/Chief Executive Officer, Ethics and Anti-Corruption Commission (EACC).
130. The letter asked the Public Procurement Regulatory Authority and EACC to investigate a complaint of breach of the law in the tender process and undertake the prosecution of those found culpable.
131. Investigations under Section 35 of the *Public Procurement and Asset Disposal Act* No 33 of 2015 in the manner sought by the Ex-Parte Applicant in his letter of 9th May, 2023 may be initiated by the Public Procurement Authority on request by a public institution or any person.
132. The 4th Interested Party contends that the claim for judicial review is bad for want of locus standi and is in any event, premature for the reason that there is no decision made by the Director- General of the Public Procurement Authority on the complaint by the Ex-Parte Applicant.
133. A request for administrative review before the Public Procurement Review Board is provided for under Section 167 of the *Public Procurement and Asset Disposal Act* No 33 of 2015. The avenue is available only to "a candidate or a tenderer..." Evidently, the Ex-Parte Applicant would lack locus standi to espouse a claim in respect of the tender process and the outcome thereof before the Public Procurement Review Board.
134. The 4th Interested Party submits that the statutory remedies available to the Ex-Parte Applicant and/or in respect to the tender process and the outcome thereof under Sections 35 to 39 and 167 of the



- Public Procurement and Asset Disposal Act No 33 of 2015 have not been exhausted and further, that no request for exemption has been made before the Court nor is there justification for the same.
135. Section 9 (3) of the Fair Administrative Action Act No 4 of 2015 obliges the High Court to decline a request of judicial review where it is satisfied that the statutory remedies available have not been exhausted. Relying on the cases of Republic v Commissioner of Co-operative Development & others, Ex-Parte Paul Manwa & others (2022) eKLR and Republic v The County Assembly of Kisii Committee of Powers & Privileges & others, Ex Parte Karen Nyamota Magara (2021) eKLR.
136. On whether it was lawful, just and proper for the Ex-Parte Applicant to institute this claim without disclosing the fact of his prior filing of Miscellaneous Judicial Application No E053 of 2023, Republic v Kenya Power & Lighting Company Limited in which leave was not granted.
137. The 4th Interested Party avers that that the Ex-Applicant breached the duty of candour and that this claim ought to fail for that reason alone. Citing the case of Adopt-A-Light Ltd v Municipal Council of Mombasa & Another, Misc. Application No 997 of 2007 (UR) where an order for leave to commence judicial review proceedings was set aside. The Court pronounced as follows: -
- “I find that the applicant intentionally failed to disclose to the Court that granted leave that there was an Application for stay pending in the Court of Appeal and that stay had been denied by that court three times. Had the Court known of all these facts it is unlikely that it would have granted the orders of leave and stay as that meant that the Applicant was moving two courts for similar orders at the same time thus abusing the court’s process.”
138. On whether a claim for judicial review can be entertained on hotly contested facts. The 4th Interested Party submitted that the Ex-Parte Applicant’s complaint relates to disputed facts concerning the tender process and is not capable of determination by way of judicial review.
139. There is propriety in the entrenchment of the statutory remedies under Sections 35 to 39 and 167 of the Public Procurement and Asset Disposal Act No 33 of 2015. The purpose was to have a forum where disputes relating to public procurement can be adequately and sufficiently adjudicated by interrogation of evidence. The claim before the Court seeks to circumvent that viable option and encumber the Court with a dispute that does not fall under the prevue of judicial review.

Analysis and determination:

140. I have taken into account the rival positions and robust arguments made by the parties in this suit and carefully considered the applications, the affidavits on record as well as submissions and authorities as fronted by the counsels and in particular the following:
- i. The Ex Parties Notice of Motion Application dated 29th May 2023.
 - ii. The Applicant’s grounds of Opposition dated 26th June 2023 opposing the 4th Interested Party’s Notice of Motion dated 2nd June 2023.
 - iii. The Applicant’s written submissions dated 30th June 2023.
 - iv. The Respondent Preliminary objection dated 2nd June 2023.
 - v. I have looked at and considered the Respondents List Bundle of Authorities and Digest of Authorities dated 30th June 2023.
 - vi. The 2nd Interested Party’s Replying Affidavit dated 23rd June 2023.



- vii. The 2nd Interested Party written submissions dated 2nd July 2023.
 - viii. The 4th Interested Party's application dated 2nd June 2023.
 - ix. The 4th Interested Party's Replying Affidavit sworn on 7th June, 2023.
 - x. The 4th Interested Party filed written submissions dated 30th June 2023.
141. The court has identified the following as the issues for determination:
- 1. Whether the Ex-Parte Applicant has locus standi to seek administrative and judicial review of the tender process.
 - 2. Whether the court has jurisdiction to hear and determine this suit.
 - 3. Whether the reliefs sought can be granted.
142. Issue 1 and 2 are related and the court addressed its mind to them together. This has been initiated by the Respondent's Notice of Preliminary Objection dated 2nd June 2023.
143. The Supreme Court Case of *Dickson Ngigi Ngugi v Commissioner of Lands* S.C Petition No. 9 of 2019 [2019] eKLR, [36] Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, *Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".
- (37) It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this Court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.
- (38) It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by the *Constitution* or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.
144. Section 27 of the *Public Procurement and Asset Disposal Act*, 2015 provides for the establishment of the Public Procurement Administrative Review Board as follows:-
- "(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.
 - (2) The Review Board shall ensure reasonable access to its services in all parts of the Republic, as far as it is appropriate to do so."
145. Section 28 provides for the functions and powers of the Review Board as follows:-
- "(1) the functions of the Review Board shall be—



- a. Reviewing, hearing and determining tendering and asset disposal disputes; and
 - b. To perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
- (2) In performance of its functions under subsection (1) (a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.
- (3) The Authority shall provide secretariat and administrative services to the Review Board.”

146. Section 35 (2) provides for investigations procedures as follows:-

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

147. Section 75 (1) provides that:-

“A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.”

148. Section 138 provides for the publication of procurement contract as follows:-

- a. The accounting officer of a procuring entity shall publish and publicise all contract awards on their notice boards at conspicuous places, and website if available within a period as prescribed.
- b. An accounting officer of a procuring entity shall report all contract awards to the Authority as prescribed.
- c. The Authority shall publish on its website notices of the reports on contract awards from procuring entities.
- d. The Authority shall issue written directions and guidelines governing the reporting requirements of contract awards by the accounting officer of procuring entities as may be prescribed in regulations.
- e. This section shall not apply to procurement contracts awarded by the national security organs through classified procurement methods and procedures provided for under Part VIII.

149. Section 167 provides for the request for a review as follows:-

- “(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:



Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
 - a. The choice of a procurement method;
 - b. A termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
 - c. Where a contract is signed in accordance with section 135 of this Act.”

150. It is important to understand who the Exparte Applicant is to the proceedings before this court and whether or not he has the locus standi to sue. This has a direct implication of the Jurisdiction of this court.
151. Section 167 (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
152. Section 2 of The *Public Procurement and Asset Disposal Act*, 2015 defines a "candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity; "tender" means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity; "tenderer" means a person who submitted a tender pursuant to an invitation by a public entity; *Republic v Independent Electoral & Boundaries Commission & 2 Others* (2017) eKLR where it was held that persons who do not fall in the category of persons contemplated in section 167 (1) have no locus standi to commence review proceedings.
153. The same position was restated in *Philip Nyandieka (Suing on own behalf and on behalf of the general public) -v- National Government CDF - Bomachoge Borabu constituency* (2019) eKLR and also in the Court of Appeal case in *Al Ghurair Printing and Publishing LLC v Coalition for Reform & Democracy* (2017) eKLR.
154. I have looked at the Ex Partes Complaint and request for investigations dated 9th May 2023 and addressed to The Director General Public Procurement Regulatory Authority and The Ethics and Anti-Corruption Commission, The Statutory Statement and the Verifying Affidavit and I am satisfied that the Applicant was not a candidate or a tenderer.
155. The Applicant has admitted that he was neither a candidate nor tenderer in the Tender floated by the Respondent.
156. It is this courts find and I so hold that the Exparte Applicant has locus standi to lodge a complaint under Section 35 (2) for investigations. The Applicant however lacks the locus to institute judicial



- Review Proceedings under Section 167 (1) since he was neither a candidate nor tenderer in the Tender floated by the Respondent.
157. Another dimension to the issue of jurisdiction flows from the *Fair Administrative Action Act*, 2015. The Applicant argues that he has access to the judicial review jurisdiction of the court. In the heading of the Notice of Motion it can be gleaned that he has invoked Sections 9 and 11 of *Fair Administrative Action Act*, 2015.
158. Section 7 of The *Fair Administrative Action Act*, 2015 provides for the institution of judicial review proceedings as follows:-
- “(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—
- a. A court in accordance with section 8; or
 - b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.”
159. The Applicant submits that the Ex Parte Applicant’s application does not offend the cited provisions of Section 27, 28 and 167 of the *PPADA* as alleged or at all and that the Honourable Court therefore has the requisite jurisdiction under Section 7 and 11 of *FAAA* to take cognizance of, hear and determine the Ex Parte Applicant’s Application herein. The Ex Parte Applicant submits that he equally has locus standi to commence and maintain the judicial review proceedings herein, since according to him The procurement proceedings and the award decision arising therefrom are unreasonable, ultra vires, tainted with illegality, error of law, irrationality and unreasonableness
160. In advancing the argument that it is now settled that the scope of judicial review as entrenched in common law has been expanded by the *Constitution* and the *Fair Administrative Action Act* he relies on case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR (see paragraphs 55-58 of the Judgment).
161. In *Apex Finance International Limited and Another v Kenya Anti-Corruption Commission* NKU HC JR No. 64 of 2011 [2012] eKLR, the court cited a decision of the Supreme Court of Nigeria, *Goodwill and Trust Investment Ltd and Another v. Witt and Bush Ltd* Nigerian SC 266/2005 which captured the fundamental nature of the issue of capacity. The court observed that:
- “It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, “where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
162. It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave. Such a suit is incompetent and any proceedings flowing from it are a nullity in law.”
163. In the case of *John Gitbinji Wang’ondou versus Raphael Gitau Njau et al*, Civil Appeal No. 241 of 1997 [1997 LLR 6700 the court hastened to add, the question of standing before court is not a mere



technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. Standing before court goes to the root of the matter as where a wrong party is brought to court, then that is the injustice not curable by any Constitutional provision looking at the Constitutional preamble to the last Article.”

164. Section 35 (1) of The *Public Procurement and Asset Disposal Act* provides that the Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

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

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

165. Section 9 of The *Fair Administrative Action Act*, 2015 provides for the procedure for judicial review as follows:-

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

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

166. Under Section 9 (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

167. Section 9 (4) stipulates that, notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

168. In *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

“ 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *Republic v Independent Electoral and Boundaries Commission*



[IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus: "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake." See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.*)

169. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
170. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.
171. In the case before this court, it is not in dispute that the Ex-parte Applicant lodged a complaint to the PPRA on 9th May 2023. The Applicant has not tendered any evidence whether or not the complaint has been heard and determined, when it was heard or whether he faced any complications or all. The court is in the dark and the Applicant does not expect the court to abandon this suit and go and look for evidence that would enable the court to grant an exemption in an adversarial system like ours where the Respondent and the 4th Interested Party have mounted a scathing attack on the Applicant on this front.
172. In his submission the Exparte Applicant submitted that "he has pursued the only remedy available to him outside this Court process by lodging a complaint to Public Procurement Regulatory Authority under the provisions of Section 35(2) of PPAD Act. He is then asking the Court to exempt him from the obligation to exhaust the same remedy under section 35(2) of PPAD Act."



173. The Ex parte Applicant contends that he is apprehensive that upon the lapse of the statutory period, the Respondent and the 1st to 4th Interested Parties will proceed to execute procurement contracts which are founded on illegality, irrationality, error of law, unreasonableness.
174. The Ex parte Applicant further submitted that there are no timelines within which his complaint to PPRA will be resolved hence the Respondent might proceed with awarding the subject tender in light of the obligations to do so within the tender validity period.
175. He submits that the orders sought in these proceedings are beyond the powers conferred upon the Director General of PPRA under Section 38(1) of the PPAD Act since notification of intention to award has already been issued.
176. He argues that the timelines under Section 8 of the Fair Administrative Action Act would ensure that the remedy sought herein is granted without rendering the application a mere academic exercise and that this Honourable Court has wide powers to grant the relief sought and that it is in the interest of justice that the Applicant be exempted from exhausting the internal remedies under the PPAD Act.
177. On its part, the Respondent admits that the ex parte Applicant had lodged a complaint with the PPRA, alleging conspiracy to defraud, fraudulent practices and collusion on the Tender; and pursuant to sections 9(h), 34 and 35 PPADA, PPRA vide a letter dated 19.5.23 and received by the Respondent on 22.5.23, required the Respondent to offer a response to the stated allegations and by a letter dated 24.5.23. According to the Respondent this suit is premature and fatally defective.
178. The Respondent further submits that the ex-parte Application is a bid to frustrate the procurement of the key tools of trade of the respondent, herein being meters.
179. According to the Respondent, the ex-parte Applicant has acted illegally and unlawfully by misrepresentations and by failure to make material full disclosure to the Honourable Court of the existence of Miscellaneous Application No. E053 of 2023.
180. According to the Respondent, it is apparent from the foregoing that the ex parte Applicant is abusing the court process by forum shopping with the sole aim of frustrating the Respondent's procurement process, because it is well known and established under Section 175 of the PPADA, that if a person is aggrieved with a decision of the Public Procurement Administrative Review Board, then they may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties but the ex parte Applicant has now come to this Court to re-agitate the same matter in the present petition.
181. The Respondent further submits that the ex-parte Applicant's action of approaching the Public Procurement Regulatory Authority before the expiry of the 14 day's period after notification of intention of award, is malicious and in bad faith noting that Section 167 (1) of the PPADA provides that the ex parte Applicant should have lodged his complaints with the Public Procurement Administrative Review Board.
182. This court finds that the Applicant did not file an application seeking to be exempted from exhausting other avenues of redress before filing this suit. As at the time of writing this judgment, the Court had no application before it that would enable it to grant an exemption order. In the Application that the Applicant has placed before me, the Applicant has no prayer seeking the courts leave to be exempted from the obligation to exhaust any remedy.



183. There is no evidence from the Applicant that can help this court to exercise its discretion to exempt the Applicant from the Application of Section 7 of The *Fair Administrative Action Act*. Though the Applicant knew there was need to seek leave, the applicant did not even attempt to advance an oral application nor seek the leave of the court to allow him to amend the Application so as include a relief for leave.
184. The court can only grant orders that have been sought by litigants. The decision to grant or not to grant a party leave to be exempted from the obligation to exhaust the available alternative dispute resolution mechanisms before approaching this court can only be made by the court under The *Fair Administrative Action Act* after a court has been moved appropriately.
185. The Respondent submits that:
- “It is not in doubt, that the Ex-Parte Applicant has anchored all his claims and prayers under the *PPADA*. It also not in doubt, that the Ex-Parte Applicant is allegedly aggrieved by a public procurement proceeding. It is clear, the Ex-Parte Applicant made no attempts, whatsoever, to engage the Respondent on any of the issues he has raised in the Application. Had he done so, the Respondent would have explained to him the basis therefore. The import of the Respondent's Preliminary Objection is that the High Court is not the appropriate forum for the Ex-Parte Applicant to institute his claims. That the Ex-Parte Applicant ought to have first exhausted the administrative remedies provide under the *PPADA* before proceeding to the High Court. Further, that the Ex-Parte Applicant prematurely filed this Application.
186. The *PPADA* has comprehensive measures of addressing any complaints relating to public procurement. The jurisdiction of the Public Procurement Administrative Review Board Review Board emanates from sections 27, 28 and 167 of the PAD Act. The Respondent submits that the Review Board has the powers to hear and determine complaints submitted to it. Also, the alternative forum with jurisdiction is the Public Procurement Regulatory Authority (PPRA).
187. PPRA has extensive powers to investigate and act on complaints received from any individual. The PPRA has wide and sweeping powers, including termination of procurement proceedings, among others. We therefore submit that the *PPADA* clearly establishes 2 ways under which a party, may raise grievances. The procedure set for lodging complaints with PPRA or the Review Board is elaborate and clearly sufficient to deal with the issues such as the ones raised by the Ex-Parte Applicant including any complaints relating to the procurement process which should have been investigated by PPRA before any intervention by this Honorable Court.
188. More fundamental, the claims raised by the Ex-Parte Applicant touches on the regulatory role of the PPRA. PPRA is the sector regulator clothed with the Powers to Order as stipulated under section 38 *PPADA* including terminating the procurement proceedings. The powers of PPRA under section 38 are as wide as the powers of this Honourable Court. It is on record that, the Ex-Parte Applicant only sent a complaint letter and did not make any follow ups to ascertain the investigations and actions so far undertaken by PPRA. It is noteworthy that the issues raised against the Respondent are technical and PPRA is best placed and equipped to hear the complaints as the forum of first instance. The mandate of PPRA in particular is to address all regulatory matters within the context of the public procurement and asset disposal spectrum.



189. It is abundantly clear that the Ex-parte Applicant chose to ventilate his issues in various fora. He lodges a complaint with the PPRA. He did not exercise patience nor let PPRA discharge its mandate pursuant to section (h), 35 and 43 PPADA. This matter was still undergoing investigations and before PPRA could act as required by law, without notice and like a rocket taking off from a launch pad, the Ex-Parte Applicant prematurely lodged this Application. He did not allow PPRA to exercise its mandate and address his concerns as required by the PPADA. PPRA has never declined to discharge its mandate. This Application is therefore premature and the court has no jurisdiction, as there is no decision from the PPRA to form the basis for this Judicial Review Application as required by section 42 PPADA. (See the case law set out as Case No. 3 in the Respondent's Digest of Authorities)

“We thus submit that there exists an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the Ex-Parte Applicant, but which the Ex-Parte Applicant has bypassed and rushed to this Court. The Ex-Parte Applicant claims could thus be redressed by first approaching the PPRA. Instead, the Ex-Parte Applicant rushed to this Court citing a litany of provisions in an attempt to camouflage the dispute as Judicial Review issue. This court has repeatedly guided litigants in disputes such as the one before this Honourable Court to first seek redress as provided by statute before approaching the Court. (See the case laws set out as Case No. 3 to 7 in the Respondent's Digest of Authorities). In order to exercise discretion judiciously, the court must be satisfied that the Applicant has made out a compelling case for exemption”.

190. From these submissions, and I so find it is clear that the Respondent was able and willing to deal with the Applicants Complaint. This court finds that the Ex parte Applicant did not exhaust the alternative dispute resolution mechanisms and this court lacks jurisdiction to hear the suit. It is my finding that the Applicant did not make any application for exemption from Section 9 of The FAAA. He has not furnished the court with an order granting him the exemption.

Disposition:

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

192. Consequently, this court cannot address its mind to the third issue being whether the reliefs sought can be granted. The 4th Interested Party's Application has been attended by the consequences of upholding the Notice of Preliminary Objection dated 2nd June 2023. The same collapses alongside the suit.

Order:

1. The Respondent's Notice of Preliminary Objection dated 2nd June 2023 is upheld.
2. The Notice of Motion dated 29th May 2023 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.



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JOHN CHIGITI (SC)
JUDGE

