



Blue Sea Services Limited v Kenya Ports Authority; Everdiva & 12 others (Interested Parties) (Constitutional Petition E028 of 2022) [2023] KEHC 22382 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E028 OF 2022**

OA SEWE, J

SEPTEMBER 21, 2023

IN THE MATTER OF ARTICLES 1, 2(4), 10, 21, 22, 23, 28, 35, 43, 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE TENDER FOR PROVISION OF CLEANING AND LANDSCAPING SERVICES FOR ZONES 2 & 3 AND THE NEW CONTAINER TERMINAL LOCATED WITHIN THE PORT OF MOMBASA

AND

IN THE MATTER OF THE FAILURE BY KENYA PORTS AUTHORITY TO COMPLY WITH THE MANDATORY LEGAL REQUIREMENTS IN THE ACQUISITION OF THE SAID SERVICES

BETWEEN

BLUE SEA SERVICES LIMITED PETITIONER

AND

KENYA PORTS AUTHORITY RESPONDENT

AND

EVERDIVA INTERESTED PARTY

HEAI GARDEN INTERESTED PARTY

DEROCK ENTERPRISE INTERESTED PARTY

TREVIAL INVESTMENT INTERESTED PARTY

CAJOSMA CONTRACTORS INTERESTED PARTY

BRADRIAN INTERESTED PARTY



HIGHGRADE KENYA LIMITED	INTERESTED PARTY
2 KEY ENGINEERING	INTERESTED PARTY
FOTI UNIVERSAL CO	INTERESTED PARTY
ULIZU ENTERPRISES	INTERESTED PARTY
BEKI SUPPLIER	INTERESTED PARTY
NAJOMAC INVESTMENTS	INTERESTED PARTY
AFRICAN MEMSAP	INTERESTED PARTY

JUDGMENT

1. The petitioner, Blue Sea Services Limited, is a limited liability company whose principle business is said to be the provision of hygiene and cleaning services at a fee. It filed this Petition on 23rd June 2022 on the basis that it won a tender floated by the Kenya Ports Authority (the respondent); being Tender No. KPA/111/2016-17/MO-Provision of Cleaning Services and Landscaping, with regard to Zone 3, situated within the respondent’s property known as the Port of Mombasa. The petitioner asserted that it won the said tender following a competitive process and in strict conformity with the Public Procurement & Asset Disposal Act, No. 33 of 2015, which is the law governing procurement of goods and services by public bodies.
2. The petitioner further stated that, since the date of award in May 2019, and upon signing a three-year contract in respect thereof, it has provided services to the respondent’s satisfaction; and even went beyond the contracted period as the respondent readied itself to float a fresh tender for the said services. It averred, at paragraph 10 of the Petition that, it was surprised to learn, on 16th June 2022, that the respondent had floated the tender and received bids for the provision of cleaning services for the amalgamated Zones 2 & 3 and the new container terminal at the Port of Mombasa; and that the bids were opened on 17th June 2022. Upon attending the tender opening meeting, the petitioner got to learn that 13 bids had been received by the respondent and that it was poised to proceed to the next stage of tender evaluation and award. He set out the list of bidders at paragraph 10 of the Petition and pointed out that they have been cited herein as the interested parties.
3. Being aggrieved that the tender was not advertised to enable it present its bid, the petitioner approached the Court vide this Petition seeking the following reliefs:
 - (a) A declaration that the public opening, on the 17th June 2022, of the tender for cleaning and environmental hygiene services for Zones 2 and 3 and the new container terminal situated within the Port of Mombasa, in which the interested parties participated, be declared null and void for all purposes for want of compliance with Articles 10, 27, 28, 35, 43, 201 and 219 of *the Constitution* of Kenya.
 - (b) An order directing the respondent to strictly comply with Articles 209 and 219 of *the Constitution* and the relevant provisions of the Public Procurement & Asset Disposal Act as and when it decides to procure the provision of cleaning and environmental hygiene services for to Zones 2 & 3 and the new container terminal situated within Mombasa Port.
 - (c) Costs of the Petition.



4. The petitioner contended that, being a public body, the respondent is subject to *the Constitution*, and is required to act in a credible, accountable, open and transparent manner at all times, as provided for in Articles 10 and 47 of *the Constitution*. Accordingly, the petitioner faulted the respondent in the following respects:
 - (a) That the respondent having not floated the said tender in public as required by Article 201 and 219 of *the Constitution*, and having not complied with Section 60, 62, 68, 74 and 96 of the *Public Procurement and Asset Disposal Act* (PPADA), it denied the petitioner the chance to participate in the tender alongside the interested parties.
 - (b) By handpicking a few selected bidders, to wit the interested parties herein, the respondent acted in a discriminatory manner which is expressly outlawed by Article 27 of *the Constitution*.
 - (c) *The Constitution* and the PPADA expressly require public bodies to ensure fairness, equity, competitiveness in procurement to ensure value for money and eliminate corruption.
5. Thus, the petitioner averred that, unless the impugned procurement process is nullified, it will be completely locked out of the process; thereby occasioning it irreparable loss. In particular, it was averred at paragraph 14 of the Petition that the petitioner's directors, namely Benson Nyangeh Maina, Eliud Maina Muturi and the estate of the late Rachael Mirigo Nyange, who sustain themselves from the income made by the petitioner, will be denied a chance to earn a living; and therefore that their social and economic rights as provided for under Article 43, which rights are related to the right to personal dignity as per Article 28 of *the Constitution*, is threatened with violation.
6. The respondent relied on the Replying Affidavit sworn by its Manager, Procurement & Contract Management, Mr. Daniel Amuyunzu on 24th May 2023. Mr. Amuyunzu averred that the Petition was filed in bad faith and is solely intended to exert undue influence on the procurement process commenced by the respondent. He added that the petitioner's contract was with respect to 3 zones dubbed 1, 2 and 3; and that the contract has since come to its end by effluxion of time and is not in any way connected to the impugned tender. He further deposed that the contract in question did not create any legitimate expectation or preference whatsoever on the part of the petitioner for subsequent tenders, since public procurement is strictly governed by *the Constitution* and the procurement laws.
7. Mr. Amuyunzu explained that the respondent continuously registers suppliers in various categories through its Supplier Relationship Management (SRM) Portal, a process which is done strictly in accordance with the PPADA; and that such suppliers are thereupon issued with a unique vendor number and password to enable them access the Portal. Accordingly, he deposed that it was up to the petitioner to comply with the mandatory requirements for preferences and reservations in public procurement and asset disposal to enable it participate in the impugned tender. In particular he made reference to the provisions of Article 227(2) of *the Constitution* and Section 53(6) and (10) and Part X11 of the PPADA, which require that 30% of procurement opportunities be reserved for the youth, women and persons with disability.
8. At paragraph 10 of his Replying Affidavit, Mr. Amuyunzu averred that, whenever a tender reserved for the preference groups is ready for floatation, the same is advertised in the SRM Portal for the specific category of registered suppliers in the preference group; and that immediately upon advertisement, all the registered suppliers in that category are automatically notified through the email addresses provided at the time of registration. The suppliers would then proceed to submit their bids online in the portal before the deadline.



9. Mr. Amuyunzu confirmed that Tender No. KPA/140/2021-22/MO for the Procurement of Industrial & Mechanized Cleaning Services was advertised by the respondent on 8th June 2022 in its SRM Portal under prequalified youth group category; and was therefore open to all prequalified vendors under that category. He further stated that, as at 30th June 2022, the SRM Portal-Youth Category had a total of 606 registered suppliers. He pointed out the petitioner has never applied for registration in that category and is therefore not one of the 606 registered suppliers who were eligible to compete for the subject tender.
10. Thus, Mr. Amuyunzu deposed that, since the tender was reserved for the youth, the orders sought by the petitioner are not merited. He further explained that the continued absence of environmental service providers has compromised continues to compromise the rights of employees and port users to enjoy clean and healthy environment. He therefore asserted that none of the petitioner's rights has been infringed at all by the respondent's implementation of the subject procurement and prayed for the dismissal of the Petition with costs and for the discharge of the conservatory orders issued herein to ensure seamless continuity of service provision to the respondent.
11. The 3rd interested party also opposed the petition. He initially filed an application dated 5th June 2023 seeking that judgment be deferred pending the hearing and determination of his application. He essentially sought to be accorded time to present his case before the Court in opposition to the Petition. He explained that he only got to learn of the Petition on the 5th June 2023, by which time a judgment date had been set for 7th July 2023. The application, being unopposed, was allowed on 29th June 2023; whereupon leave was granted to the 3rd interested party to file a Replying Affidavit as well as written submissions within 7 days of the order. The judgment date of 7th July 2023 was accordingly vacated to enable compliance.
12. Accordingly, I have perused and considered the 3rd interested party's Replying Affidavit sworn by Derrick Owino Ogundo on 7th July 2023. He posited that the petitioner is guilty of non-disclosure of material facts, namely, that his contract vide Tender No. KPA/111/2016-17/MO-Provision of Cleaning & Landscaping services is totally different from the subject tender, Tender No. KPA/140/2021-22/MO-Provision of Industrial & Mechanized Cleaning Services, yet it is relying on the former tender to challenge the latter tender.
13. Mr. Ogundo further averred that the expectation by the petitioner to be invited personally or specifically to participate in the subject tender is unlawful and would amount to canvassing; and should therefore not be entertained as it is not backed by any constitutional or statutory provision. He also posited that the petitioner was not qualified or eligible for the subject tender which was reserved for the youth because it was not registered in the youth category. He therefore asserted that there was no evidence of handpicking, or discrimination or that the tender was secretively published.
14. In addition, Mr. Ogundo deposed that, the assertion by the petitioner that its directors will be denied a chance to earn a living is misconceived in so far as it is based on the assumption that the petitioner would automatically win the tender without any competition.
15. The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 17th May 2023. Accordingly, counsel for the petitioner, Mr. Gikandi, relied on his written submissions dated 6th June 2023. He made reference to the national values and the principles of governance set out



in Articles 10 and 201(d) and (e) of *the Constitution*, as well as Article 227(1) of *the Constitution*, which provides that:

“When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, competitive and cost effective.”

16. Counsel further submitted that it was upon the foregoing foundation that the PPADA was enacted in 2015 with a view of streamlining public procurement and ensure the same is undertaken in a transparent manner devoid of any discrimination, favouritism or bias. He relied on *Association of Retirement Benefits Schemes v Attorney General & 3 Others* [2017] eKLR as to the supremacy of *the Constitution* and *Republic v Public Procurement Administrative Board, Ex Parte Accounting Officer, Kenya Ports Authority & Another; FCM Travel Solutions t/a Charlestone Travel Limited & 3 Others (Interested Parties)* [2021] eKLR for an explication of the applicable principles under-girding public procurement.
17. While conceding that there are tenders that are restricted and available to specific groups of tenderers such as the youth, Mr. Gikandi nevertheless submitted that the petitioner was discriminated against taking into account that one of its members, Benson Maina, who holds 70% of the petitioner’s shares, falls in such a category yet the petitioner was not given an opportunity to present its bid. Moreover, he submitted, by confining the floatation of the tender to its SRM Portal, the respondent infringed the petitioner’s right to information as envisaged by Article 35 of *the Constitution* and the entire Part VI of the PPADA. For this proposal, Mr. Gikandi relied on *Katiba Institute v President’s Delivery Unit & 3 Others* [2017] eKLR, *Republic v Musikari Kombo, Minister for Local Government & 2 Others, Ex Parte James Mwangi Waweru* [2007] eKLR and *Republic v Public Procurement Administrative Review Board, Ex Parte Kenya Power & Lighting Company Limited, Energy Sectors Contractors Association & Another (Interested Parties)* [2020] eKLR and urged the Court to allow the Petition and grant the orders prayed for therein.
18. On his part, counsel for the respondent, Mr. Kyandih, filed written submissions dated 9th June 2023 and thereby proposed the following issues for determination:
 - (a) Whether the petitioner’s rights have been violated;
 - (b) Whether an expired public procurement contract creates constitutional rights to the supplier;
 - (c) Whether the petitioner risks suffering irreparable loss on account of the respondent’s tender;
 - (d) Whether the respondent committed procedural impropriety in the procurement of the services;
19. Mr. Kyandih reiterated the respondent’s assertion that the subject procurement was reserved for the youth and was therefore advertised and processed in accordance with the provisions of Article 227(2) and Section 71 of the PPADA. He therefore submitted that the petitioner’s claim of violation of constitutional rights is unfounded, granted that the petitioner was not, at the material time, registered as a supplier in the youth category. He relied on *Chris Ochieng & 3 Others v Director of Public Prosecutions & Another; Jude Anyiko (Interested Party)* [2021] eKLR for the proposition that the alleged infringement or violation must be eminent.
20. On whether the respondent had an obligation to accord the petitioner an opportunity to compete in the subject contract, it was the submission of counsel that an expired procurement contract does not create any constitutional rights; and therefore there was no obligation owed by the respondent to the petitioner. He relied on *Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho* [2017] eKLR in which the Court of Appeal held that a fixed term contract



- carries no right, obligations or expectations beyond the date of expiry. He added that, under Section 91 of the PPADA, the choice of a procurement method is entirely the preserve of the procuring entity.
21. It was further the submission of Mr. Kyandih that there is absolutely no loss that the petitioner risks suffering as a result of the advertisement of the tender reserved for the youth. His view was that, even assuming that the petitioner was registered in the youth category, the tender process conducted by the respondent does not grant any person an entitlement to or guarantee of winning the tender; and therefore none of the parties can possibly risk suffering any loss. Accordingly, counsel urged the Court to find that the standard set in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR as to what amounts to irreparable injury has not been met herein.
 22. Lastly, it was the submission of Mr. Kyandih that the subject procurement process was verily grounded in statute, and therefore the issue of procedural impropriety does not arise. He relied on *Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development, Ex Parte Soweto Residents Forum CBO* [2019] eKLR for the proposition that an expectation whose fulfilment requires that a decision maker should make an unlawful decision cannot be a legitimate expectation. Accordingly, counsel prayed for the dismissal of the petition with costs.
 23. On behalf of Derock Enterprises, the 3rd interested party, Mr. Mutisya filed written submissions dated 7th July 2023. He essentially reiterated the averments of Mr. Ogundo on behalf of the 3rd interested party and urged for the dismissal of the Petition with costs. He relied on High Court Petition No. E065 of 2021: *Mohamed Maula Saggaf & Others v Attorney General & Others* and Supreme Court Presidential Election Petition No. E001 of 2022: *Raila Amollo Odinga & Others v William Ruto & Others* to buttress his arguments.
 24. In response to the written submissions filed by the respondent and the 3rd interested party, counsel for the petitioner filed Further Written submissions dated 7th June 2023 as well as Supplementary Submissions dated 17th July 2022, leave having been granted in that regard. He reiterated his argument that procurement of goods and services by public entities should be done in an open and transparent manner so that members of the public can easily access the information to know which tenders have been floated at any given time. In his view, the respondent's SRM Portal does not uphold the national principles of integrity and transparency. He added that it is also an affront to Articles 27, 201 and 227 of *the Constitution*. For these arguments counsel cited *Car Importers Association of Kenya v Kenya Revenue Authority & 3 Others* [2019] eKLR in which a discriminatory policy was declared unconstitutional by Hon Ogola, J.
 25. In the Petitioner's Supplementary Submissions, Mr. Gikandi responded to the submissions put in by Mr. Musyoka on behalf of the 3rd interested party. He submitted that the case of the 3rd interested party in fact supports the Petition in so far as it contends that the subject tender was only floated to a small group of registered suppliers. He therefore argued that the petitioner had sufficiently demonstrated that any interested tenderer like the it who did not have the credentials to access the SRM Portal of the respondent could not possibly have known of the advertisement of the tender.
 26. In the light of the foregoing, there is no dispute that the respondent floated a tender for the provision of cleaning and landscaping services at its Port of Mombasa vide Tender No. KPA/111/2016-17/MO; or that the petitioner was the successful bidder and was therefore awarded the tender in May 2019 for a three-year period ending April 2022 or thereabouts. A formal contract was consequently executed between the parties that was satisfactorily serviced by the petitioner to the end. In fact, the petitioner averred at paragraph 8 of the Petition that it was still providing the services on "...a holding on basis as it awaits the Respondent to procure a service provider for the said services..."



27. It is also common ground that in June 2022, the respondent floated a tender, being Tender No. KPA/140/2021-22/MO for the provision of industrial and mechanized cleaning services in terms of the tender documents annexed to the Replying Affidavit sworn by Mr. Amuyunzu. As was pointed out by the petitioner, the said tender was opened on 17th June 2021 and the following bids formally received by the respondent:

Name of Company

Amount in Kenya Shillings

Everdiva

142,500,570.50

Heai Garden

141,719,400.00

Derock Enterprise

37,564,080.00

Treval Investment

35,102,160.00

Cajosma Contractors

Bradrian

Highgrade Kenya Limited

32,161,590.00

2Key Engineering

52,044,062.40

Foti Universal Co.

57,320,820.00

Ulizu Enterprises

332,055,825.00

Beki Supplier

113,562,000.00

Najomac Investments

51,646,393.00

African Memsap

54,288,792.00

28. That is the point at which the procurement was when interim conservatory orders were issued herein on 29th June 2022; which orders were confirmed on 11th May 2023. Granted the respective positions taken by the parties, the issues emerging for consideration are:

(a) Whether the petitioner's rights have been violated or threatened with violation as alleged; and if so,



- (b) Whether the petitioner is entitled to the reliefs sought.

A. On whether the petitioner’s constitutional rights were violated or threatened with violation:

29. In its particulars of breach, set out at paragraphs 13 to 15, the petitioner complained that:

- (a) The respondent having not floated the impugned tender in public as required by Article 201 and 219 of *the Constitution*; and having not complied with Section 60, 68, 74 and 96 of the PPADA, the invitation of the interested parties to bid for the tender was secretive and therefore in breach of Articles 10 and 47 of *the Constitution*.
- (b) By handpicking a few selected bidders to compete for the subject tender, the respondent discriminated against the petitioner and thereby acted in breach of Article 27 of *the Constitution*.
- (c) By floating the tender in its SRM portal, the respondent infringed the petitioner’s right to information as envisaged by Article 35 of *the Constitution*.

30. There is no gainsaying that lack of transparency and equity in the area of procurement of goods and services by public entities has been an area of concern both to the Government and the Kenyan public at large; and it is for this reason that the framers of the 2010 Constitution deemed it fit to include Article 227 in Chapter 12 thereof thus:

“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”

31. It is noteworthy too that, in the first Article in that Chapter, namely, Article 201, *the Constitution* sets out the principles of public finance thus:

“The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular —
- (i) the burden of taxation shall be shared fairly;
- (ii) revenue raised nationally shall be shared equitably among national and county governments; and
- (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible, and fiscal reporting shall be clear.”

32. Further to the foregoing, Article 227(2) is explicit that:



- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
- (a) categories of preference in the allocation of contracts;
 - (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
 - (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.
33. The derivative statute, for purposes of the above provision is the PPADA. It is objective, as set out in the preamble thereto is to give effect to Article 227 of *the Constitution* and connected purposes; and therefore in Section 3, the Act reiterates and expands on the values and principles of public procurement thus:
- Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—
- (a) the national values and principles provided for under Article 10;
 - (b) the equality and freedom from discrimination provided for under Article 27;
 - (c) affirmative action programmes provided for under Articles 55 and 56;
 - (d) principles of integrity under the *Leadership and Integrity Act*, 2012 (No. 19 of 2012);
 - (e) the principles of public finance under Article 201;
 - (f) the values and principles of public service as provided for under Article 232;
 - (g) principles governing the procurement profession, international norms;
 - (h) maximisation of value for money;
 - (i) promotion of local industry, sustainable development and protection of the environment; and
 - (j) promotion of citizen contractors.
34. Of the provisions cited by the petitioner, the only relevant ones for purposes of the first issue are Sections 68 and 74 which both provide for invitation to tender and the need for advertisement. Those provisions have to be understood within the context of the other provisions of the Act, such as the provisions to do with the choice of procurement methods and the threshold for different kinds of procurement and the categories of institutions involved. The evidence availed before the Court shows that the respondent prepared an Annual Procurement & Asset Disposal Plan for the Financial Year 2021-22 as required by Section 53(2) of the PPADA; and that it made a deliberate effort to reserve 30% of the eligible budgetary allocations for enterprises owned by the youth, women and persons with disabilities. This imperative is provided for in Section 53(6) of the PPADA thus:



- (6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.”
35. It is notable that Section 53(10) of the PPADA further stipulates that
10. For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).
36. The respondent having demonstrated compliance with Article 227(2) and the aforesaid provisions of the PPADA by setting aside 30% of its budgetary allocation for the Financial Year 2021-22 to the youth, women, people living with disabilities and other marginalized groups, the next question to pose is, how are these groups to be identified and handled to ensure the objectives of *the Constitution* and the Act are realized?
37. Whereas open tender is the preferred mode of procurement whereby bids are invited by way of advertisement in the print and other media with country-wide circulation for purposes of Sections 74 and 96 of the PPADA, such procurement is subject to a prescribed threshold; below which entities are permitted to use alternative methods that are served by way of pre-qualification and registration of suppliers. In this regard, Section 96(6) of PPADA is explicit that:
5. Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national advertising, the procuring entity shall advertise using the options available in subsection (3)(a) and (b).
38. And the alternatives envisaged by Sub-section (3)(a) and (b) aforementioned include use of Kenya's dedicated tender portals or any other electronic advertisements as prescribed; as well as posting of advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity. The alternative methods provided for under the PPADA comprise framework agreements; which is what the respondent opted for in this instance. Hence, Section 114 of the PPADA provides that:
1. A procuring entity may enter into a framework agreement open tender if—
- (a) the procurement value is within the thresholds prescribed under Regulations to this Act;
- (b) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and
- (c) a minimum of seven alternative vendors are included for each category.
2. The maximum term for the framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment undertaken annually to determine whether the terms designated in the framework agreement remain competitive.
39. It is plain therefore that, in prequalifying and registering suppliers through its SRM portal, the petitioner merely complied with Article 227(2) of *the Constitution* and Section 155 of the PPADA; and therefore cannot be said to have acted in violation of either Article 10 or Article 47 of *the Constitution*.



It is plain then that the petitioner has itself to blame for not having registered itself as a supplier in the respondent's SRM Portal, because Section 57 of the PPADA is explicit that:

- “(1) The head of the procurement function of a procuring entity shall maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services according to its procurement needs.
- (2) Submission of names shall be continuous and the registration list shall be updated periodically as prescribed in Regulations and in accordance with this Act.”

40. Further to the foregoing, Section 71 of the PPADA provides that:

- (1) The head of procurement function shall maintain and continuously update lists of registered suppliers, contractors and consultants in various specific categories of goods, works or services according to its procurement needs.
- (2) An application to be included in the list of the procuring entity may be made at any time, at no cost and shall contain proof of the following—
 - (a) eligibility criteria as prescribed in this Act; and
 - (b) capability criteria that defines necessary qualifications, experience, resources, equipment and facilities to provide what is being procured;
- (3) A tenderer may seek clarification from the candidate or relevant government agency on eligibility but not on capability.
- (4) The lists shall be applied on the alternative procurement methods as specified and appropriate and the list shall —
 - (a) be generated through portal, websites and people submitting hard copies of their intention to supply;
 - (b) allow for continuous applications and hence updating;
 - (c) be evaluated leading to registration on a bi-annual basis;
 - (d) be generated through market knowledge and survey; and (e) be as may be prescribed.

41. These provisions are reiterated in Regulations 44 and 69 of the Public Procurement and Asset Disposal Regulations, 2016. Hence, while open tender is the preferred mode of procurement, the PPADA recognizes that there are alternative methods specifically crafted to cater for the different interest groups provided for in *the Constitution* and actualized by the provisions of the Act and the regulations thereunder. Consequently, the petitioner failed to demonstrate in what manner the actions of the respondent amounted to a violation of Articles 47(1) of *the Constitution* which provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”



B. On alleged discrimination:

42. It was the petitioner's contention that by handpicking a few selected bidders to compete for the subject tender, the respondent discriminated against the petitioner and thereby acted in breach of Article 27 of *the Constitution*, which states:

“The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

43. Needless to add that, in this context the word “state” means the collectivity of offices, organs and other entities comprising the government of the Republic of Kenya, (see Article 260 of *the Constitution*). Hence, the respondent falls in that category.

44. According to Black's Law Dictionary, discrimination is defined to mean:

“Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

45. Thus, in *Jacqueline Okeyo Manani & 5 others v Attorney General & Another* [2018] eKLR it was held that:

“...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...*The Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”

46. In the instant matter, the differential treatment alleged is in the fact that the respondent opted to float the subject tender on its SRM Portal as opposed to public advertisement, yet *the Constitution* itself provides, in Article 227(2), for differential treatment for the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition in procurement. Besides, Article 27(6) also states that:

“To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

47. In the circumstances, the petitioner's complaint that it was discriminated against lack traction.



48. I note that at paragraph 9 of the Petition, the petitioner pleaded the doctrine of legitimate expectation thus:

“...considering that the Petitioner is currently on the site and has been on the said site providing high quality cleaning and environmental hygiene services in Zone No. 3 of the Respondent, the Petitioner has a right both under the written Laws of Kenya and also as provided for in the doctrine of reasonable and legitimate expectation that the Respondent would at the very least invite the Petitioner to participate in the bidding process of provisions of the said services following the termination of the contract between the Petitioner and the Respondent as foresaid.”

49. In the light of the provisions of *the Constitution* and the PPADA governing procurement, it was not open for the respondent to make any such assurances as envisioned by the petitioner; in fact, to do so would amount to an illegality. The Supreme Court made this manifest in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR thus:

263 “Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C. 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

264 In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

265 An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.

50. Upon reviewing both local and comparative jurisprudence on the point, the Supreme Court concluded thus at paragraph [269] of its Judgment:

“The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.



51. It is therefore my finding that the allegations of discrimination by the petitioner are utterly untenable. Indeed, in *Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho* [2017] eKLR, the Court of Appeal held that:

“...fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained...”

52. In the premises, the petitioner’s averments at paragraph 14 of the Petition that its directors, namely Benson Nyangeh Maina, Eliud Maina Muturi and the estate of the late Rachael Mirigo Nyange, who sustain themselves from the income made by the petitioner, will be denied a chance to earn a living; or that their socio-economic rights as protected under Article 43 are threatened with violation, are without any foundation whatsoever. The same applies to the assertion that the right of the directors to personal dignity under Article 28 of *the Constitution* are threatened with violation.

C. On alleged breach of the petitioner’s right to information under Article 35 of *the Constitution*:

53. Article 35 of *the Constitution* simply states that:

- “ 1 Every citizen has the right of access to—
 - a information held by the State; and
 - b information held by another person and required for the exercise or protection of any right or fundamental freedom.
- 2 Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- 3 The State shall publish and publicise any important information affecting the nation.”

54. Again, the breach alleged by the petitioner was predicated on the fact that the petitioner was left out of the respondent’s invitation to tender. In this regard, the respondent explained, vide Mr. Amuyunzu’s Replying Affidavit, that the respondent continuously registers suppliers in various categories through its SRM Portal; and that interested persons and entities are at liberty to register with the respondent at any time. Once registered, such prospective tenderers are issued with a unique vendor number and a password enabling them to access the portal and place bids for any of the opportunities as and when advertised. Thus, Mr. Amuyunzu averred that, as of 30th June 2022, the youth group in the respondent’s SRM Portal had 606 registered suppliers; and that the petitioner was not among them.

55. The petitioner, having conceded that it was not registered with the respondent under the youth category, cannot be heard to complain that its right to information for purposes of Article 35 was violated simply because the tender was floated in the SRM Portal. Moreover, there is no indication at all that the petitioner applied for registration whether electronically or otherwise and the same was declined. More importantly, there is no indication that the petitioner applied for information about the tender and its request was declined; for this is the essence of Article 35. Indeed, Section 8 of the *Access to Information Act*, No. 31 of 2016, any person seeking information from a public entity is required to do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. (see *Katiba Institute v Presidents Delivery Unit & 3 others*, supra)



56. Thus, having found that the registration process undertaken by the respondent was undertaken in accordance with the applicable law and regulations, and there being no proof by the petitioner that it made a request to the respondent for information and the request was denied, it is my finding that no breach of Article 35 can be imputed in the circumstances.

57. The foregoing being my view, it follows that the petitioner is not entitled to the reliefs sought by it in the Petition dated 23rd June 2022. Accordingly, the Petition is hereby dismissed with an order that each party shall bear own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE

