



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 597 OF 2017

IN THE MATTER OF ARTICLES 22 (1) & (2) (c) AND 258 (1)

& (2) (c) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE NATIONAL VALUES AND PRINCIPALS OF GOVERNANCE IN

ARTICLES 1, 2, 3(1), 10(1)&(2), 231 (3), AND 232(1) (a), (b), (c), (d), (e),

(f) &(2)(a) & (b) AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES

27, 35 AND 47 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION

OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015;

THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005; THE FAIR

ADMINISTRATIVE ACTION ACT, 2015; THE CENTRAL BANK OF

KENYA ACT; AND THE STATUTORY INSTRUMENTS ACT, 2013.

IN THE MATTER OF THE ALLEGED FRAUDULENT AWARD ON

30TH NOVEMBER 2017 BY THE CENTRAL BANK OF KENYA

(CBK) TODE LA RUE INTERNATIONAL LIMITED OF THE

RESTRICTED TENDER FOR PRINTING AND SUPPLY OF

NEW DESIGN KENYA CURRENCY BANKNOTES:

TENDER REFERENCE NO. CBK/37/2017-2018.

BETWEEN

OKIYA OMTATAH.....PETITIONER

~ VERSUS ~

CENTRAL BANK OF KENYA.....1ST RESPONDENT

PUBLIC PROCUREMENT

REVIEW AUTHORITY.....2ND RESPONDENT

DE LA RUE INTERNATIONAL LIMITED.....3RD RESPONDENT

DE LA RUE CURRENCY &

SECURITY PRINT LIMITED.....4TH RESPONDENT

DE LA RUE KENYA EPZ LIMITED.....5TH RESPONDENT

AND

THE HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....2ND INTERESTED PARTY

THE ETHICS AND ANTI-CORRUPTION

COMMISSION.....3RD INTERESTED PARTY

JUDGEMENT

The Parties

1. The Petitioner herein, **Okiya Omtatah Okoiti**, describes himself in this petition as a resident of Nairobi City County, a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, which is a legal entity, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, economic development, and prosperity.

2. The 1st Respondent – **Central Bank of Kenya** (hereinafter referred to as “the CBK”– is established by Article 231 of the Constitution. It is responsible for *inter alia* issuing Kenyan currency. According to the Petitioner, it is sued herein for failing/refusing to procure the printing of new Kenyan currency banknotes in full and strict compliance of the Constitution and procurement law, including by rigging the tender in favour of **De La Rue International Limited**, the 3rd Respondent herein.

3. The 2nd Respondent – **Public Procurement Review Authority** – is described as a State agency established under the **Public Procurement and Asset Disposal Act (2015)**, to promote fair competition, transparency and accountability, as well as local participation in the procurement process.

4. The 3rd Respondent – **De La Rue International Limited** – is described as a foreign controlled company incorporated in the United Kingdom on 16th April 1962 vide Registration No. 720284 and is wholly owned by **De La Rue Holdings Limited**. According to the Petitioner, in law it is a separate and distinct legal entity from **De La Rue Currency & Security Print Limited** and **De La Rue Kenya EPZ Limited** and has no Kenyan shareholders and, therefore, it does not qualify as a preferred supplier under Kenyan law. It was contended that it was sued herein for conspiring with the 1st, 4th and 5th respondents to rig the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018.

5. The 4th Respondent – **De La Rue Currency & Security Print Limited** – is a Nairobi based company registered in Kenya (CPR 2011/39289), which is a wholly owned subsidiary of De La Rue Holdings plc. and Thomas De La Rue. According to the Petitioner, it has been sued herein for conspiring with the 1st, 3rd and 5th respondents to rig the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018.

6. The 5th Respondent – **De La Rue Kenya Epz Limited** – is a Nairobi based company registered in Kenya, which is a wholly owned subsidiary of De La Rue plc. (1 share) and Thomas De La Rue (9 shares). It has been sued herein for conspiring with the 1st, 3rd and 4th respondents to rig the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018.

7. The 1st Interested Party – **The Hon. Attorney General** – has been sued in this Petition as the Legal Adviser and Representative of the Government of Kenya, who is tasked with the promotion, protection and upholding of the rule of law and defending the public interest, within the meaning of Article 156 of the Constitution.

8. The 2nd Interested Party – **The Director of Public Prosecutions** – is a public officer and a public office established under Article 157 of the Constitution of Kenya 2010 and is charged with the role of prosecuting criminal cases for the State and is also vested with powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct.

9. The 3rd Interested Party – **The Ethics and Anti-Corruption Commission** – is a constitutional commission established pursuant to Article 79 of the Constitution and is responsible for enforcing and ensuring compliance with the provisions of Chapter Six of the Constitution on leadership and integrity.

Petitioners' Case

10. The facts of this petition, according to the petitioners herein, **Okiya Omtatah Okoiti** are that on 9th and 13th March 2012 the CBK published advertisements in the dailies inviting members of the public to offer their proposals for new Kenyan currency banknotes. On 14th June 2014, the procurement process commenced with the publication of an advertisement in the regional newspaper *The East African*. The second set of advertisements ran on 16th June 2014 in both the *Daily Nation* and *The Standard* national newspapers. Lastly, the CBK had an advert in the Tenders Portal on its website from 16th June 2014 to 8th July 2014.

11. It was pleaded that early 2017, after undercutting the competition by bidding a mere US\$ 0.1, which was tantamount to offering a free service, **De La Rue International Limited** was awarded Tender No. CBK/64/2016-2017 to design the new Kenyan currency banknotes. However, the Petitioner averred, the technical specifications included at Paragraph 5.4 to 5.4.15 of the Restricted Tender No. CBK/37/2017, which was developed on the basis of the designs **De La Rue International Limited** delivered, do not refer to or accord with Paragraph 6 of the Design and Origination Tender No. CBK/64/2016-2017.

12. It was further pleaded that on 24th October 2017, the CBK issued a Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018. Section II Clause 2.1.1 of the Restricted Tender Document provided that only candidates prequalified under the prequalification process would be considered for invitation to tender. The tender, it was averred was a restricted one due to the specialised and complex nature of the goods, works or services required. In the circumstances, competition for the contract was to be limited to only pre-qualified contractors. It was disclosed that the only prequalified applicants were **Giesecke & Devrient, Crane & Co., De La Rue International Limited, and Oberthur Fiduciaire**. On 8th November 2017, the CBK issued an Addendum No. 3 to the tender wherein it brought to the attention of the tenderers preferences and reservations by virtue of sections 155 and 157 of the **Public Procurement and Asset Disposal Act, 2015 (PPADA)**. The Addendum provided that the provisions of the Act on preferences and reservations would be applied to tenderers who would demonstrate that they were thus entitled. Further, tenderers seeking to subcontract part or whole of the contract were to obtain express authority of the procuring entity, the CBK.

13. According to the Petitioner, no bidder sought and obtained the authority of the procuring entity to subcontract part of or the whole contract. However, on 14th November 2017, just before the tender was awarded, **De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited**, filed **Nairobi High Court Constitutional Petition No. 568 of 2017 - De La Rue Currency & Security Print Ltd & Another vs. Central Bank of Kenya**, arguing that they had been unfairly precluded, and challenging the tender, *inter alia*, for contravening Article 227 and 231 of the Constitution. According to the Petitioner, in its reply to **Constitutional Petition No. 568 of 2017**, the CBK admitted, *inter alia*, that the procurement process commenced in 2014; that the applicable law was the repealed **Public Procurement and Disposal Act 2005** (hereinafter, “the repealed 2005 Act”) as saved by section 183 of the **PPADA** and the transitional provisions in Paragraph 1 (1) and (2) of the Third Schedule to the Act; and that the averments contained in the Replying Affidavit sworn by **Mr. Wainaina Kigundu** show clearly that the 3rd, 4th and 5th respondents were neither individually nor collectively entitled to the award of the tender.

14. Subsequently on 30th November 2017, the 4th and 5th respondents entered consent with the CBK withdrawing their petition. The same day, under the guise of the application of the 15% margin of preference, which was unlawful as the 3rd respondent is not a preferred supplier under Kenyan law, and which markedly lowered the 3rd respondent’s bid prices, the CBK awarded the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018 (hereinafter, “the tender”) to **De La Rue International Limited**.

15. According to the Petitioner, the award was unlawful since **De La Rue International Limited** does not under any law qualify as a preferred supplier to benefit from the margin of preference. It was therefore the Petitioner’s case that the entire procurement process is a nullity in law *ab initio* to the extent that the CBK applied inapplicable laws and regulations. According to him, the CBK wrongfully applied the provisions of the **Public Procurement and Asset Disposal Act 2015 (PPADA)** whereas the applicable law was the **Public Procurement and Disposal Act 2005 Cap 412A (repealed)**. The repealed Act of 2005 is considered to be null and void by virtue of the enactment of the **PPADA**, except where it is saved by the provisions of section 183 and the Third Schedule of the 2015 Act, which applies the transitional provisions specified in the Third Schedule shall apply.

16. In the Petitioner’s view, whereas section 183 of the **PPADA** provides clear transitional provisions and, in particular, upholds the principle that laws cannot be applied retrospectively, the CBK has unlawfully tried to apply the law retrospectively in the tender. It was averred that the procurement process commenced in 2014, when the tender was advertised, and the law in force at the time was the repealed 2005 Act. The first advertisement relating to the subject matter tender was published on 14th June 2014 in the regional newspaper *The East African*. The second set of advertisements ran on 16th June 2014 in both the *Daily Nation* and *The Standard* national newspapers. Lastly, the CBK had an advert in the Tenders Portal on its website from 16th June 2014 to 8th July 2014. The request for proposals was subsequently issued on 24th October 2017.

17. However, via Addendum to the tender No. 3 of 8th November 2017, the CBK wrongfully relied on sections 155 and 157 of the **PPADA** which provide for preferences and reservations, yet the law was not applicable to the tender. But even if, for argument’s sake the **PPADA** applied, the preferences and reservations would not be applicable because the Cabinet Secretary has not operationalized the provisions by

gazetting the regulations required under the Act. It was therefore contended that the application of a preference margin of 15% as provided by section 28 of the **Public Procurement and Disposal Regulations, 2006** (Legal Notice No. 174 of 30th November, 2006) was invalid, null and void as the said Regulations had expired pursuant to section 21 of the **Statutory Instruments Act (No. 23 of 2013)**, which provides for the automatic revocation of statutory instruments “*on the day which is ten years after the making of the statutory instrument.*”

18. It was accordingly contended that the CBK is barred from relying on Regulation 177 of the Public Procurement and Asset Disposal Regulations, 2017, which is intended to operationalise section 157 (8) (b) of the **PPADA** since the Regulations are yet to be gazetted and/or to be tabled before Parliament for scrutiny and approval as required by section 11(1) of the **Statutory Instruments Act**.

19. In any event, it was averred, the procurement is also unlawful under the **PPADA** and, therefore, invalid, null and void.

20. The Petitioner pleaded that there was lack of transparency in the manner the tender was conducted. The CBK failed to give all tenderers an open and transparent opportunity at winning the tender, thus compromising the integrity, fairness, transparency and accountability of the process in violation of the objectives enumerated in section 2 of the repealed 2005 Act, and the principles on the procurement of public goods and services enshrined in Article 227 (1) of the Constitution. Further and in particular:

i. In spite of the fact that the tender was a restricted one, De La Rue International Limited used their purported affiliate companies, De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited, who were ineligible because they were not prequalified, to induce the CBK to award the tender to them.

ii. The approval and consent of the CBK, the procuring entity, was not obtained to allow De La Rue International Limited to subcontract any portion of the tender.

iii. The award to De La Rue International Limited was on the basis of Preferences and Reservations of the **PPADA**, yet the company does not qualify as a preferred supplier because Kenyan citizens do not own at least 51% of its shares as required by law. In addition:

- 1) Currency production is very complex and therefore no materials are available locally by citizen contractors;
- 2) Banknotes are not wholly printed or produced in Kenya;
- 3) The raw materials for production of banknotes are not sourced locally;
- 4) There are no citizen contractors in Kenya that can print banknotes as per the specifications of the CBK contained in Paragraph 6 (on page 43) of the **Origination and Design Tender No. CBK/64/2016-2017** awarded to De la Rue International Limited early 2017.
- 5) De La Rue International Limited did not apply and demonstrate how its bid qualified for preference by producing evidence of eligibility as prescribed by Section 157 (6) of the **PPADA**.
- 6) The essence of the tender process is to take advantage of advances in technology and competition without discrimination. Preference procurement does not preclude competition. Preferred suppliers cannot be given direct and exclusive rights in a procurement process.
- 7) The incorrect and unlawful application of preference margin unfairly undercut the competition and ensured as intended that De la Rue International Limited had the lowest evaluated price despite not having any local nexus.
- 8) By wrongfully and unlawfully applying the preference margin in favour of the 3rd respondent, the CBK has burdened the Kenyan taxpayers to pay costs much higher than the market rate, and that has violated articles 10, 47, 201 (d), and 227 (1) of the Constitution.
- 9) In particular, the CBK has deliberately and contemptuously acted contrary to Article 227 (1) of the Constitution which provides that the procurement of public goods and services must be “*in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*”
- 10) De La Rue International Limited’s tender prices were not the most economically advantageous.
- 11) By awarding the tender to De La Rue International Limited despite not being the most competitive bid, the procuring entity acted in contravention of the Constitution and, therefore, the award is invalid, null and void.
- 12) The CBK’s decision to include an Addendum No. 3 of 8th November 2017, midstream through the tender process to include preferences and reservation was clearly intended to unlawfully and unethically tilt the tender in favour of the De la Rue International Limited.
- 13) Vide **DE LA RUE CURRENCY & SECURITY PRINT LTD & ANOTHER VS CENTRAL BANK OF KENYA, Nairobi High Court Constitutional Petition No. 568 of 2017**, the petitioners therein (who are the 4th and 5th respondents herein) challenged the tender claiming, *inter alia*, that they had been unfairly excluded in the procurement process.

14) Despite the CBK strenuously opposing the **Petition No. 568 of 2017** on the grounds that the petitioners therein (who are the 4th and 5th respondents herein) were not affiliates of De La Rue international Limited nor qualified to print the new currency banknotes, the CBK nevertheless awarded the Tender to De La Rue International limited on the same day that the 4th and 5th respondents herein withdrew their **Petition No. 568 of 2017**.

15) It is disturbing that the 4th and 5th respondents herein, who in **Petition No. 568 of 2017** challenged the manner in which the terms of the tender were presented, were, upon withdrawing the petition, subsequently used as the basis on which the tender was awarded. The petitioner reasonably suspects that the award of the tender to De La Rue International Limited was a sweetheart deal.

iv. The award was made without any benefit of a market survey to ascertain the average market price as required under section 30 (3) of the repealed 2005 Act.

21. It was contended that in the Request for Proposals under Section II – subtitled Instructions to tenderers – made provisions for the eligible bidders. The Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018 was only open to pre-qualified tenderers as set out in the terms of Tender Reference No. CBK/043/2013-2014. Since only the pre-qualified candidates were to be considered, the 4th and 5th respondents were disqualified. Therefore according to the Petitioner, by failing to ensure that the pre-qualification criteria for all tenderers were upheld, the CBK proceeded with the procurement exercise in complete disregard of its own clearly documented and fundamental procurement regulations under Section II Clause 2.1.1 of the Restricted Tender Document, and the repealed 2005 Act. He averred that it was deliberately contrary to constitutional and statutory fairness for the CBK to change the pre-qualification terms and the participation criteria midstream on 8th November 2017 vide Addendum No. 3 to the tender.

22. It was pleaded that whereas the tender was to be awarded in two lots, being **Lot 1** for denominations of Kshs 50 and 100; and **Lot 2** for Kshs. 200, 500 and 1000, the entire tender was awarded as though it constituted one lot to **De La Rue International Limited** who are not even among the lowest bidders. In the rush to award the tender to **De La Rue International Limited**, there was neither input nor approval of the CBK Board of Directors as required under section 10 of the Central Bank of Kenya Act. To make matters worse, the prescribed security features on the currency notes were compromised in favour of **De La Rue International Limited**.

23. The Petitioner lamented that upon realising the anomalies listed above, the petitioner sought but failed to get administrative reliefs available in law from both the CBK and Public Procurement Review Authority.

24. It was averred that from the documents filed in proceedings in **De La Rue Currency & Security Print Ltd & Another vs. Central Bank of Kenya Limited, Nairobi High Court Constitutional Petition No. 568 of 2017, De La Rue Kenya EPZ Limited** was incorporated with the intention of acquiring the assets of **De La Rue Currency & Security Print Limited**. Though it was expected that **Thomas De La Rue** would own 60% shareholding in **De La Rue Kenya EPZ Limited**, and the Government of *Kenya* would take the remaining 40% interest, for a cash consideration of some US\$ 5.0 million payable upon completion. However aware that the transaction has not been completed and the 4th respondent remains a wholly owned subsidiary of **De La Rue plc**. (1 share) and **Thomas De La Rue** (9 shares). The Petitioner therefore reiterated that **De La Rue International Limited** is not a citizen contractor, and it did not seek and receive the consent allowing it to sub-contract the 4th and 5th respondents or any other third party.

25. It was further contended the recommendation to award the tender to **De La Rue International Limited** was unlawfully made by the Evaluation Committee instead of the Head of Procurement (in his professional opinion) as required by section 80 (4) of **PPADA**. Further, because the process was rushed after the tender opening, there was no input and approval from the CBK Board of Directors as required under section 10 of the **Central Bank of Kenya Act**.

26. In so doing, the CBK was accused of having failed to curb cartel like behaviour by awarding the tender to same company that had earlier also awarded the tender of designing the notes which means that taxpayers who were the beneficiary of the procurement will not be protected from price fixing.

27. The petitioner asserted that he has a right to access justice pursuant to articles 48 and 50(1) of the Constitution and an obligation under Article 3(1) to respect, uphold and defend the Constitution. However, the petitioner does not have the *locus standi* to move the Public Procurement Administrative Review Board (PPARB) for redress pursuant to both section 167 (1) of the **PPADA** and Section 93 (1) of the repealed 2005 Act, because the jurisdiction of the PPARB is limited to review, hear and determine tendering and asset disposal disputes between a candidate or a tenderer and a procuring entity. The High Court, on the other hand, has original and exclusive jurisdiction, which arises from Article 22 (1) & (2) (c) & (d), 23, 165 (3) (d) (ii), (6) & (7), and 258 (1) & (2) (c) & (d) of the Constitution of Kenya, 2010, and Section 5 (a) of the **High Court (Organization and Administration) Act**, 2015, to determine the instant petition. In this respect the Petitioner relied on the case of **Timothy Otuya Afubwa & Another vs. County Government of Trans Nzoia & 3 others [2016] eKLR** and **Erick Okeyo vs. County Government of Kisumu & 2 others [2014] eKLR**.

28. In this case it was the Petitioner's position that the PPARB has no jurisdiction to issue remedies for the violation of the Constitution hence this Court has original jurisdiction to hear this petition relating to public procurement matters. As the circumstances prevailing at the critical Central Bank of Kenya, which is a very strategic government agency, are untenable under the law, this Court is enjoined to intervene and enforce the law.

29. The Petitioner therefore sought for:

(i) a declaration that:

a. The 1st, 2nd, 3rd, 4th, and 5th respondents' have variously violated the Constitution of Kenya, 2010.

- b. The Public Procurement and Disposal Regulations, 2006 (Legal Notice No. 174 of 30th November, 2006) is a void law.
- c. The Public Procurement and Asset Disposal Regulations, 2017 is not law in Kenya.
- d. *De La Rue International Limited* does not qualify as a preferred supplier to benefit from the margin of preference.
- e. The 1st, 3rd, 4th and 5th respondents conspired to rig the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018.
- f. The award on 30th November 2017 by the CBK to De La Rue International Limited of the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018 was both unlawful and unconstitutional and, therefore, invalid, null and void.

(ii) An Order:

- a. Annuling in its entirety the award on 30th November 2017 by the CBK to De La Rue International Limited of the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018
- b. Compelling the 1st respondent to transparently re-evaluate the bids of all compliant tenderers and to award the tender strictly according to the law, including awarding it in the prescribed lots.
- c. Alternatively, that the entire procurement proceedings herein be annulled and the CBK be ordered to retender afresh for the procurement in full and strict compliance with the law.
- d. Barring De La Rue International Limited, De La Rue Currency & Security Print Limited, and De La Rue Kenya EPZ Limited from participating in any re-evaluation or re-tender relating to the procurement for the printing of Kenya's new currency banknotes.
- e. Compelling the respondents to bear the costs of this suit.

(iii) Any other relief the court may deem just to grant.

30. In his submissions the Petitioner contended that Article 258(1) of the Constitution of Kenya, 2010, takes away the notion of '*locus standi*', which meant that only an aggrieved party, demonstrating damage or harm, can approach the court seeking legal remedy. Further, public interest cases encompass more than just the parties to a particular matter since public interest litigation is meant to benefit the wider public and not just the individual directly affected. It was his case that the instant petition was filed in the public interest with a view to respect, uphold and defend the Constitution and the law. To him, the Constitution of Kenya at Article 22(1) & (2) is explicit that any person can institute proceedings in this Court, claiming the violation of rights and fundamental freedoms, even on behalf of another person or in the public interest while pursuant to Article 22(3)(b), formalities relating to the proceedings, including commencement of the proceedings, are to be kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. In support of this submission the Petitioner relied on *Kiluwa Limited & Another vs. Commissioner of Lands & 3 Others [2015] eKLR* and *Timothy Otuya Afubwa & Another vs. County Government of Trans Nzoia & 3 Others [2016] eKLR* .

31. In the premises, the petitioner submitted that the he has '*locus standi*' to institute these proceedings.

32. As to whether the petition qualifies as public interest litigation, the Petitioner relied on the article "*Advancing Human Rights and Equality Through Public Interest Litigation*" accessed at <http://www.pilsni.org/about-public-interest-litigation>, *Thakur Bahadur Singh and Another vs. Government of Andhra Pradesh* and *People's Union for Democratic Rights & Others vs. Union of India & Others (1982) 3 SCC 235*.

33. According to the Petitioner, this Petition is filed in good faith pursuant to Article 3(1) of the Constitution to respect, uphold and defend the Constitution. Therefore the Petition meets the tests of *bona fide* public interest litigation since the facts relied upon in the petition are *prima facie* true and correct in the sense that the respondents have violated clear provisions of the Constitution and statutes, which this Court should redress by upholding and enforcing the law.

34. As to whether the Court has the power to entertain the petition, it was submitted that it is trite that the jurisdiction of a court or tribunal is derived from the Constitution, statute, or by principles laid out in judicial precedent as was held *In Re the Matter of the Interim Independent Electoral Commission eKLR* and *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others (2012) eKLR*. The petitioner submitted that, whereas any dispute resolution procedure laid down in statute should be exhausted first, whenever the bar of this Court's jurisdiction is raised, the Court should examine the nature of the case and the reliefs sought, to determine whether or not the aggrieved party would get redress elsewhere.

35. It was submitted that the High Court has original and exclusive jurisdiction, which arises from **Article 22(1)&(2)(c), 23, 165(3)(d)(ii), (6)&(7) and 258(1)&(2)(c) of the Constitution and Section 5(a) of the High Court (Organization and Administration) Act, 2015**, to determine whether the award of the tender in the manner complained about herein violated provisions of the Constitution. According to him, the Public Procurement Administrative Review Board's (PPARB's) mandate and powers are derived from **section 28(1)(a) and 167(1) of the**

Public Procurement and Asset Disposal Act, 2015 (the **PPADA**), and its jurisdiction is limited to “review, hear and determine tendering and asset disposal disputes” between “a candidate or a tenderer and a procuring entity.” This automatically eliminates the petitioner as an aggrieved party entitled to have audience before the PPARB. From the above, it is clear that the petitioner does not have the *locus standi* to move the PPARB for redress pursuant to both section 167 (1) of the **PPADA** and section 93 (1) of the repealed 2005 Act.

36. However, the jurisdiction of the PPARB under section 28(1)(a) and 167(1) of the **PPADA** does not oust the High Court’s jurisdiction to hear and determine matters respecting violations of the Constitution.

37. In this regard the Petitioner relied on **Republic vs. National Environment tribunal & 2 Others ex-parte Athi Water Services Board [2015] eKLR, Ex Parte Mayfair Bakeries Limited vs. Rest Restriction Tribunal and Kirit R (Kirit) Raval Nairobi HCMCC No. 246 of 1981** and **Choitram vs. Mystery Model Hair Salon [1972] EA 525** where it was stated that a judicial or quasi-judicial tribunal, such as the PPARB, does not have inherent powers. To further augment his case the Petitioner cited **Lenaola, J’s** decision in **Okiya Omtatah Okoiti vs. Nairobi City County & 5 Others [2016] eKLR**, at paragraphs 78 and 79.

38. According to the petitioner, the PPARB does not have jurisdiction to determine disputes regarding the violations of the Constitution and/or to issue remedies for the violation of the Constitution and if it purports to address the issues sought in this petition, then it would be acting *ultra vires* its mandate and in excess of its jurisdiction and, thereby, issue decisions which are unlawful, irregular and not procedural.

39. In his view, the bulk of the reliefs sought in the instant petition require the authoritative interpretation of the Constitution, which is not within the mandate of the PPARB. Further, because the PPARB is limited to only entertain disputes involving a candidate or a tenderer and a procuring entity, disputes involving the Constitution cannot be sustained before it pursuant to Articles 22 and 258, which allow any person to approach the High Court to seek redress for violations of the Constitution. It was submitted that the High Court has original jurisdiction to hear Petitions relating to public procurement matters and the Court was urged to assert its judicial authority to protect the Constitution and the law from being violated by the actions of the respondents and reliance was placed on **Cohens vs. Virginia 19 U.S. 264 (1821)**.

40. In this case it was argued that since the jurisdiction to interpret the Constitution falls within this Court’s mandate, this Court has the jurisdiction to hear and determine the issues raised herein. Further, this Court is enjoined to protect his rights under Articles 48 and 50(1) of the Constitution by entertaining the instant petition.

41. As to whether the Court should strike out the petition unheard, it was submitted that a court’s jurisdiction flows from the Constitution and/or the statute, or both. Article 159(2) of the Constitution of Kenya, 2010 provides the guiding principles of the exercise of judicial authority. The Court was urged not to strike out constitutional petitions *in limine* since under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** there is no power to strike out petitions *in limine*. In support of this position the Petitioner relied on **D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another [1980] eKLR**.

42. Based on the Court of Appeal’s decision in the case of **Rashid Odhiambo Aloggoh and 245 Others vs. Haco Industries Limited [2007] eKLR**, it was submitted that held that it was undesirable for the High Court to summarily dismiss a petition (or any application) that seeks the enforcement of fundamental rights. In essence the Court of Appeal meant that the Court ought to first join the issues to prove the facts on which the alleged contravention was based before determining whether the material facts amount to infringement of a fundamental right or not. Based on the foregoing decision and other related decisions, the Petitioner submitted that the respondents have not demonstrated in any way whatsoever why the petitioner’s Notice of Motion application and/or the Petition should be struck out unheard.

43. As to whether the CBK’s operational autonomy insulates it from this Court, it was submitted that the 1st respondent’s claim of operational independence or discretion, such as would insulate the 1st respondent from this court’s process, the petitioner submitted that being a creature of the Constitution, the 1st respondent is bound by the Constitution, and for our purposes herein, **Article 227** of the Constitution does not exempt the 1st respondent from the requirement that it must procure goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In this respect the Petitioner relied on the decision of the Supreme Court **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** at paragraph 59 where it held that independence is not a *carte blanche* for the 1st and 2nd respondents to conduct themselves on whim; but that their independence is, by design, configured to the *execution of their mandate*, and performance of their functions as prescribed in the Constitution and the law.

44. Therefore it was the petitioner’s submission that the CBK is independent but accountable under the law and its operational autonomy does NOT insulate it from oversight by this Court.

45. As to whether the Petition raises a reasonable cause of action, it was submitted that the gravamen of the Petition is that the 1st respondent acted contrary to the Constitution and the law when it awarded the tender to the 3rd respondent on the basis of a preference margin of 15%, which made **De La Rue International Limited** the lowest evaluated bidder, yet its bid price was the 3rd highest. The petitioner contended that being an international company, the 3rd respondent is not qualified for preferential treatment. Further and in particular the 3rd respondent never applied for and never demonstrated that it met the criteria in law for preferential treatment; the goods required, the printing and supply of new design Kenyan currency banknotes, cannot be produced locally by the 4th and 5th respondents; the 3rd respondent never sought and received the 1st respondent’s approval to subcontract the 4th and 5th respondents; the 4th and 5th respondents were not pre-qualified yet the tender was restricted only to CBK prequalified tenderers; and by allowing the use of alleged local/affiliate/subsidiaries to undertake the contract, the CBK introduced new criteria after prequalification had already been made, and effectively changed the substrata of the tender. The CBK used the ineligible 4th and 5th respondents to introduce a backdoor to favour the 3rd respondent. By so doing, the CBK deliberately tilted the scales to unfairly favour the 3rd respondent. As expressly admitted at paragraphs 28 of the 1st respondent’s Replying Affidavit in Petition No. 568 of 2017, the 1st respondent could not in constitutional and statutory fairness change the prequalification terms midstream to admit the 4th and 5th respondents.

46. The petitioner also posits that the recommendation to award the tender to **De La Rue International Limited** was unlawfully made by the

Evaluation Committee instead of the Head of Procurement (in his professional opinion) as required by section 80 (4) of **PPADA**. Further, because the process was rushed after the tender opening, there was no input and approval from the CBK Board of Directors as required under Section 10 of the **Central Bank of Kenya Act**.

47. The petitioner is also aggrieved that by refusing to respond to his letters to them requesting that they offer administrative reliefs under the law, the 1st and 2nd respondents, respectively, failed in their mandate and violated Article 47 of the Constitution.

48. It was the Petitioner's case that the impugned actions and/or omissions of the 1st and 2nd respondents are contrary to **Articles 2(1) & (2), 3(1), 4(2), 10, 27, 47, 73(2)(b), 75(1)(a) & (b), 201(d), 227(1), 232 (1) (a) – (f) and 259(1) & (3)** of the **Constitution** and if undisturbed, the trend will overthrow the Constitution of Kenya in public procurement. It was therefore his case that the instant petition raises a reasonable cause of action and ought to be heard in the merits.

49. On the issue whether the Constitution was violated and the Court should intervene, it was submitted that under Article 2(1) of the Constitution, the Constitution binds all persons including the 1st respondent and, under Article 2(4) of the Constitution, provides that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid. According to the Petitioner, he has pointed out acts and omissions on the part of the 1st respondent which he alleges contravene the Constitution and the law and based on **Republic vs. Kenya National Examination Council, Miscellaneous Civil Application No. 328 of 2015**, and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, it was submitted that the Court should intervene to ensure that the 1st respondent respects, upholds and defends the Constitution. It was the Petitioner's case that in carrying out its duties, the 1st respondent has an obligation to be transparent and accountable and exercise other principles of good governance, including equity, social justice, inclusiveness, equality, human rights, integrity, and sustainable development. Further, any action by the 1st respondent pertaining to application of the policy on preferred suppliers/contractors, comes under the ambit of Article 47 of the Constitution which is breached when the 1st respondent's actions are unreasonable as was recognised in the case of **Republic vs. Kenya Power & Lighting Co. Ltd. & Another (2013) eKLR** and **Republic vs. National Police Service Commission exparte Daniel Chacha (2016) eKLR**.

50. Dealing with the issue whether the tender documents are admissible evidence on the grounds that they were illegally acquired "*confidential documents that are protected by Section 67 of the Public Procurement and Asset Disposal Act and emphasised in the Tender document that cannot be disclosed except by an order of this Court*", the Petitioner submitted that this Court is enjoined to distinguish between admissibility of illegally obtained evidence in these constitutional proceedings (or in a civil suit) from the admissibility of illegally obtained evidence in a criminal trial. Based on Article 50(4) of the Constitution, it was submitted that the exclusionary principle is applied exclusively in criminal prosecutions since it refers to trial.

51. It was submitted that the development of the law concerning the admissibility of illegally obtained evidence has been fairly recent. The common law rule was that admissibility was not affected by the illegality of the means by which evidence was obtained. The exclusive legal remedy of a person wronged by an illegal search and seizure was a civil action for damages against the trespasser or wrongdoer. It was felt that there was no reason to exclude the evidence so long as it was relevant and material. The court would not interrupt the progress of a trial to consider the collateral issue of the illegality of the means by which the evidence was obtained. The Petitioner relied on **Commonwealth vs. Dana, Met. 329, 337 (Mass. 1841)** quoted in **Adams vs. New York, 192 U.S. 585, 595, (1904)** and contended that the constitutional provision is categorically clear that illegally obtained evidence is inadmissible against an accused in a criminal prosecution "*if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*" In this case, however, the 1st respondent has not demonstrated how *the admission of the impugned tender documents would render the purported trial unfair, or would otherwise be detrimental to the administration of justice.* To him, the specific protection provided in Article 50(4) of the Constitution is not so basic as to be included in the general concept of due process of law, but should apply to cases only in order to give a defendant in a criminal trial its remedy at law against offending officials. The exclusion principle should only be applied exclusively in criminal prosecutions where the evidence was acquired in so barbarous a manner as to shock the judicial conscience. Accordingly, the exclusionary principle should not be imposed upon constitutional proceedings. Its application should be limited to criminal prosecutions in which prosecuting officials have obtained evidence in an illegal manner "*if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*"

52. The petitioner submitted that the 1st respondent's application represents a considerable departure from the exclusionary principle as enshrined in the Constitution in two respects: first, it wants the principle to be applied in civil litigation; secondly, it wants the evidence excluded even though the party offering it, the petitioner herein, is innocent of any improper actions. In his view, the 1st respondent's application, by its very nature, seeks to obstruct the truth by excluding logically relevant and material testimony. For this reason, the principle should not be applied herein so that the truth can be brought to light in these proceedings.

53. To apply the exclusionary principle in a constitutional or civil case, especially when the evidence was not obtained by unreasonable or barbaric methods, it was submitted seems inequitable. While the constitutional rights of the respondent may be protected by this extension, the innocent petitioner's right to just compensation for his injuries is thereby prejudiced. To allow the principle to be applied when the petitioner's case depends on the excluded evidence will result in this injustice. According to the Petitioner, the principle for the exclusion of evidence illegally obtained is not an absolute right; it is a conditional right. The rationale behind this classification is that the principle does not exclude evidence because of the unreliability of such evidence but because of the illegality of means by which it was obtained. Therefore, as in the case with all conditional rights, the principle should be applied very strictly and sparingly.

54. It was further contended that, constitutionally, the impugned tender documents cannot be censored since at the time of his filing the petition, they were already part of the public record, having been put there (into the public record) for the benefit of the public record. They were spirited out by somebody who wanted the public to see them. The petitioner therefore submitted that he has a constitutional right to access information from the 1st respondent. The purpose of Article 35 is to ensure that the mistakes and scandals of the rulers are NOT concealed from the people, especially where the rulers violate their obligation to serve. To him, the only way the 1st respondent can challenge the admissibility of the impugned tender documents is by demonstrating that they are not authentic. The documents cannot be

excluded simply because they don't want to confront the tender documents.

55. As to whether the CBK conducted the procurement under the correct law, it was submitted that the procurement process for printing and supply of new design Kenyan currency banknotes commenced in June 2014 under the **Public Procurement and Asset Disposal Act, 2005 Cap 412A** (hereinafter, the repealed Act), and the **Public Procurement and Disposal Regulations of 2006** when the tender for the prequalification of suppliers was advertised and issued. By dint of section 183 of the **PPADA** and the transitional provisions in Paragraph 1 (1) and (2) of the Third Schedule to the Act, the correct law that should have been applied in the tender process was the repealed Act and not the **PPADA**. Hence, entire procurement process was flawed to the extent that it was conducted under the non-applicable **PPADA**, and the bids need to be re-evaluated using the correct law.

56. The Petitioner reiterated the averments in the petition and the supporting affidavits and relied on section 80(2) of the **PPADA**.

57. As to whether CBK abused the preference margin, it was submitted that via Addendum to the Tender No. 3 of 8th November 2017, the CBK wrongfully relied on sections 155 and 157 of the **PPADA** which provide for preferences and reservations, yet the law was not applicable to the tender. But even if, for argument's sake, the **PPADA** applied, the preferences and reservations would not be applicable because the Cabinet Secretary has not operationalized the provisions by gazetting the regulations required under the Act. It was his view that the CBK is barred from relying on Regulation 177 of the proposed/draft **Public Procurement and Asset Disposal Regulations, 2017**, which is intended to operationalise section 157 (8) (b) of the **PPADA** since the Regulations are yet to be gazetted and/or to be tabled before Parliament for scrutiny and approval as required by section 11(1) of the **Statutory Instruments Act**. It was reiterated that there being no regulations in place to govern the application of the preference margin envisaged under sections 155 and 157 of the **PPADA**, the provision must remain suspended until the requisite regulations are enacted. In this respect the Petitioner relied on Republic vs. Public Procurement Administrative Review Board Ex-parte Kenya Power and Lighting Company Limited & Another [2017] eKLR, where this Court cited with approval the case of Republic vs. Public Procurement Administrative Review Board & 2 Others Ex Parte Kenya National Highway Authority [2016] eKLR.

58. The petitioner further submitted that, the application of a preference margin of 15% as provided by section 28 of the **Public Procurement and Disposal Regulations, 2006** (Legal Notice No. 174 of 30th November, 2006) was invalid, null and void as the said Regulations had expired pursuant to section 21 of the **Statutory Instruments Act (No. 23 of 2013)**, which provides for the automatic revocation of statutory instruments "on the day which is ten years after the making of the statutory instrument."

59. In support of his case, the Petitioner contended that the procuring entity acted contrary to the provisions of section 39(8)(b) of the Repealed Act which was the applicable law.

60. It was the petitioner's submissions the 3rd Respondent did not meet the above requirements at all and that it was only by twisting the law and fudging facts through the illegal and unlawful application of the 15% margin of preference that made **De La Rue International Limited**, the lowest evaluated bidder. Otherwise, their bid was some US\$ 7 million higher than the lowest evaluated bidders, Crane & Co. It was therefore submitted that since it did not qualify for the preference margin of 15% applied, **De La Rue International Limited** was not the lowest evaluated bidder. Without prejudice the foregoing, and assuming for argument's sake that the applicable law was the **PPADA**, it was submitted that the 3rd Respondent still did not meet the requirements for preferences and reservation as Kenyan Citizens do not own at least 51% of its shares, and/or the banknotes cannot be produced locally. The Petitioner asserted that being a foreign owned and based company, the 3rd respondent did not meet any of the conditions for being treated as a preferential supplier/contractor. It was therefore not only unfair to other bidders but also highly improper to apply the preference margin and award the bid to a bidder who neither meets the said criteria for preferential treatment nor provides evidence of meeting the criteria.

61. From the foregoing it was the petitioner's case that:

i. In evaluating the bids the 1st respondent's Tender Evaluation Committee was NOT guided by the evaluation criteria set out in law and in the bidding documents provided to all candidates. The 1st respondent acted in conflict with and deviated from the Tender Evaluation Criteria provided in the Bid Documents.

ii. By abusing the preference margin of 15% and holding that De La Rue International was the lowest evaluated bidder and awarding the tender to De La Rue International Limited on the grounds that the 4th and 5th respondents would produce the banknotes locally, the 1st respondent failed to take into consideration mandatory evaluation criteria in the prequalification evaluation stage of the bid process of which the 4th and 5th respondents were not subjected to and, therefore, did not meet the mandatory minimum qualification criteria required in the bid documents in order to be considered for award of the tender.

iii. In awarding the tender to the 3rd respondent based on the argument that the banknotes would be produced locally, the 1st respondent used a criterion not contained in its bid documents, and it effectively conducted an evaluation based on criteria not set out in the tender documents and, therefore, breached the clear and mandatory provisions of Article 227(1) of the Constitution, Section 80(2) of the **PPADA**, and Section 66(2) of the repealed Act.

iv. The 1st respondent had no power to make decisions that violate the express provisions of the law and exceeded the requirements and criteria expressly set out in its bid documents.

v. The aforementioned acts by the 1st respondent are illegal, unlawful and were undertaken by the 1st respondent in excess of its jurisdiction.

vi. It was grossly unreasonable and irrational for the 1st respondent to introduce extraneous evaluation requirements outside of the

provision of section 66 of the repealed Act and to use the same as a basis to award the tender to the 3rd respondent.

vii. In applying the preference margin of 15% in favour of the 3rd respondent, the 1st respondent acted in an arbitrary manner and erred in holding that De La Rue International Limited qualified.

62. It is the petitioner's submissions that there is no basis in law for the application of the preference and reservation margin of 15% in favour of the 3rd respondent. In the premises, the abuse of the preference was tantamount to rigging the tender in favour of the 3rd respondent. The Court was therefore urged to find and hold that the CBK violated the law by applying a 15 per cent margin preference meant for local firms to favour **De La Rue International Limited**, which is foreign owned and registered in the UK. The Petitioner referred to the decision of the Public Procurement Administrative Review Board of 8th January 2018, in **Review No.108/2017 of 19th December, 2017 - Crane AB vs. Central Bank of Kenya & 3 Others**, whereby the Public Procurement Administrative Review Board (PPARB) annulled the tender award and ordered the CBK to re-evaluate the bids after it determined that that **De La Rue International Limited** was unlawfully awarded the tender for printing and supply of new currency and that the application of 15% preference margin in its favour was unlawful.

63. According to the Petitioner, the **Public Procurement and Disposal Regulations of 2006** (Legal Notice No. 174 of 30th November, 2006) became law more than eleven (11) years ago, on 30th November, 2006. By dint of section 21 of the **Statutory Instruments Act (No. 23 of 2013)**, the regulations automatically expired on 30th November, 2016 and are, therefore, void since section 21 of the Act provides for the automatic revocation of statutory instruments "on the day which is ten years after the making of the statutory instrument". Since a void law has no legal effect. An action, document or transaction which is void is of no legal effect whatsoever: an absolute nullity, it was submitted that the law treats it as if it had never existed or happened. The Petitioner in this respect relied on **Black's Law Dictionary**.

64. According to the Petitioner, the invalidation of the regulations does not have wait to take effect from the date when this Court declares it to be so since the Court is being asked to simply articulate and clarify a constitutional reality that Legal Notice No. 174 of 30th November, 2006 has no force of law since 30th November 2016.

65. It was contended that the general point about statutory instruments is that they greatly increase the power of the Executive arm of Government by avoiding unfavourable publicity and critical examination. In order to reduce substantially the regulatory burden on the people of Kenya without compromising law and order, essential economic, environmental and social objectives; and to ensure subordinate legislation is relevant to the economic, social and general wellbeing of the people of Kenya, the law provides that a statutory instrument stands revoked on the day which is ten (10) years after its making unless it is sooner repealed or expires; or a regulation is made exempting it from expiry. In this case no regulation was made by the responsible Cabinet Secretary exempting Legal Notice No. 174 of 30th November, 2006 from expiry. To the Petitioner, the invalidity of the legal notice is clear on its face, and it does not require the pronouncement of any court before the said invalidity can be determined and/or take effect.

66. It was the Petitioner's position that the legal notice is void; it is not that it is voidable, hence being valid until it is so declared. Whereas statutes should be presumed to be constitutional, and statutes should be obeyed by individuals and officers until they are declared unconstitutional by the courts, the petitioner submits that in this case the law itself sets a procedure that automatically voids a statutory instrument. He contended that the legal notice was fatally smitten on 30th November, 2016, by the responsible Cabinet Secretary's failure to make a regulation exempting it from expiry, and it cannot by some administrative *hocus pocus* be resurrected. The statutory instrument automatically ceased to have effect on 30th November, 2016. Since the Constitution of Kenya prescribes the rule of law as a binding national value, then the law is paramount and reliance as placed on **Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006)**.

67. According to the Petitioner, the above approach is dictated by the new constitutional democracy which expects persons purporting to act under the authority of any law and under the Constitution to be subservient to both the Constitution and to the people of Kenya, whose interest ought to be paramount. The Court was therefore urged to apply the doctrine of void *ab initio* to the impugned legal notice. To support this position the Petitioner relied on **Oliver P. Field's** academic paper published in the **Indiana Law Journal** titled, **Effect of an Unconstitutional Statute**, that the doctrine of an unconstitutional statute being void *ab initio* is stated as the universal and unqualified rule by so eminent an authority as Cooley, in his work titled **Constitutional Limitations** ((7ed.) p. 259 and note 2.), a position approvingly echoed in **Coleman vs. Mitnick, etc. No. 19,955. 137 Ind. App. 125 (1964) 202 N.E.2d 577**.

68. The Petitioner also relied on **Carr, Auditor v. State ex rel. Coetlosquet, 127 Ind. 204, 215, Frost v. Corporate Commission of Oklahoma - 278 U.S. 515 (1929)**, the United States Supreme Court decision in **Chicago, Indianapolis, & Louisville Railway Company, Plff. In Error vs. Haynes I. Hackett. No. 889, and Norton vs. Shelby County**.

69. As regards the issue whether the 4th and 5th respondents can be subcontracted, the Petitioner submitted that the 4th and 5th respondents are not qualified to participate in the tender in any capacity since they were not prequalified to participate in the tender. It was further submitted that the 4th and 5th respondents lack the capacity to print modern currency notes as borne out by the Public Accounts Committee **Report on the Matter of Currency Printing Contracts Between Central Bank of Kenya and De La Rue Company** (hereinafter, "the PAC Report). Further in its Replying Affidavit in **Nairobi HC Petition No. 568 of 2017**, the 1st respondent held:

- a) Currency production is very complex and therefore no materials are available locally by citizen contractors;
- b) Bank notes are not wholly minted or produced in Kenya neither;
- c) The raw materials for production of bank notes are not sourced locally;
- d) There are no citizen contractors in Kenya that can print banknotes as per the specifications of CBK.

e) Under tender number CBK/37/2017-2018 it was incumbent upon the Tenderers to apply and demonstrate how their bids qualify for preference by producing evidence of eligibility as prescribed **by Section 157 (6) of the PPADA 2015.**

f) Under the provision mandating the procuring entity to require successful bidders to cause technological transfer or create employment opportunities this was made part of the requirements in the tender whereby the knowledge transfer will happen before and during the printing process with the involvement of CBK for public education.

g) The successful bidder (3rd Respondent) was not a citizen contractor.

70. According to the Petitioner, the Procuring Entity's consent allowing the 3rd Respondent to sub-contract was neither sought nor obtained. Further:

a) The essence of the tender process is to take advantage of advances in technology and competition without discrimination. Preference does not preclude competition. Preferred suppliers cannot be given direct and exclusive rights in a procurement process.

b) The incorrect application of the preference margin unfairly undercut the competition and was intended to ensure that De La Rue International Limited had the lowest evaluated price despite not having any local nexus.

c) That by wrongfully applying the preference margin the Procuring Entity has burdened the tax payers of Kenya to pay higher costs.

d) The actions of the Procuring Entity are also contrary to Article 227 of the Constitution which provides that procurement of public goods and services must be in accordance with a system that is fair, equitable, transparent, competitive and cost effective. By ensuring that the 2nd Respondent was awarded the Tender despite not being the most competitive bid, the Procuring Entity acted in contravention of the Constitution and such an award cannot be upheld.

e) That the actions of the Procuring Entity to include an Addendum No. 3 midstream through the Tender process to include preferences and reservation was clearly intended to tilt the Tender in favour of the 3rd respondent.

f) Without being subject to the rigorous evaluation criteria to which all other bidders who qualified at the prequalification stage were subjected to, including a financial evaluation and post qualification stage to test for capacity, the 1st respondent has no legal and/or scientific basis upon which to unilaterally determine that the 4th and 5th respondents could be subcontracted to produce the currency notes. Hence, in awarding the tender to the untested 4th and 5th respondents, albeit through the 3rd respondent, the 1st respondent ignored and negated both procurement conditions in its bid documents, and the evaluation criteria provided under the Constitution and statute.

71. According to the Petitioner, the events around the award of the tender to the 3rd respondent are not transparent. Additionally, the filing of Petition No. 568 of 2017 and the responses thereto, filed by the 1st respondent, clearly demonstrated that there was collusion between the procuring entity and the other respondents. *Petition 568 of 2017*, was filed by the 4th and 5th respondents, challenging the tendering process, *inter alia*, on the grounds that they had been unfairly excluded. However, despite strenuously opposing the petition on grounds that the 4th and 5th respondents were not affiliates of the 3rd respondent; they had deliberately not participated in the prequalification tender which was open to them; and that they were not qualified to print the new generation banknotes, the 1st respondent, nevertheless, proceeded to award the tender to the 3rd respondent on the same day the 3rd and 4th respondents withdrew the petition, and on the grounds that notes would be printed locally by the 4th and 5th respondents, hence, the application of a preference margin of 15%.

72. It was the petitioner's submissions that it is not clear how the 4th and 5th respondents could subsequently be used by the 1st respondent as the basis on which the tender was awarded to the 3rd respondent. Only collusion can explain the convoluted state of affairs.

73. According to the Petitioner, the 1st respondent failure to adhere to Article 227 of the Constitution of Kenya 2010 which provides that the tender process should be done in a manner that is fair, equitable, transparent, competitive and cost effective clearly shows lack of transparency and accountability on the part of the 1st respondent. By allowing the use of alleged local/affiliate/subsidiaries to undertake the contract the 1st respondent had changed the entire substrata of the tender and introduced new criteria after prequalification had already been done. This conveniently introduced a backdoor tailored for 3rd respondent, through the 4th and 5th respondents, to execute the contract even though they were not prequalified and were ineligible to participate. The 1st respondent had by doing so, tilted the scales to enable it unfairly award the tender to the 3rd respondent.

74. It was therefore submitted that in applying the **Public Procurement and Disposal Regulations, 2006**, the 1st respondent acted in breach of section 21 of the **Statutory Instruments Act**, and the evaluation criteria in the Bid Documents, hence, it was grossly arbitrary, unreasonable and irrational. The 1st respondent acted irrationally and unreasonably and without consideration for the public interest in getting value for money when it awarded the tender to the 3rd respondent who was the 3rd highest evaluated bidder instead of to the lowest evaluated bidder, which was manifestly discriminatory and unfair to all other tenderers and, in exercising its discretion, the CBK acted in an arbitrary, unreasonable and irrational manner. The 1st respondent essentially rendered the bid documents null and void when it considered extraneous material outside the evaluation criteria provided for in the bid documents. In this respect the Petitioner relied on **Zachariah Waganza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR.**

75. To the Petitioner, allowing the 3rd respondent to subcontract the 4th and 5th respondents, who were not subjected to detailed examination

at the prequalification of bidders, amounted to alteration of the tender document, which the 1st respondent had no power to do because a fundamental and mandatory part of the tender stipulated the tender document was that only prequalified entities would participate in the procurement. Therefore in awarding the tender contrary to the criteria set out in the tender documents and on the basis of which all the bidders, including the 3rd respondent relied on to submit their bids, the 1st respondent acted contrary to section 3 of the **PPADA** and section 2 of the repealed Act, which require that the public procurement process treat all competitors equally, fairly and without discrimination. The same also violated Article 227(1) of the Constitution which requires that the goods be procured "in accordance with a system that is fair, equitable, transparent, competitive and cost-effective." In addition, the 1st respondent's decision is in violation of Article 47(1) of the Constitution which affirms the right of every person to administrative action that is efficient, lawful, reasonable and procedurally fair.

76. According to the Petitioner, there is no provision under either the **PPADA** or the repealed Act, which confers the 1st respondent with jurisdiction to disregard the tender documents and the law, and award a tender to an unsuccessful bidder based on criteria not contained in the tender document. Such conduct by the 1st respondent constitutes unlawfulness, unreasonableness, and irrationality. The 1st respondent's decision is in conflict with express provisions Constitution, including Articles 10, 27, 73, 75, 201, 232 and 259, and is in breach of mandatory provisions of the **PPADA** and the repealed Act. Its decision to award the tender to the 3rd respondent without subjecting its bid to the strict criteria and conditions set out in the Constitution, statutes, and regulations, and in its own bid documents constitutes an illegality, unreasonableness and irrationality.

77. According to the Petitioner, he has demonstrated that the 1st respondent acted *ultra vires* in the manner it evaluated and awarded the tender to the 3rd respondent. Under the law the 1st respondent has power to do only those things which are authorized by the law, and anything not so authorized is both *ultra vires* and unconstitutional and, therefore, invalid, null and void and of no consequence. Under the doctrine of *ultra vires*, an act of a public body or official must not be beyond or exceed the powers delegated to the body or official, or what the law allows, otherwise it will be *ultra vires* and, therefore, invalid, null and void and of no consequence. The doctrine of *ultra vires* protects the public interest by ensuring that public bodies and officers act strictly within and according to the law to prevent the abuse of power. Thus, it puts a check over the activities of public bodies and officials by setting the four corners of law within which they are authorized to and must act. The Petitioner therefore submitted that an *ultra vires* act is void *in toto* from its inception and it is because the public body or officer has not the capacity to make it in the first place.

78. As to whether the tender should be awarded to the lowest bidder, it was submitted that when the financial bids were opened on the 22nd November 2017, the 3rd respondent had submitted the 3rd highest evaluated price for both Lot 1 and Lot 2. Hence, it was utterly surprising and unacceptable that 1st respondent awarded the tender to **De La Rue International Limited**, the 3rd highest evaluated bidder contrary to section 66(4) of the repealed Act and which is mirrored by Section 86(1)(a) of the **PPADA**.

79. The 1st respondent was accused of having acted in breach of the said provisions of law by awarding the tender to the 3rd Respondent who was not the lowest evaluated bidder. According to him, since the 1st respondent's evaluation and award of the tender to the 3rd respondent is contrary to the law, because of technical and procedural defects, and because it violates the very clear provisions of the constitution and the procurement laws, the same or its outcome should not be allowed to stand in law. Instead, the tender ought to be awarded to the lowest evaluated bidder who is successful in all the evaluation stages of the tender. Further, the Court should order the 1st respondent to re-evaluate the bids and award the tender to the company that emerges the lowest evaluated bidder without the abuse of the preference margin (of 15%).

80. According to the Petitioner, given their misconduct as demonstrated in these proceedings, the 3rd, 4th and 5th respondents should be locked out of tendering process, including from participating in any re-evaluation or re-tender relating to the procurement for the printing of Kenya's new currency banknotes. This submission was based on Articles 73, 75 and 227(2)(d) of the Constitution and sections 66 of the **PPADA** which outlaw any corrupt, coercive, obstructive, collusive or fraudulent practices, and conflicts of interest, and make it an offence. And any contract entered into in violation of the law is a nullity *ab initio*.

81. The petitioner submitted further that locking the 3rd, 4th and 5th respondents from tendering process will curb curtail like behaviour, especially given that the 3rd respondent designed the new Kenyan currency banknotes being procured by the 1st respondent.

82. In response to the Respondents' submissions the Petitioner admitted that there was a typographical error on the record wherein the **Public Procurement Regulatory Authority** was inadvertently referred to as the **Public Procurement Review Authority**. However, the petitioner corrected the error in open Court (before the **Hon. Justice Mwita**), and the matter ought to have rested there. Further, the 2nd respondent accepted service of the petitioner's petition, and also responded to the letter. In the circumstances, the petitioner submitted that the 2nd respondent is properly enjoined to these proceedings and is ably represented by the Hon. Attorney General, who filed and served its memorandum of appointment to that effect and cannot then purport to claim the contrary. The Hon. AG has also filed numerous pleadings, including its written submissions herein, in the name of the 2nd respondent.

83. It was the Petitioner's case that the petition is properly before this Court, since he only moved the Court after he failed to get administrative remedies available in law. Further, having not been a bidder, the petitioner had no standing in law to move the Public Procurement Administrative Review Board, and the Board itself had no mandate to address matters concerning the violation of rights. In his view, he is not estopped from filing the instant petition demanding compliance with the law in the procurement of new design currency notes simply because he filed **Nairobi HC Petition 477 of 2017 - Okiya Omtatah Okoiti vs. Central Bank of Kenya & Another** seeking to compel the 1st respondent to issue new design currency notes in conformity with the Constitution. On the contrary, the petitioner submits that he, more than any other Kenyan, is under the obligation to protect the public interest by ensuring that the procurement process he triggered is conducted strictly and fully in compliance with the law and public policy.

84. The Petitioner urged the Court to take judicial notice of the fact that whereas the instant petition is dated 11th December 2017, and was filed in court on 13th December 2017, the Request for Review **Public Procurement Administrative Board Review Application No. 108 of 2017**, was dated 19th December 2017 and filed on same date.

85. The petitioner disagreed with the Hon. Attorney General that the **Public Procurement and Disposal Regulations, 2006** are a valid law, having been saved pursuant to Treasury Circular No. 02/2016, dated 29th March 2016. Nothing could be further from the truth as the Circular is not the regulation made exempting it from expiry as provided in section 21(1) (b) of the **Statutory Instruments Act 2013**. Keeping in mind that the purpose for the staged repeal of statutory instruments “on the day which is ten years after the making of the statutory instrument” is to ease the burden of legislation by the Executive on the population, a regulation saving a statutory instrument has to be made through the process provided in the Act for making regulations. He further disagreed with the Hon. Attorney General that section 24 of the **Interpretation and General Provisions Act (Cap 2)** saved the **Public Procurement and Disposal Regulations, 2006** from being voided by section 21(1) (b) of the **Statutory Instruments Act 2013**.

86. According to the Petitioner, the said provision is abundantly clear that it does not address or apply to the staged repealing of statutory instruments in section 21 of the **Statutory Instruments Act**. According to him, the **Public Procurement and Disposal Regulations, 2006** would still have been voided by section 21 of the **Statutory Instruments Act** even where their parent Act, the **Public Procurement and Disposal Act 2005**, had not been repealed. It was his submission that section 27(2) of Cap 2 does prevent the application of the **Statutory Instruments Act** on statutory instruments which were enacted before the act came into force. On the contrary, the section imposes the Act on such statutory instruments.

87. According to the Petitioner, the phrase “**shall continue in force as if it were made under this Act**” needs no interpretation. The instrument is to be considered as if it complied with all the requirements of the Act, and cannot be voided say on the grounds that there was no public participation provided for when the instrument was made. However, going forward, the instrument is subject to the 10-year sunset rule in the Act.

88. The petitioner however agreed with the Hon. Attorney General that the 1st Respondent misapplied the law on preferences and reservations to the extent that:

a. The preference can only be awarded directly to a bidder in its own right and not through third parties such as the 4th and 5th respondents.

b. The purported subcontracting of the 4th and 5th respondents as a basis for applying the preference margin was a nullity in law as it was not applicable to the evaluation process, since it would only come into effect long after the evaluation had been made and the tender had been awarded and the contract signed.

89. The petitioner also agrees with the Hon. Attorney General that “the values and principles of accountability, transparency, [and] fairness must be adhered to. It is not worth to hold a non-transparent and flawed procurement process at whatever cost...”

90. The Petition also agreed with the decision of the Review Board in quashing of the tender award on the findings of the PPARB in Review 108/2017, including that the 3rd respondent did not qualify for the application of the preference margin which allowed it to beat the competition; and that the tender should be awarded to the lowest evaluated tenderer. It was however his view that the findings did not address prayers G(i)(a), (b), (c), (d), (e), and (f) in the petition seeking declaratory orders which the PPARB has no jurisdiction to consider and determine. In addition there were other issues the subject of the petition which only this Court can deal with. In the circumstances, and bearing in mind that the petition was filed before the review application, this Court will not be acting in vain by hearing and determining the instant petition on the merits, even on those issues that the PPARB has expressed itself on.

91. As regards costs, the Petitioner submitted that it is trite law that costs follow the event. The instant consolidated petitions have merit and the orders sought ought to be granted. The petitioner submitted that the application be allowed as prayed with costs being borne by the respondents and he relied on **Erick Okeyo vs. County Government of Kisumu & 2 Others [2014] eKLR**.

92. However, this being is a suit between a private citizen and the State, the petitioner urged the court not to award costs to the respondents in the event the petition is not successful and relied on the *ratio decidendi* in the South African case of **Biowatch Case cited as CCT 80/2008 or 2009 ZA CC 14** at paragraph 21.

93. The petitioner submitted that the petition ought to be upheld since it tilts in favour of the public interest in as far as it seeks to entrench constitutionalism, the rule of law, sustainable development, and good governance in the affairs of the 1st respondent. According to him, the award of a tender should arise out of a fair and transparent evaluation of bids. It’s a procedural act. But the 1st respondent acted *ultra vires* and its award is unlawful and, therefore, invalid, null and void. For the said reasons the Court was urged to find legal and Constitutional infirmity in the impugned actions of the 1st respondent and allow the petition as prayed.

1st Respondent’s Case

94. The 1st Respondent opposed the petition.

95. According to the 1st Respondent, **the CBK**, the Petitioners have based their case on illegally obtained documents, in abuse of process and in breach of the 1st Respondents right to privacy and the privacy of its communications under Article 31 of the Constitution, and also in breach of Article 35 of the Constitution.

96. It was averred that **Central Bank of Kenya** is established under Article 231 of the Constitution of Kenya 2010 and that it undertook the procurement of the new design currency in accordance with the Constitution of Kenya, **Public Procurement and Asset Disposal Act, 2015** and other applicable laws of Kenya. The award of tender was made to **De La Rue International Limited** on November 30, 2017 after successful completion of the procurement process for Tender Number CBK/37/2017-2018. It is therefore not true that the tender was rigged

in favour of **De La Rue International Limited** as alleged or at all.

97. According to the CBK, in exercise of its independent operational mandate granted under the Constitution of Kenya in Article 231 (3), it does not act under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions. It therefore denied all the allegations of conspiracy and or impropriety in the Petition.

98. CBK's position was that during the design and currency development process considered receiving views from members of the public in the process to be a fundamental right and therefore invited their input. Advertisements inviting members of the public to offer their proposals for both banknotes and coins were published in the dailies on 9th and 13th March, 2012. In pursuance of the Constitutional imperatives laid in Article 231(4) the procurement process of currency banknotes commenced in 2014 following an advertisement by the CBK for Prequalification of Suppliers for Production of Banknote Origination Material and Currency Printing Services. This was done both locally and internationally in Tender number CBK/043/2013/2014, published in two local dailies, a regional weekly paper and in the CBK's website. The advertisements were made as follows:

- a. Local Media – “*The Daily Nation*” and “*East African Standard*” of June 16, 2014;
- b. Regional Media – “*The East African*” for the week of June 14 to 20, 2014; and
- c. International Media - *CBK Website, Tenders Portal* from June 16 to July 8, 2014.

99. According to CBK, it floated a Restricted Tender Number CBK/64/2016-2017 for the *production, supply and delivery of currency origination materials, proofs and dataset files* for new design Kenya currency banknotes to prequalified bidders on 8th March, 2017. The tender was competitive and bidders submitted their origination proposals and price, which were evaluated and the tender awarded to the lowest evaluated Tenderer. The tender was for Production, Supply and Delivery of Currency Origination Materials, Proofs and Dataset Files for New Design Kenya Currency Banknotes. The prequalification guidelines were clear that participation of prequalified candidates could be done *for either production of Banknote Origination Materials and /or Printing and Supply of banknotes*. (Emphasis added). This condition was clear to all participating tenderers right from 2014 and has never been a point of challenge making the entire process to be fair, equitable, transparent, competitive and cost effective in accordance with the Constitution of Kenya. It was further averred that the CBK issued a Tender Number CBK/64/2016-2017 where proposed specifications were developed for the banknote origination process and issued to all Tenderers. In the origination tender, CBK had made it clear that the choice of elements and features incorporated in the design was subject to acceptance by the Bank. The clauses referred to in the tender document are:-

- a) *Clarification clause 2.1.1 stated that the Bank will engage with the selected Bidder in stage 2 to fine-tune or adjust the primary and complementary prototypes. This will involve consultative meetings at the Central Bank of Kenya Offices in Nairobi or bidder premises if required. Once the Bank has agreed on the exact prototype details, the Bidder shall produce the origination material, printed proofs and specified quantities of banknotes produced under actual production conditions.*
- b) *Clause 6.2.15 stated that final security features will be determined by the Bank and will be procured by the winning bidder at the print stage.*
- c) *Clarification clause 3.10.1 (ii) stated in part that the final design elements and features will be subject to discussion and concurrence with the bank.*

100. The CBK deposed that the provisions of section 22 of the **CBK Act** mandates CBK to have the sole right to issue banknotes in Kenya in addition to determining the denominations, inscriptions, forms, material and other characteristics of the banknotes and that it made several other improvements and not one, while undertaking the banknote origination process and before the printing tender was issued. These improvements were made based on functionality of the security elements, resilience to counterfeiting and not on the basis of a particular Printers capability. The change of elements was within CBK's mandate and these adjustments, modifications, additions or discarding of some elements was done based on sound and solid technical considerations.

101. It was averred that CBK issued a Restricted Tender Number CBK/37/2017-2018 on 24th October, 2017. Due to the specialised and complex nature of the goods required, competition for the contract was limited to prequalified contractors. The tender was therefore issued to only four pre-qualified suppliers namely; **Giesecke & Devrient, Crane Currency, De La Rue International Limited** and **Oberthur Fiduciaire**.

102. It was disclosed that CBK had in the tender document clause 2.25.1 stated that Preference shall be as provided in PART XII— PREFERENCES AND RESERVATION of the **Public Procurement and Asset Disposal Act** and that it was also made clear that it was incumbent upon Tenderers to demonstrate that their bids qualify to be granted a preference under the law. Issuance of Addendum Number 3, as part of Tender Number CBK/37/3017-2018, was only made in response to Tenderers' request for clarifications. Right from the Prequalification for Tender Number CBK/043/2013/2014, **De La Rue International Limited** had indicated that they will use a local affiliate in the execution of the Print tender. Addendum number 3 was therefore issued by the 1st Respondent on 8th November, 2017 in addition to Addendum Number 1 issued on 31st October, 2017, Addendum Number 2 issued on 6th November, 2017 and Addendum Number 4 issued on 13th November, 2017 as per tender procedure. None of these addendums changed the substratum of the tender document issued. They only answered clarifications sought by the bidders as provided by Clause 2.5 of the Tender Document.

103. It was averred that in submitting its tender number CBK/37/2017-2018, one of the prequalified bidders, **De La Rue International Limited**, applied for sub-contracting and demonstrated that the goods to be supplied to CBK will be produced and assembled locally in Kenya through their affiliate company.

104. The CBK's position was that it strenuously opposed Petition No. 568 of 2017 and that the 3rd, 4th and 5th Respondents were neither individually nor collectively entitled to award of the tender. It further denied that it did enter into any consent with 3rd and 4th Respondents as alleged as the 3rd Respondent withdrew the Petition on its own volition.

105. The Bank reiterated that it clearly stated in the Tender document and subsequent Addendum that the Prescribed Preference would be applied during evaluation to any of the bidders fulfilling the conditions outlined in Part XII of the **Public Procurement and Asset Disposal Act**. The 1st Respondent granted the application of a 15 percent preference as set out in the law to **De La Rue International Limited** who sought to be granted preference and provided satisfactory evidence in accordance with the provisions of section 155(3)(a) of the **PPADA**. The margin of preference was not applied on the basis of shareholding but rather on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya.

106. According to CBK, the policy behind preferences is contained in section 3(i) and (j) of the **PPADA** which states that Public procurement and asset disposal by State organs and public entities *shall be guided by the values and principles of the Constitution and relevant legislation including promotion of local industry*, sustainable development and protection of the environment and promotion of citizen contractors. It was therefore its position that it acted fully within the law in the application of the provisions relating to Preferences and Reservations as stated in section 155 of the **PPADA**.

107. Further, the Tender document in clause 3.15 had provided that with express Authority of CBK, sub-contracting would be allowed. It was contended that the Tender Evaluation Committee independently met and carried out the evaluation of Tender Number CBK/37/2017-2018 from 23rd to 27th November, 2017. The Committee then made recommendations for consideration to the Head of Procurement Function on 27th November 2017, recommendations which included consideration for award of the Tender to **De La Rue International Limited**. It is therefore not true that on 30th November 2017, CBK applied the 15 percent margin of preference as alleged in the Petition. In addition, it is the Head of the Procurement Function who gave the professional opinion to the Accounting Officer for consideration to award the tender to the Lowest Evaluated Tenderer.

108. It was reiterated that **De La Rue International Ltd** in their bid demonstrated that the goods to be supplied to CBK will be produced and assembled locally in Kenya through their affiliate and that qualification for the application of preference was based on location of production and not ownership of the tenderer.

109. According to the CBK, the applicable statute, i.e. the **Public Procurement and Asset Disposal Act, 2015** was complied with together with the applicable Regulations as guided in the Treasury Circular Number 2/2016 in the Tender Number CBK/037/2017-2018. The use of the repealed law, **PPDA, 2005** was not applicable in the subject tender but was used in the Prequalification process which commenced in 2014 and was then concluded before enactment of the new Act. It was therefore its position that the procurement was initiated and concluded strictly in accordance with the law and that it undertook the entire procurement process in a fair, equitable, transparent, competitive and cost-effective manner in accordance with Article 227 (1) of the Constitution and the **PPADA, 2015**. The entire procurement process was carried out in stages as follows:-

a. A prequalification tender was advertised in June/July 2014 openly in various media without restricting any eligible party hence achieving transparency and fairness.

b. Due to the speciality and complexity of the procured goods, subsequent Tenders for Origination and Printing were issued through Restricted tendering to the prequalified suppliers, hence still subjecting the procurement to competition.

110. According to CBK, **De La Rue Currency and Security Print Limited** and **De La Rue EPZ Limited** did not bid in all the tenders. The Tender was awarded to **De La Rue International Limited** on the basis of the evaluation of their bid as provided in the Tender Document. **De La Rue International Limited** demonstrated that they have the capacity to carry out local production and thus the application of preference margin in their evaluation. It is therefore not correct that there was an inducement given or made to CBK to award the tender to **De La Rue International Limited**. According to the CBK, **De La Rue International Limited** did seek the authority of CBK to Subcontract and that the application of Preferences and Reservations of the **PPADA** was on the basis of Section 155(3) (a), where manufactured articles, materials and supplies are partially mined or produced in Kenya or where applicable have been assembled in Kenya, and Regulation 28 of PPDR of 2006. The use of Preferences and Reservations on the basis of 51 percent shareholding as a citizen contractor was therefore not applicable.

111. According to the CBK, Banknotes are not wholly produced in Kenya as a number of components and substrates are externally sourced. However, banknotes are wholly printed in Kenya once all the components and substrates have been assembled. It deposed that CBK did not require bidders to print banknotes as per 'paragraph 6' of the Origination tender but as per the specifications given in the tender for Printing and Supply of New Design Banknotes number CBK/37/2017-2018. It was its case that the Petitioner was not privy to the Tendering process, and in particular evaluation, in which the relevant documents demonstrating eligibility for preference were submitted by **De La Rue International** and evaluated. It denied that it used the Direct Procurement Method to procure the Printing and Supply of New Design Currency as no supplier was given direct and exclusive rights in the procurement process as alleged. To the contrary, at all stages of the procurement process, CBK used methods that were fair, equitable, transparent, competitive and cost effective. The application of preference was done in accordance with the applicable laws and this was disclosed in the Tender Document and clarified in the subsequent addenda issued to all bidders.

112. The CBK averred that neither itself nor any of the bidders could have known the prices of each bid prior to the opening of the tenders hence there was clearly no intention as alleged to ensure that **De La Rue International Limited** will have the lowest evaluated price. It reiterated that it conducted the procurement process lawfully in compliance with the Article 227 or the Constitution and applied Part XII— Preferences and Reservation of the **Public Procurement and Asset Disposal Act** as specified and awarded the tender to the lowest evaluated bidder in full compliance with the law.

113. It was reiterated that the preference requirement was provided in the primary tender document under Clause 2.25.1 and further in the Appendix to Instructions to Bidders and not added midstream as alleged. Addendum Number 3 was issued as a response to bidders query in addition to three other Addendums also issued in the same tender number CBK/37/2017-2018.

114. According to the Bank, whereas it filed a Replying Affidavit to Petition Number 568 of 2017 and averred that the 4th and 5th Respondents are affiliates of the 3rd Respondent, it did not state that they were not qualified to print banknotes but rather they were not prequalified in the Tender Number CBK/043/2013/2014. It therefore denied that there was a link between the award of the tender and withdrawal of the Petition.

115. It was CBK's case that it carried out the entire procurement proceedings within the legal timelines provided in law and that its Board does not engage in any procurement proceedings or processes. Section 10 of the CBK Act outlines the responsibilities of the CBK Board which mainly rests on policy and budget approval. Furthermore, section 44 of the **PPADA** mandates the accounting officer of a public entity to be responsible for ensuring that the public entity complies with the Procurement Act and not the Board.

116. CBK insisted that the role of identification of security elements in a banknote is at the sole discretion of the CBK. This is meant to ensure that the national currency is not prone to any counterfeit threat. The action was therefore undertaken on assessment of threat levels and without the influence of any of the tendering parties. According to it, the Petitioner by writing to the CBK was trying to interfere with an ongoing procurement process. It was also noted that in writing to CBK, the Petitioner had attached portions of the Origination and Print Tender Documents which were found intriguing and interesting as the Petitioner was not a participant in the issued Tender Number CBK/64/2016-2017 or CBK/37/2017-2018. In its view, it was intriguing as to how the Petitioner got access to these Tender Documents whose confidentiality is protected under section 67 of the **Public Procurement and Asset Disposal Act** and emphasised in the particular Tender document.

117. The CBK's position was that the Petitioner is intent to stall a procurement process that has been carried out in a fair, transparent, competitive and legal means in accordance to Article 227 (1) of the Constitution. Any of the parties to the tender was free to move to the Public Procurement Administrative Review Board (PPARB) to seek redress if not satisfied on how the procurement proceedings was carried out.

118. CBK averred that under section 176 of the **PPADA**, various Offences and Sanctions are provided for.

119. The CBK relied on Article 227(2) of the Constitution which states that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented, including categories of preference in the allocation of contracts. According to it, the Constitution required Legislation on procurement of public goods and services as specified under Article 227, to be enacted by Parliament within four years. The required Legislation, **The Public Procurement and Asset Disposal Act**, was assented on 18th December 2015 and became effective on 7th January 2016.

120. It was therefore contended that the section makes it mandatory for CBK to provide for preferences in the tender in compliance to the Act. Accordingly, being aware of the clear provisions of the Constitution, the **PPADA** and Circular Number 2 of the National Treasury, the CBK would not have failed to provide for Preferences or provide opportunities for any of the prequalified Tenderers to produce the banknotes locally, if done within the specified requirements of the tender and the law.

121. The CBK insisted that it prepared all its tenders using standard tender document templates provided by the Public Procurement Regulatory Authority, documents which contain a clause on application of preferences. It accused the Petitioner of having failed in their duty of candour to the Honourable Court since both the Petition and the Supporting Affidavit have grave misrepresentation of facts and the misrepresentation of the applicable law, designed to hoodwink the Court.

122. It was therefore CBK's position that:

a) The Petition herein and the Application before the Court has been filed in gross abuse of the process of this Honourable Court and for collateral purpose of intimidating, pressurising and forcing the 1st Respondent to afford the Petitioner's Principals undue advantage.

b) The Petition herein, like Constitutional Petition Number 477 of 2017 which was filed by the Petitioner are an attempt to subvert the Constitution and the 1st Respondent's constitutional mandate, the same are against public interest and public policy.

123. According to the CBK, the currency printing tender process is security sensitive and strictly time bound and the 1st Respondent stands to fail to deliver on its constitutional mandate to the Kenyan public, suffer serious and irreparable international and national reputational losses, massive irreparable damage to the economy, irreparable loss of public confidence and expenses that cannot be atoned to in monetary terms.

124. On behalf of the CBK, it was submitted that by a Determination dated 8th January 2018, the Board annulled the Award and declared that the 3rd Respondent herein was unlawfully awarded the Tender by being given the 15% preference margin. The Board further directed the 1st Respondent to evaluate afresh all the tender submitted by the 4 bidders. According to CBK, the net effect of the findings and/or Orders of the Board are that the substantive prayers in the Petition (i) (d), (e) & (f) and (ii)(a), (b) & (c) are rendered otiose since the subject matter of the Petition has been determined by the Board. Therefore the Petition has been overtaken by events and the High Court cannot deal with the issues raised therein.

125. According to the CBK, the live issues for determination are the following:

- i. whether the Petitioner obtained the Tender documents illegally;
- ii. whether the Public Procurement and Disposal Regulations 2006 is void;
- iii. whether the CBK failed to curb cartel like behaviour;
- iv. whether the 4th and 5th Respondents should be locked out of the tender; and
- v. which Orders should this honourable Court grant.

126. It was CBK'S submission that the following Tender Documents annexed to the Supporting affidavit of **Okiya Omtata Okoiti** sworn on the 11th December 2017 were obtained illegally;

- a) Tender Documents Number CBK/64/ 2016-2017 at pages 8-14 of "Exhibit 'OOO-1'";
- b) Tender Documents Number CBK/37/2017-2018 at pages 15-17 of "Exhibit 'OOO-1'";
- c) Tender Documents Number CBK/64/ 2016-2017 at pages 23-29 of "Exhibit 'OOO-1'";
- d) Tender Documents Number CBK/37/ 2017-2018 at pages 30-32 of "Exhibit 'OOO-1'";
- e) Tender Documents Number CBK/64/ 2016-2017 at pages 41-98 of "Exhibit 'OOO-1'";and
- f) Tender Documents Number CBK/37/ 2017-2018 at pages 99-158 of "Exhibit 'OOO-1'";

127. As to the competency of the application, the CBK submitted that rule 19 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** gives discretion to a party to either file an Affidavit in support of an Application or not hence it is not a mandatory requirement to file an Affidavit in support of any Application. Further, the essence of an Affidavit is to adduce documentary evidence of facts. Order 19 Rule 1 and 2 of the Civil Procedure Rules 2010 are clear that an Affidavit is required to prove and/or adduce certain facts before the Court. If the documents in dispute are before the Court and the issue raised is one of law, it is not necessary to file an Affidavit. That is why Rule 19 gives a party the discretion to file an Affidavit in support of an Application or not.

128. It was submitted that the Petitioner has largely admitted that he was not a tenderer, the documents are confidential and that he did not request for the documents from the 1st Respondent either under Article 35, 46 or 47 of the Constitution. It was therefore submitted that the Petitioner has illegally obtained the said Tender Document in breach of the 1st Respondent's right to privacy and the privacy of its communication with the pre-qualified Tenderers under Article 31 of the Constitution of Kenya, 2010 to its greatest prejudice and reliance was placed on the decision of **Lenaola, J** (as he then was) in **Okiya Omtatah Okiiti & 2 others vs. Attorney General & 3 others [2014] eKLR** and the Supreme Court decision in **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others**.

129. With respect to the allegation that the Tender documents were available to members of the public long before he filed the Petition through the website www.scribd.com, it was submitted that the said website is an online platform for sharing documents. The documents posted therein have a digital signature and identity of the person who shares the same. In the circumstances of this case, the documents were shared by one **Olakachuna Adonija** who uploaded the Tender documents as an afterthought on 20th and 24th December 2017 after the Petition herein had been filed a week earlier on 13th December 2017. The Petitioner cannot therefore argue that the said documents were available to the members of the public when he filed his Petition.

130. On the authority of the foregoing decisions of the High Court and the Supreme Court, the Court was urged to strike out the Tender documents illegally obtained by the Petitioner herein.

131. As regards the issue whether the **Public Procurement and Disposal Regulations 2006** is void pursuant to section 21 of the **Statutory Instruments Act No. 23 of 2013**, it was submitted that it is important to note that on the issue of procurement, the Rules were expressly imported to the **PPADA, 2015** by virtue of section 182(2) thereof. Reliance was also sought in section 24 of the **Interpretation and General Provisions Act**.

132. According to the CBK, these sections expressly operationalise and apply the Regulations to the new Act. In support of our submissions, we rely on the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**.

133. It was further noted that section 21 is not absolute since section 21(1)(b) qualifies the ten (10) year statutory period as amenable to exemption by regulation. By virtue of sections 182(2) of the **PPADA, 2015** as read with section 24 of the **Interpretations and General Provisions Act** the Rules are carried on and deemed as enacted under the **PPADA 2015** hence there is no question of its lapsing. In this respect the CBK relied on **Kenya Pharmaceutical Distributors Association vs. Kenya Veterinary Board & 3 Others [2017] eKLR**.

134. In any event, it was submitted that the said **Statutory Instruments Act** came in to operation on 25th January 2013. There is no express provision applying it retrospectively to the Rules enacted pursuant to the repealed **Public Procurement and Disposal Act, 2005**. It can only

be forward looking as time only runs from the date of commencement of the Act unless it expressly was intended to operate retrospectively. No wonder section 27 of the said **Statutory Instruments Act** imports all these instruments as if they were made under the said Act and continue to be in force under the Act unless the same are repealed by the parent statute.

135. To the CBK, as is clear above, Parliament did not retrospectively apply Section 21 to the extant Rules and Regulations. It imported them under the **Statutory Instruments Act** and only allowed Parliament to revoke them under the parent statute. Therefore, time can only run from the commencement date and not before. In this respect it relied on the case of **Vipul Kakad T/A Kavico Auto Spares & 328 Others vs. Kenya Bureau of Standards [2017] eKLR**.

136. As to whether the CBK failed to curb cartel like behaviour and whether the 4th and 5th Respondents should be locked out of the tender, it was submitted that though the Petitioner has made these egregious allegations against the Respondents, he has not availed any iota of evidence to support his claim. Under Section 107 of the **Evidence Act**, the Petitioner bears the burden to support his claim that the Respondents engaged in collusion and acted in a cartel like manner. In the voluminous Affidavits filed by the Petitioner, there is no evidence that supports the said allegations.

137. On the other hand, the CBK contended that it had in the Replying Affidavits explained the process and steps taken by the CBK in the tender. There was no collusion or cartel like behaviour. The 4th and 5th Respondents withdrew their Petition in the High Court which they were entitled to do, and it couldn't not have stopped them from doing so. In addition, as explained in the Affidavits filed by the 1st Respondent, it followed the law in the tender process and indeed there was no discrimination or favour accorded to any of the tenderers.

138. In respect of the other claims and allegations by the Petitioner on the tender process, the Court was informed that there is in fact a decision on the process, compliance with Article 227 of the Constitution and the applicable law, to wit, the **Public Procurement and Asset Disposal Act 2015** made by the Public Procurement Administrative Review Board. That decision is only subject to review on appeal by this Honourable Court in Judicial Review Nos. 6 and 7 of 2018. The said issues cannot be raised in the present Petition again.

139. It was also submitted that the question of disqualification of the 4th and 5th Respondents from the tender process also requires proof by cogent evidence from the Petitioner which is lacking in this case. In the circumstances, the Court cannot issue the Order barring the said Respondents from the tender process or indeed any other process. In this respect reliance was sought from **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance(NASA) Kenya & 6 Others [2017] eKLR**, the Court of Appeal held at paragraphs 49-50 and 55 held that a Petitioner bears the burden of proving his allegations as required by section 107 of the **Evidence Act**. Without doing so, his claims are liable for dismissal.

140. It was submitted that in respect of the Order sought by the Petitioner, most of them are actually overtaken by events in light of the decision of the Board. The other prayers in the Petition the subject of these submissions are not merited and should be dismissed.

141. The Court was therefore urged to strike out the documents the Petitioner obtained illegally and dismiss the entire Petition with costs to the 1st Respondent.

2nd Respondent and 1st Interested Parties' Case

142. On their part, the 2nd Respondent and the 1st Interested Parties herein, the **Public Procurement Review Authority** and the **Attorney General**, opposed the Petition by way of the following grounds of opposition:

1. The application is an abuse of the court process and intended to subvert clear provision of the constitution and the law in that:-

(a) The tender in question seeks to implement the provisions of Article 231(4) of the Constitution which requires the 1st Respondent to have in place new currency notes and coins with images that depict or symbolize Kenya or an aspect of Kenya but not one bearing the portrait of any individual. The Petition and the Application herein must be weighed against this constitutional requirement of the 1st Respondent.

(b) Article 231(3) of the Constitution grants the 1st Respondent the functional and operational independence to act not under the control or direction of any person or authority. The totality of the Petition herein and the actions of the Petitioner amount to an attempt to control and direct the operations of the Central Bank of Kenya.

(c) The Public Procurement and Asset Disposal Act, 2015 at section 155 allows for grant of preference to tenderers by procuring entities upon the satisfaction of the set criteria. The grant of preference cannot therefore be a ground for alleging constitutional violations unless it can be shown the set criteria under the Act was not met.

2. The Petition and the application amount to a challenge of a procurement process which the unsuccessful bidders have not challenged at the Public procurement Administrative Board (PPARB). The application for conservatory orders must be weighed against this backdrop as the Petitioner was not a party to the tender.

3. It is publicly on record that the Petitioner in Nrb Hc Petition 477 of 2017 Okiya Omtatah Okoiti Vs Central Bank of Kenya & Ano is litigating on the failure by the 1st Respondent to issue new currency notes. That it is the Petitioner who now seeks to stop the procurement process towards the printing of new currency notes speaks bad faith and an attempt to direct the procurement process.

4. The application is devoid of any merit and does not disclose any grounds for the grant of conservatory orders or extension of the interim conservatory orders already issued and lapsing on 20th December, 2017.

143. On their behalf, it was submitted that following the award of the subject tender to the 3rd Respondent herein, on the 19th December, 2017 and Pursuant to the resultant award **M/s Crane AB**, filed a request for review before the **Public Procurement Administrative Review Board (PPARB), Review no. 108/2017**. According to the Authority and the AG, The issues raised by the petitioner in this petition are a replica of the grievances raised before the Public Procurement Administrative Review Board which is vested with jurisdiction to hear and determine grievances of parties to tenders in public procurement. The issues that were raised by **M/s Crane AB** before the **(PPARB)** were as follows;

- (a) That the Public Procurement and Asset Disposal Act of 2015 was not applicable to the subject tender.**
- (b) That the 2006 Regulations made under the Public Procurement and Asset Disposal Act of 2005 have expired by operation of Section 21 of the Statutory Instruments Act,**
- (c) That the 3rd Respondent was not entitled to local preference since it is a foreign Company.**
- (d) That the Local Preference was introduced midstream by way of an Addendum No.3 to unfairly favour the 3rd Respondent.**
- (e) That no approval to subcontract was obtained by the 3rd Respondent from the 1st Respondent (CBK).**
- (f) That there was no input nor approval by the Central Bank of Kenya Board of Directors as required under section 10. of the Central Bank Act.**
- (g) That the 3rd Respondent could not rely on its affiliation for the 4th and 5th Respondents herein to claim entitlement to local preference.**
- (h) That the tender was awarded in only one lot whilst it was supposed to have been awarded in two lots.**
- (i) That the CBK has failed to curb cartel like behavior by awarding the tender to a company that had already won the tender of designing the new currency.**

144. On the 8th January, 2018 the Public Procurement Administrative Review Board delivered its decision and in it made conclusive findings on the above listed issues that had been raised by the parties. The said decision of the Public Procurement Administrative Review Board is now the subject of 3 judicial Review proceedings namely **Misc Civil Application No.6 of 2018, JR Misc Civil Application No.7 of 2018, JR Misc Civil Application No.18 of 2018.**

145. On behalf of the 2nd Respondent it was submitted that “**Public Procurement Regulatory Authority**” is a non-existent entity under any Laws of Kenya. Instead, the existing Authority that deals with matters on Public Procurement is “**The Public Procurement Oversight Authority**” which was created by the **Public Procurement and Disposal Act, 2005** whose mandate includes *inter alia* Ensuring that procurement procedures established under the Act are complied with and Monitoring the procurement system and reporting on its overall functioning. Consequently, this Honourable Court can not issue any adverse Orders or otherwise against an entity that is no party to the suit since such a party shall be greatly prejudiced by being condemned unheard. This is anchored on the **Article 47 of the Constitution of Kenya, 2010** which gives the right to fair administrative Action to all persons. In this respect the Court was asked to be guided by the decision in **Yako Supermarket (K) Ltd & Another vs. National Land Commission & 4 others [2016] eKLR.**

146. According to the 1st interested party, the Petition is an abuse of court process and the law. It is superfluous to entertain this Petition as presented whereas there are laws that provide well established forum and procedure for addressing grievances arising from any processes of Public Procurement. The Public Procurement Administrative Review Board (PPARB) is established under the **Exchequer and Audit (Public Procurement) Regulations, 2001**. It was established to promote and uphold fairness in public procurement through impartial adjudication of disputed procurement proceedings. This particular forum has not been resorted to and no evidence has been presented to show that the proscribed avenues in law are insufficient or are not available.

147. It was disclosed that the Petitioner did file **Nrb HC Petition 477 of 2017 Okiya Omtata Okita vs Central Bank of Kenya & Anor** wherein he was litigating on the failure by the 1st Respondent to issue new currency in compliance with the constitutional mandate of the 1st Respondent. The Petitioner sought the intervention of the court to compel the 1st Respondent to fulfil its mandate. The Respondent then set out to carry out this constitutional mandate by advertising for the Tender the subject matter of this Suit. The Petitioner then in in clear abuse of the court process filed this petition seeking to stop a process which he was agitating for. The tender in question seeks to implement the provisions of Article 231(4) of the Constitution which require the 1st Respondent to have in place new currency notes and coins. The actions of the Petitioner are against public Interest and public policy. Reliance was sought from **Republic vs. Non-Governmental Organisations Co-Ordinations Board & 4 others Ex Parte International NGO Safety Organisation (INSO) [2016] eKLR.**

148. In any event, it was submitted that Article 231(3) of the Constitution grants the 1st Respondent the functional and operational independence to act not under the control or direction of any person or Authority. The totality of the petition herein and the actions of the petitioner amount to an attempt to control and direct the operations of the Central Bank of Kenya.

149. As regards the law applicable to the tender in issue, the 1st interested party concurred with the findings of the **Public Procurement Administrative Review Board (PPARB)** in **Review no. 108/2017** that as the procurement process the subject matter of this suit commenced in the June 2014 the law relating to the issue of entitlement to the application of the Law on Preference is the provisions under section 155 of the **Public Procurement and Assets Disposals Act** and that the provisions of section 39(8) (b)(i) of the **Public Procurement and Assets Disposals Act, 2005** (repealed) is in the same wording as those of section 155(3)(a) and 157(8)(b) of the **Public Procurement and Assets Disposals Act, 2015**. According to them, the regulations made under the 2005 Act, are still in force pursuant to Treasury Circular No.02/2016 dated 29th March, 2016 on the operationalization of the new **Public Procurement and Asset Disposal Act, 2015** and section 24 of the **Interpretation and General Provisions Act** Cap 2 Laws of Kenya.

150. They submitted that the **Public Procurement and Asset Disposal Act, 2015** at section 155 allows for grant of preference to tenders by procuring entities upon the satisfaction of the set criteria. In this case it was submitted that the 3rd Respondent was granted preference pursuant to the provisions of section 155(3)(a) of the **Public Procurement and Asset Disposal Act, 2015**, which allow the procuring entity to grant a preference to a bidder where the materials and supplies are mined or produced in Kenya or where applicable, they have been assembled in Kenya. The preference margin in this case was not applied on the basis that new currency would be produced in Kenya, or where applicable assembled in Kenya. This was granted to the 3rd Respondent on the basis of the evidence it provided that the 3rd Respondent in their bid demonstrated that the goods to be supplied to the Central Bank of Kenya will be produced and printed and assembled Locally in Kenya through its affiliates. Further that the preference had been granted to the 3rd Respondent because it had applied to be allowed to subcontract for works and that it had been granted consent to do so by the procuring entity.

151. The 1st Interested Party was in agreement with the findings of the Public Procurement Administrative Review Board (PPARB) on this issue that the manner in which the margin Preference was awarded to the 3rd respondent was erroneous in Law in two limbs;

1. The provisions of section 155 of the Act, preference can only be granted to a bidder in its own right as abider if it can demonstrate that the manufactured articles, materials and supplies are mined or produced in Kenya or they will be assembled in Kenya by the bidder but not by an affiliate or any other legal entity from the bidder.
2. That the argument the preference was granted because the 3rd respondent had requested to be allowed to subcontract after being awarded the Tender is erroneous because this condition of the contract shall come into effect once evaluation has been done, the tender awarded and the contract has been entered into. A party cannot sub contract what they don't have. The ability to subcontract comes into play when a bidder has won a tender and signed the contract and not at the evaluation stage.

152. Notwithstanding the foregoing, they emphasized that all State organs are bound by the values and principles enunciated among others in Articles 10, 201, 227 (1) of the Constitution. The values and principles of accountability, transparency, fairness must be adhered to. It is not worth to hold a non-transparent and flawed procurement process at whatever cost, CBK and all procurement entities must at all times remain accountable and transparent in their operations and must adhere to the values in Article 227 of the Constitution as incorporated in Section 3 of the **Public Procurement and Asset Disposal Act**.

153. It was therefore submitted that the petition against the 2nd Respondent lacks merit. This is a case where the Court is called upon to stop the abuse of its process. The 1st Interested party averred that in light of the fact that the issues raised in this Petition have been heard and determined by the Public Procurement Administrative Review Board (PPARB), Review no. 108/2017 and the same decision now being the subject matter of Judicial Review proceedings it would be superfluous for this court to sit and make a determination again.

3rd Respondent's

154 The 3rd Respondent, **De Larue International**, opposed the Petition.

155. According to it, there was no breach of the constitution in the 3rd Respondent's participation in Tender Number CBK/37/2017 -2018 and that the 3rd Respondent was eventually awarded the Tender lawfully and on merit.

156. The said Respondent averred that the Petition herein is an abuse of the process of court. It is disguised as public interest litigation but in truth is litigation by proxy on behalf of a private entity **M/s Crane AB** a Swedish Company. **Crane AB** was the Applicant in **PPARB No 108 of 2017 Crane AB vs Central Bank & 3 others**. The hearing in **PPARB No 108 of 2017** has since been concluded and the decision therein is the subject of 3 judicial review applications filed by the 1st Respondent, 3rd Respondent and Crane AB (JR Misc Applications Nos 6 of 2018, 7 of 2018 and 18 of 2018 respectively) at the High Court.

157. It was its case that the Petition is a replica and re-litigation of the grievances raised in PPARB No 108 of 2017 and that the following are the matters and averments that are replicated in the two matters:

- a. **THAT** the Public Procurement and Asset Disposal Act of 2015 was not applicable to the subject tender.
- b. **THAT** the 2006 Regulations made under the Public Procurement and Asset Disposal Act of 2005 have expired by operation of Section 21 of the Statutory Instruments Act.
- c. **THAT** the 3rd Respondent was not entitled to local Preference since it is a foreign company.
- d. **THAT** local preference was introduced midstream to unfairly favour the 3rd Respondent by way of Addendum No 3.

- e. THAT no approval to subcontract was obtained by the 3rd Respondent from the procuring entity.
- f. THAT the institution and withdrawal of Constitutional Petition Number 568 of 2017 was a part of a conspiracy to facilitate the award of the tender to the 3rd Respondent.
- g. THAT in Constitutional Petition Number 568 of 2017 the Central Bank of Kenya had indicated that the 4th and 5th Respondent herein were not qualified to execute the banknotes printing tender.
- h. THAT in a rush to award the Tender to De La Rue International, there was no input nor approval of the Central Bank of Kenya Directors as required under Section 10 of the Central Bank Act.
- i. THAT the Tender having been a restricted one, the 3rd Respondent could not rely on its affiliation to the 4th and 5th Respondents herein to claim entitlement to local preference.
- j. THAT the Tender was awarded in only one Lot whilst it had been intended to be awarded in 2 Lots.
- k. THAT the CBK has failed to curb cartel like behaviour by awarding the tender to a Company that already had won the tender of designing the new banknotes. This means that taxpayers who were the beneficiary of the procurement will not be protected from price fixing.

158. According to the 3rd Respondent, the similarity in the two claims to a point of plagiarism in the averments and pleadings cannot be coincidental. The replication was even seen in the structuring of the Petition and the Request for Review. It was disclosed that during the hearing of PPARB No 108 of 2017 and in its decision read on 8th January 2018, the Public Procurement Administrative Review Board (“the Board”) addressed itself to and made findings regarding some of the issues above. For instance:

- (a) The Board made a finding of fact that the applicable law in Tender Number CBK/37/2017-2018 was the 2015 Act and the 2006 Regulations.
- (b) The Board noted in its findings that the accounting officer of Central Bank had given approval to subcontract.
- (c) The Board made a finding that the Tender No CBK/37/2017-2018 was in fact awarded in two lots.
- (d) The Board noted that Addendum No 3 and Addendum No 4 were responses by the procuring entity to clarifications sought by bidders on the issue of inter alia preference and reservations.
- (e) The Board made a finding of fact that De La Rue International Limited was not entitled to a local preference margin.

159. Following the decision of the Board of 8th January 2018, the 3rd Respondent filed JR Misc Civil Application No 7 of 2018 where it challenges the finding that it was not entitled to a local preference margin among other grounds. Central Bank of Kenya has also filed JR Misc Civil Application No 6 of 2018 while Crane AB has filed JR Misc Civil Application No 18 of 2018. The decision of the Board is therefore currently under consideration by this Court pursuant to section 175 of the **Public Procurement and Asset Disposal Act, 2015**. The determination of the same issues by way of a Constitutional petition is therefore superfluous. It was further contended that the Petition herein is on account of the foregoing res judicata in respect of matters that were conclusively resolved by the Board in PPARB No 108 of 2017 and are not subject of the pending judicial review applications. Such matters cannot be reopened by way of a constitutional petition. To do so amounts to inviting the Court to sit on an appeal against the decision of the Board.

160. It was the 3rd Respondent’s case that the Board indeed has powers to give orders directed at compliance with the constitution in so far as public procurement matters are concerned. In its view, the Petition herein and the Request of Review by Crane in PPARB No 108 of 2017 are in truth predicated on the singular contention that De La Rue International Limited was not entitled to receive a local preference margin of 15% in Tender No CBK/37/2017-2018. However the Petitioner’s contention that the application of the margin to **De La Rue International Limited** was unconstitutional is unfounded and deliberately ignores the following salient facts.

161. According to the 3rd Respondent, local preference margin was applied in a transparent and fair manner since **De La Rue International’s** intention to execute the tenders relating to Kenya’s new currency banknotes through local resources was manifested way back in the year 2014 in the process of bidding for prequalification in Tender Number CBK/043/2013/2014. In its prequalification bid **De La Rue International** clearly indicated that if it successfully prequalified and subsequently successful in the ensuing tenders they would subcontract aspects of the printing of the new generation banknotes to the 4th and 5th Respondents herein. Clause 2.4.3 of the Prequalification Tender Document had required bidders to provide details of subcontractors where highly specialized inputs would be required from specialist subcontractors. Clause 2.25.1 of the Tender Document in Tender Number CBK/37/2017-2018 instructed the tenderers that preference, where allowed in the evaluation of Tenders, shall not exceed 15%. The Appendix to Instructions to Tenderers in reference to Clause 2.25.1 further provided that preference shall be as provided in Part XII –Preference and Reservation of the **Public Procurement and Asset Disposal Act**. The tenderers were instructed that it was incumbent upon them to demonstrate that their bids qualify to be granted preference under the law. Under Clause 3.15.1 of the General Conditions of Contract included in Tender Number CBK/37/2017-2018 it was stipulated that a Tenderer would need to notify the procuring entity in writing of all subcontracts awarded under the contract if not already specified in the Tender. It was therefore envisaged that bidders could subcontract the tender and indicate their subcontractors in the bids. The subcontracting option was also disclosed in Clause 4.2 (in reference to clause 3.15 of the General Conditions of Contract) in the Restricted Tender which stipulated that the Tender could only be subcontracted with the express authority of the procuring entity.

162. It was disclosed that on 6th November 2017 and prior to any of the bidders submitting its bid, the 3rd Respondent sought *inter alia* the following clarifications from the 1st Respondent by way of a letter dated 6th November 2017 pursuant to Clause 2.5.1 of the Tender Document-

- (a) Preference and reservations criteria
- (b) Subcontracting criteria and procedure
- (c) The use of local affiliates/subsidiary to execute the contract

163. On 8th November 2017 the 1st Respondent issued Addendum Number 3 pursuant to clause 2.5.2 of the Tender Document providing clarifications on the queries as follows:

- (a) On preference and reservations the 1st Respondent referred the bidders to Section 155 through 157 of the **Public Procurement and Asset Disposal Act, 2015** as read with Clause 2.25.1 of the Tender Document. It was clarified that requests for preference would be evaluated in accordance with the Act and on the strength of a Tenderer's demonstration that their bids qualify to be granted preference.
- (b) On subcontracting it was clarified that a successful tenderer wishing to subcontract may seek express authority from the 1st Respondent as already provided for under Clause 3.15 of the Special Conditions of Contract.
- (c) The 1st Respondent further clarified that it would not be objecting to a successful Tenderer using a local affiliate to execute the contract.

164. According to the 3rd Respondent, on 13th November 2017 before the bidders submitted their bids, the 1st Respondent issued Addendum Number 4 and among other clarifications further clarified the issue of Preference and Reservations criteria and reminded the bidders that they would need to demonstrate their qualification for preference.

165. The 3rd Respondent therefore contended that it was factually incorrect for the Petitioner to allege that the local preference criteria was added midstream or unfairly to the tender process. All the tenderers were aware that local preference would be applicable in the tender right from the time they were issued with the tender documents and all the tenderers were also aware of and had equal opportunity to take advantage of the subcontracting option from time of prequalification and use their bids to demonstrate their qualification for preference through local subcontracting. The two (criteria and option) were set out in tender documents and subsequently reiterated in clarifications provided by way of addenda before bids were submitted. **De la Rue International Limited** cannot be blamed or chastised for its prudence in the tendering process where the other bidders were indolent.

166. It was disclosed that the 3rd Respondent submitted its bid on 22nd November 2017 in compliance with the Tender Document and Addenda Number 3 and Number 4 on the strength of *inter alia* the following:

- (a) The 3rd Respondent's qualification to be granted preference under the **Public Procurement and Disposal of Assets Act, 2015** on account of demonstrable affiliation and intention to print the banknotes in Kenya.
- (b) Submission of a technical and financial bid capable of giving money value to the Procuring Entity and the tax paying Kenyan public.
- (c) Demonstration of outstanding financial, technical and production capability to perform the tender assignment.
- (d) Demonstration of capacity to deliver the proposed new design currency banknotes by the intended completion date specified in the Tender Document's Schedule of Requirements under Section VI.
- (e) The 3rd Respondent has local affiliates through whom it would be executing the tender if successful and hence qualification.
- (f) The 3rd Respondent's bid included (as Appendix 1) an application for local preference and a request to subcontract.

167. The 3rd Respondent further averred that it specifically demonstrated that it qualified for preference evaluation on *inter alia* the basis that it was the only bidder with intention and capacity to subcontract the contract (subject to the 1st Respondent's permission) to a highly modern high security printing company incorporated in Kenya which has;

- (a) Invested, constructed and equipped a fully functional factory with an initial KES 15 billion (approximately GBP 11m) in 1993;
- (b) employs directly around 300 highly skilled Kenyan citizens;
- (c) contributed over KES 200m (approximately GBP1.5 million) annually (almost KES 5 billion since manufacturing began) to the local economy in Kenya; and
- (d) has supplied the Central Bank of Kenya with its currency requirements for almost 25 years and is capable of manufacturing the

168. It was averred that contrary to the contention by the Petitioner and Crane AB in PPARB No 108 of 2017 that no request to subcontract was made or given, the 3rd Respondent indeed applied for leave to subcontract to the local entities in a letter dated 17th November 2017. As per the findings of the **Public Procurement Administrative Review Board**, the request to subcontract was approved by the Governor of Central Bank on 29th November 2017. It is on account of the above demonstrated capacity and intention to perform the Tender in Kenya through its Kenyan affiliates using Kenyan workforce and facilities that the 3rd Respondent was evaluated more favourably than the other tenderers. On 30th November 2017 the 1st Respondent communicated to the Tenderers the outcome of the technical and financial evaluation. The 1st Respondent informed the Parties that the Tender had been awarded to the 3rd Respondent who had submitted the lowest evaluated price.

169. In its view, the award of the Tender to the 3rd Respondent on account of local preference margin is supported by the law. Section 155(3) of the **Public Procurement and Asset Disposal Act, 2015** makes it mandatory for procuring entities to apply local preference for manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya.

170. The 3rd Respondent maintained that the Petitioner herein, as did Crane AB in PPARB No 108 of 2017, has attempted to advance a make-believe conspiracy theory regarding the filing and the withdrawal of Constitutional Petition Number 568 of 2017. The 3rd Respondent was not a party to the Constitutional petition which was withdrawn long before and in circumstances that are unrelated to the award of the Tender to the 3rd Respondent. Beyond conjecture, the Petitioner has not provided any material to demonstrate the existence or the involvement of the 3rd Respondent in the very serious and potentially criminal allegation of conspiracy surrounding Constitutional Petition Number 568 of 2017.

171. As regards the Parliamentary Public Accounts Committee Report on the Matter of Currency printing Contracts between the Central Bank of Kenya and De La Rue Company, July 2012, it was the 3rd Respondent's case that the content and context of the Report are irrelevant to the issues raised in the petition. Nonetheless, from information available on the National Assembly's Hansard, the Report was rejected by the Committee of the Full House on 4th September 2012.

172. It was therefore the 3rd Respondent's case that there was no constitutional impropriety on the part of the 3rd Respondent or the procuring entity. The Petitioner is therefore merely asking the Court to speculate and question the merit of the evaluation undertaken by the procuring entity's tender evaluation committee on qualification of the 3rd Respondent for preference margin of 15%. That amounts to an appeal of the Board's decision and not a public interest constitutional grievance. In its view, the Board's decision can only be challenged by way of judicial review under section 175 of the **Public Procurement and Asset Disposal Act** which option is already being explored by the parties to PPARB No 108 of 2017. All the grievances raised in the current Petition are to be addressed in the three pending judicial review applications Misc Civil Applications Numbers 6 of 2018, 7 of 2018 and 18 of 2018.

173. It was submitted by the 3rd Respondent that public interest litigation should not be used for ulterior motive and for the furtherance of clandestine private causes and the Court was urged to be guided by the directions given in the case of **Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 3 Others [2014] eKLR**.

174. The 3rd Respondent submitted that as the outcome of this Petition is only intended to position **Crane AB** to win Tender Number CBK/37/2017-2018 for the printing and supply of Kenya's new currency banknotes, the Court must shut its doors to such furtherance of private interests disguised as public interest grievances. In any event the matters presented herein for determination are being handled by the Court in Jr Nos 6,7 and 18 of 2018. It is therefore superfluous to entertain the Petition where the procedures provided in law for addressing grievances arising from public procurement have been resorted to, are ongoing and no material has been presented to show that the available remedies and avenues are insufficient.

175. The Petitioner's claim, according to the 3rd Respondent, is anchored on the correctness of the Central Bank's Tender Evaluation committee evaluation of the 3rd Respondent's bid as the lowest evaluated bid on account of local preference margin of 15%. Tender evaluation criteria and applicability of local preference are matters that clearly spelt out and regulated in the **Public Procurement Act**. A breach of the provisions of the Act do not equate to a breach of the constitution. As was noted in the case of **Kituo Cha Sheria & Another vs. Central Bank of Kenya & 8 others [2014] eKLR**.

176. In the 3rd Respondent's view, several of the issues that the petitioner brings for interrogation and determination by the Court are issues of fact which the Board in its decision of 8th January 2018 already addressed itself to and made conclusive determinations on. In particular:

- a) The Board made a finding of fact that the applicable law in Tender Number CBK/37/2017-2018 was the 2015 Act and the 2006 Regulations.
- b) The Board noted in its findings that the accounting officer of Central Bank had given approval to subcontract.
- c) The Board made a finding that the Tender No CBK/37/2017-2018 was in fact awarded in two lots.
- d) The Board noted that Addendum No 3 and Addendum No 4 were responses by the procuring entity to clarifications sought by bidders on the issue of inter alia preference and reservations.

177. Noting that these matters are not even the subject of the dispute in the pending judicial review application, it was contended that reopening them under the present constitutional petition amounts to an appeal of the decision of the Board. In this respect reliance was placed

on the case of **Kenya Planters Co-operative Union Limited vs. Kenya Co-operative Coffee Millers Limited & Another [2016] eKLR** where a constitutional petition was filed at the High Court on matters that were similar to a dispute that had been filed and determined before the Business Premises Rent Tribunal. In circumstances akin to the present matter, at the time of lodging of the constitutional petition an appeal against the ruling of the BPRT had been lodged and was pending before the High Court on the same issues.

178. We the 3rd Respondent appreciated that the Petitioner's right to approach the Court to enforce a constitutional right is not impeachable, it was submitted that this Court has a duty to ensure that its process is not abused. It is an abuse of the process of court where there exists an alternative remedy; which remedy is in fact in the process of being explored by the aggrieved parties. There is nothing to show that the outcome of the pending judicial review proceedings would be less effectual or beneficial to the public than the remedies sought under this Petition.

179. The 3rd Respondent lamented though the Petitioner made far reaching accusations of conspiracy and collusion between the 3rd respondent and the Central Bank, the allegation of such impropriety though made in the context of a constitutional petition have criminal nuance. It was therefore imperative on the petitioner to provide the Court with precise evidentiary material to demonstrate such allegations which go beyond noncompliance with statute. The circumstances of this case, make the standard of proof higher than ordinary civil suits. As was noted by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

180. To the 3rd Respondent, the narrative set out in the Petition does not disclose grievances that amount to breach of the constitution beyond the bare allegation of non-compliance with statutory provisions and speculation of a conspiracy. In particular the allegation of wrongful application of the law was debunked by the Board and cannot be reopened for consideration. The ground couched as 'Lack of Transparency' is admitted by the petitioner to be a matter governed by section 2 of the Act. Article 227(1) of the Constitution has itself been engrained in the Act's objectives and principles. The allegation of non-compliance with Tender documents is equally not a constitutional issue. It is a purely statutory matter regulated by section 80(2) of the Act which requires that tender evaluation is to be conducted in accordance with tender documents. The documents produced by the Petitioner are mainly the tender documents which do not disclose any constitutional breach.

181. It was therefore submitted that the Petition lacks merit and is not bona fides. It presents a proper case where the Court is called upon to act to stop the abuse of its process in clear circumstances where an individual is in fact advancing the private interest of a commercial entity. The Court was invited to be guided by the assessment of "bona fides" of a petitioner in constitutional matters as was addressed by the Indian Supreme Court in the case of **Ashok Kumar Pandey vs. State of West Bengal Writ Petition (crl.) 199 of 2003**.

182. The 3rd Respondent therefore prayed that the Petition be dismissed with costs.

4th and 5th Respondents' Case

183. The 4th and 5th Respondents similarly opposed the Petition.

184. According to them, **De La Rue International** took part in the tender process purely as a bidder and has never conspired with anyone to take part in any unethical or illegal actions. They disclosed that the 3rd Respondent is one of the world's leading manufacturers of currency, publicly listed on and subject to the rules of the London Stock Exchange and has worked on the production of currencies with more than 140 countries and has unrivalled experience in producing secure and robust currencies and currency features. De La Rue is a strategic partner of Her Majesty's Government, producing UK passports for HMPO and Sterling for the Bank of England. Because it is publicly listed on the London stock Exchange, De la Rue is subject to a level of transparency and reporting scrutiny that is unique in the banknote industry.

185. On the other hand, the 4th Respondent, **De La Rue Currency and Security Print Limited**, has for the past 25 years been in the business of printing currency for the Republic of Kenya through its premises located in Ruaraka, Nairobi, where it set up a currency printing factory in 1992. The 4th Respondent has employed over 300 local Kenyan employees and through its investment in Kenya, the De La Rue group of companies contributes over KES 150 million to the local economy annually through taxes, salaries and sponsorships.

186. The said Respondent averred that the 5th Respondent's existence as a legal entity and a going concern is a result of a contract signed between the National Treasury of the Republic of Kenya and Thomas De La Rue to form a joint venture bringing together the National Treasury of the Republic of Kenya and Thomas De La Rue AG, a company in the De La Rue group of companies, being a wholly owned subsidiary of De La Rue Holdings Limited. They contended that contrary to the alleged facts stated at paragraph 5 of the Supporting Affidavit, the National Treasury has paid GBP 5 million for 40% of the shares in the 5th Respondent and it is expected that that the transfer of business to the 5th Respondent will be imminently completed.

187. It was averred that the 3rd Respondent has never claimed in any proceedings or tender documents to be a citizen contract or confirm that that it did specifically seek in its tender submission the CBK's consent to subcontract the production to De La Rue's local subsidiaries, the 4th and 5th Respondents and indeed provided the evidence of its capability to produce the new generation currency within Kenya. To them, the allegations of lack of preference for local manufacturers or suppliers of goods in a public procurement tender are based on a selective reading of the law with some unknown intention on the part of the Petitioner. In their view, the preference available under sections 155 to 157 of the **Public Procurement and Asset Disposal Act, 2015 ("PPADA")** were open to all bidders, not just De La Rue, provided they chose to subcontract some or all of the production to Kenyan producers as required by the **PPADA** which preferences are aligned to the Kenyan Constitution and Vision 2030 to increase and incentivize manufacturing and jobs in Kenya. All bidders were asked at bid submission whether they wished to claim preference but none of the bidders, other than **De La Rue**, chose to do so and they therefore did not qualify for preference.

188. It was contended that the 3rd Respondent did not claim a preference by way of Kenyan citizen ownership and therefore the Petitioner's

references to sections 86(2), 89(f) and section 155(3) (b) and (4) of the **PPADA** are misleading and not based on fact. The 3rd Respondent did however claim the 15% preference for local manufactures as envisaged and permitted by section 155(2) and (3)(a) of **PPADA** by formally applying for the application of preference for local manufacturer, committing in its bid to subcontract the manufacture to De La Rue Currency and Security Print Limited and providing the necessary evidence for qualification of the preference for local manufacturer.

189. It was therefore contended that De La Rue qualifies for and is entitled to the preference for local manufacture and supply.

190. The said Respondents clarified that petition No. 568 of 2017 was filed solely by the 4th and 5th Respondents herein as local companies seeking a declaration from this Court that they should have been included in the procurement process for the reasons stated in the Petition. They also wanted the Court to consider the significantly increased national security risk in relation to the local production, storage and delivery of new notes (which are highly sensitive products). An offshore solution would require these same processes to take place thousands of miles away from Kenya as opposed to less than 10 kilometres from the Central Bank of Kenya, from premises that are under round the clock security surveillance by the General Service Unit and the National Police Service. They therefore solely sought declaratory orders that the Central Bank of Kenya should have extended the tender to the 4th and 5th Respondents herein as the local entities capable of production of the new generation Kenyan currency.

191. However, the withdrawal of that Petition was necessitated by the fact that it was completely overtaken by events when this Court declined to grant conservatory orders and determine the matters of law that had been raised by the Petitioners therein prior to the procurement proceedings. It was averred that there was neither any agreement nor discussion on withdrawal of the Petition with the CBK prior to the appearance in court on 14 November 2019 when the matter was withdrawn.

192. The submissions filed on behalf of the 4th and 5th Respondent were by and large those made by the other Respondents.

Determinations

193. I have considered the issues raised in this Petition.

194. The first issue for determination is whether the Petitioner has *locus* to bring this petition.

195. In Petition 255 of 2016 - **Okiya Omtatah Okoiti & Another vs. National Transport and Safety Authority & Others**, this Court while relying on Article 227 of the Constitution expressed itself as hereunder:

“In this case, it is contended that the decision by the Authority flies in the face of the Constitutional provisions since by awarding the tender to the Bank, the Authority violated the principles of public procurement... Therefore where it is alleged that in awarding the tender the subject of the legal proceedings before the Court, the relevant constitutional provisions were not adhered to, such contention if true may well justify the filing of a constitutional petition.”

196. Similarly, this Court in **Republic vs. Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR** relied on the same provisions, Articles 3(1) and 258 of the Constitution and held that:

“In my view a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 of the Constitution, and who has no other recourse known to law, as the IEBC concedes the applicant does not have, must in my view find recourse in the High Court which is the Court entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In my view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution.”

197. The said decision was upheld by the Court of Appeal in **Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & 2 others [2017] eKLR** in which Musinga, JA relied on **Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others [2014] eKLR**, **Anisminic vs. Foreign Compensation Commission [1969] 2 AC 147** and **Habre International Co. Ltd vs. Kassam and Others [1999] 1 E.A. 125** opined that:

“In our view, if the 1st respondent’s application had been filed under the provisions of PPAD Act only, simply challenging the decision by the Review Board and no more, then perhaps the 1st respondent would qualify to be referred to as an “aggrieved party”. However, the Board and IEBC acknowledged that some of the issues raised by the 1st respondent were outside the jurisdiction of the Review Board. Only the High Court was able to determine them... The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services.”

198. I therefore associate myself with the case of **Timothy Otuya Afubwa & Another vs. County Government of Trans Nzoia & 3 others [2016] eKLR** where it was held that:

“13. That their petition is on behalf of the public and they have invoked the provisions of Article 258(2)(c) and 22(1) of the Constitution. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the

same can be brought by a person acting on behalf of the public. This Article in my view is so wide and the drafters of the constitution intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened.

14. Article 258 of the constitution buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of the constitution. They have not in my view brought this petition with ulterior motive or bad faith. What they are saying simply is that the hospital to be build or expanded would be public. The funds used to purchase would be public. If the process is flawed then the public would obviously suffer. The tax payer eventually would foot the bill.”

199. I therefore agree that pursuant to Article 258(1) of the Constitution of Kenya, 2010, the petitioner herein cannot be barred from approaching this Court on the ground of lack of ‘*locus standi*’.

200. As regards the competency of this Court to deal with the matters the subject of this petition, it is my view that the 1st Respondent being a creation of the Constitution, Article 231(3) of the Constitution cannot be successfully invoked to bar this Court from investigating the constitutionality of its actions. To fail to do so would amount to rendering the provisions of Article 227 of the Constitution redundant. This Court has no such powers. Adopting a purposive approach the correct position must be that whenever the 1st Respondent is carrying out public procurement, it is bound by Article 227 of the Constitution and the legislative instruments enacted pursuant to the said Article just like any other public entity. If Article 227 subjects the 1st Respondent to procurement procedures then it is a subjection imposed by the Constitution itself and the 1st Respondent must bow to it. In this respect I associate myself with the decision of the Supreme Court **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** at paragraph 59 where it held that independence is not a *carte blanche* for entities to conduct themselves on whim; but that their independence is, by design, configured to the *execution of their mandate*, and performance of their functions as prescribed in the Constitution and the law.

201. In this case the Petitioner contends that the manner in which the 3rd Respondent was awarded the tender was contrary to the provisions of Article 227(1) of the Constitution which provides as follows:

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.

202. In other words the procurement in question violated the constitutional principles in Article 227 aforesaid. Article 3(1) of the Constitution mandates that:

Every person has an obligation to respect, uphold and defend this Constitution.

203. The power to institute provisions in order to attain that mandate is provided under Article 258(1) of the Constitution which provides that:

Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

204. It is therefore my view and I hold that the Petitioner was within his rights to institute these proceedings in order to uphold and protect the constitutional principles guiding public procurement. In fact Article 3(1) of the Constitution obligates him to respect, uphold and defend the Constitution.

205. It was contended that since there is an avenue provided under the ***Public Procurement and Asset Disposal Act*** for challenging decisions of procuring entities and that since such avenue was in fact invoked by the tenderers and the candidates who raised similar matters, the Petitioner herein ought not to have instituted these proceedings. First, the petitioner herein, not being a tenderer or a candidate, had no *locus* before the Respondent. Secondly, it is not lost on the Court that these proceedings were in fact instituted before the challenge was taken before the Public Procurement Administrative Review Board. The fact that the matter before the Board was determined before this petition does not necessarily render these proceedings an abuse of the court process. Thirdly, it is my view that the mere fact that Administrative Review Board proceedings are taken before the Board does not bar a publicly spirited citizen from exercising his options under the Constitution. If the position were to the contrary, nothing would stop individuals from conniving to commence hopeless proceedings before the Board with a view to locking out persons who would otherwise have merited cases from coming to Court.

206. It must also be appreciated that quite apart from the parties who have *locus* before the Board, there are cases over which the Board has no jurisdiction and which can only be heard and determined by this Court. As this Court held in **Republic vs. Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR**:

“With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the *Public Procurement and Asset Disposal Act, 2015* administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no *locus* to commence proceedings before the Review Board. This does not however mean that a person aggrieved by the action of the Procuring Entity, in such circumstances is left without a remedy. In my view, the remedy in such circumstances is to be found in section 174 of the *Public Procurement and Asset Disposal Act* which provides as follows:

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

In my view a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law. This was the position adopted by this Court in *Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR* where the Court expressed itself as hereunder:

“...any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.”

It is not in doubt that one of the available remedies for challenging a decisions made by the IEBC is to apply for judicial review which is what the ex parte applicant sought in these proceedings. It is therefore my view and I hold that these proceedings cannot be terminated on the basis of the availability of alternative remedies or want of jurisdiction on the part of this Court.”

207. That was the position adopted by **Lenaola, J** (as he then was) in ***Okiya Omtatah Okioti vs. Nairobi City County & 5 Others [2016] eKLR***, at paragraphs 78 and 79 where the Learned Judge had this to say:

“78. Whereas the *Public Procurement and Disposal Act* generally is in line with his arguments above, Section 25 of the said Act establishes the *Public Procurement Administrative Review Board* to deal with any disputes regarding procurement including for professional services. Section 93 of the Act thereof further provides:

“(1) Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed.”

79. My understanding of the foregoing provision is that the section is limited to candidates who participated in the tendering process and not an outsider like the Petitioner.”

208. It therefore follows that a person who is disqualified from instituting administrative review proceedings before the Board is entitled to commence any other available judicial proceedings to challenge an award of tender by a public entity.

209. It is however contended that the Petitioner herein relied on the documents which were illegally procured hence his petition ought to be struck out. It was CBK's case that the following Tender Documents annexed to the Supporting affidavit of **Okiya Omtatah Okioti** sworn on the 11th December 2017 were obtained illegally:

- a) Tender Documents Number CBK/64/ 2016-2017 at pages 8-14. of “Exhibit ‘OOO-1’;
- b) Tender Documents Number CBK/37/2017-2018 at pages 15-17 of “Exhibit ‘OOO-1’;
- c) Tender Documents Number CBK/64/ 2016-2017 at pages 23-29 of “Exhibit ‘OOO-1’;
- d) Tender Documents Number CBK/37/ 2017-2018 at pages 30-32 of “Exhibit ‘OOO-1’;
- e) Tender Documents Number CBK/64/ 2016-2017 at pages 41-98 of “Exhibit ‘OOO-1’;and
- f) Tender Documents Number CBK/37/ 2017-2018 at pages 99-158 of “Exhibit ‘OOO-1’;

210. It was therefore submitted that the Petitioner has illegally obtained the said Tender Documents in breach of the 1st Respondent's right to privacy and the privacy of its communication with the pre-qualified Tenderers under Article 31 of the Constitution of Kenya, 2010. It was contended that the said documents were Tender Documents whose confidentiality were protected under section 67 of the ***Public Procurement and Asset Disposal Act***. Section 67 of the ***Public Procurement and Asset Disposal Act*** provides as follows:

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 177(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

211. A strict reading of the above section clearly and expressly bars the disclosure being made by the procuring entity and employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity. In this case there is no evidence that the disclosure emanated from such class of persons and it is not alleged that the Petitioner herein falls within the said class.

212. Article 31 of the Constitution on the other hand provides as hereunder:

*Every person has the right to privacy, which includes the **right not to have—***

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

213. In support of the application to strike out the petition reliance was placed on **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.** In that case the Court expressed itself as hereunder:

“Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person ‘unlawfully’ or ‘improperly’ obtains any information held by an entity” Can a court of law admit such evidence... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process...”

214. The Court proceeded that:

“The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners’ case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of *Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board* (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the Constitution and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.”

215. The Court concluded that:

“From the foregoing it has to be established that the public interest that the Petitioners seek to advance would not infringe on the Respondents’ rights, and that the acts of the Petitioners would justifiably be upheld in an open and democratic society. However, by violating the provisions of the same Constitution that they laud in their objection, the Petitioners not only violated the provisions of Sections 27 of the Independent Electoral and Boundaries Commission Act, but also breached the provisions of Articles 24(1) and 35(1) of the Constitution and in the circumstances, their use of the internal memos would not advance the interests of justice.”

216. In that case the Court quoted Petition No. 5 of 2015 - **David Ogolla Okoth vs. Chief Magistrate Court, Kibera & 2 Others [2016] eKLR** where the Court pronounced itself as follows:

“It is true evidence ought to be obtained in accordance with the provisions of both the Constitution and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates Constitutional norms. The right to property as well as the right to privacy will be violated...In such instances, Article 50(4) provides... [e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice...I do not however agree with the position adopted by the Petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the Constitution emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice.”

217. Pursuant to Article 163(7) of the Constitution, I am bound by the decision of the Supreme Court though I, with due respect, do not entirely agree with it. However the Supreme Court did not proceed to strike out the Petition but only struck out the offensive documents. In this case the offensive documents have been expressly identified. In the premises I hereby expunge the following documents from the record:

- 1) Tender Documents Number CBK/64/ 2016-2017 at pages 8-14. of “Exhibit ‘OOO-1’;
- 2) Tender Documents Number CBK/37/2017-2018 at pages 15-17 of “Exhibit ‘OOO-1’;
- 3) Tender Documents Number CBK/64/ 2016-2017 at pages 23-29 of “Exhibit ‘OOO-1’;
- 4) Tender Documents Number CBK/37/ 2017-2018 at pages 30-32 of “Exhibit ‘OOO-1’;
- 5) Tender Documents Number CBK/64/ 2016-2017 at pages 41-98 of “Exhibit ‘OOO-1’;and
- 6) Tender Documents Number CBK/37/ 2017-2018 at pages 99-158 of “Exhibit ‘OOO-1’;

218. According to the Petitioner, no bidder sought and obtained the authority of the procuring entity to subcontract part of or the whole contract. It is not in doubt that pursuant to Addendum Number 3 issued pursuant to clause 2.5.2 of the Tender Document, a successful tenderer wishing to subcontract may seek express authority from the 1st Respondent as already provided for under Clause 3.15 of the Special Conditions of Contract. However, the 3rd Respondent countered that contrary to the Petitioner’s contention, the 3rd Respondent indeed applied for leave to subcontract to the local entities in a letter dated 17th November 2017 and as per the findings of the **Public Procurement Administrative Review Board**, the request to subcontract was approved by the Governor of Central Bank on 29th November 2017. It is on account of the above demonstrated capacity and intention to perform the Tender in Kenya through its Kenyan affiliates using Kenyan workforce and facilities that the 3rd Respondent was evaluated more favourably than the other tenderers.

219. In my view, the Petitioner’s contention that there was no authority to subcontract does not hold. As to whether the same was valid in other respects is another matter.

220. According to the Petitioner, the award was unlawful since **De La Rue International Limited** does not under any law qualify as a preferred supplier to benefit from the margin of preference. Article 227(2)(a) of the Constitution provides that:

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;

221. It is therefore clear that the decision as to the categories of preference is a matter that is left to legislative framework. Clearly therefore the failure to provide for such a framework is not necessarily unconstitutional.

222. Before moving to the next issue it is important to determine the applicable legislation to the instant procurement. Section 183 of the **PPADA** provides that the transitional provisions specified in the Third Schedule shall apply. The said Third Schedule provides as hereunder:

(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

(2) For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the

procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

223. In this case, the 1st Respondent itself disclosed that in pursuance of the constitutional imperatives laid down in Article 231(4) of the Constitution, the procurement process of currency banknotes commenced in 2014 following an advertisement by the CBK for Prequalification of Suppliers for Production of Banknote Origination Material and Currency Printing Services. This was done both locally and internationally in Tender number CBK/043/2013/2014, published in two local dailies, a regional weekly paper and in the CBK's website. The advertisements were made as follows:

- a. Local Media – “***The Daily Nation***” and “***East African Standard***” of June 16, 2014;
- b. Regional Media – “***The East African***” for the week of June 14 to 20, 2014; and
- c. International Media - ***CBK Website, Tenders Portal*** from June 16 to July 8, 2014.

224. According to the petitioner, the first advertisement relating to the subject matter tender was published on 14th June 2014 in the regional newspaper *The East African*. The commencement date for the ***PPADA*** was 7th January, 2016. It follows that the subject procurement was to be guided by the provisions of the repealed ***Public Procurement and Disposal Act***. In this case what runs throughout the 1st Respondent's case is that, in awarding the tender it applied the provisions of the ***PPADA*** which clearly was not the relevant law.

225. The repealed ***Public Procurement and Disposal Act*** under at section 39(8) provided that:

In applying the preferences and reservations under this section—

(a) exclusive preference shall be given to citizens of Kenya where—

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold.

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya;

or

(ii) works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

226. In this case, pursuant to the provisions of the repealed Act, the 3rd Respondent was clearly not a citizen. Therefore exclusive preference did not apply to it. It could only hope to benefit from the prescribed margin of preference. However, it had to prove that either the goods it was offering were manufactured, mined, extracted and grown in Kenya or that works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed. With due respect not a well worded phrase but I take it that the drafters meant that works, goods and services to which a preference is sought to be granted would depend on the percentage of shareholding of the locals on a graduating scale as prescribed. Again there is no evidence of shareholding of the locals in the 3rd Respondent so that the only option for the 3rd Respondent was to prove that the goods it was offering were manufactured, mined, extracted and grown in Kenya.

227. According to the Petitioner, being an international company, the 3rd respondent is not qualified for preferential treatment. Further and in particular the 3rd respondent never applied for and never demonstrated that it met the criteria in law for preferential treatment; the goods required, the printing and supply of new design Kenyan currency banknotes, cannot be produced locally by the 4th and 5th respondents. In support of this position, the Petitioner relied on the 1st Respondent's Replying Affidavit in ***Nairobi HC Petition No. 568 of 2017***, where 1st respondent deposed that currency production is very complex and therefore no materials are available locally by citizen contractors; that bank notes are not wholly minted or produced in Kenya either; that the raw materials for production of bank notes are not sourced locally; that there are no citizen contractors in Kenya that can print banknotes as per the specifications of CBK; and that the successful bidder (3rd Respondent) was not a citizen contractor.

228. The law as I understand it is that depositions in an affidavit amount to evidence and therefore withdrawal of a suit does not amount to withdrawal of evidence adduced therein unless such evidence is expunged from the record. See **Simon Kitavo Nduto And Another vs. Owenga Anjere Civil Appeal No. 170 of 1995**, **The Eastern and Southern African Development Bank vs. African Greenfields Ltd. & 2 Others Nairobi (Milimani) Hccc No. 1189 of 2000** and **Greenhills Investments Limited vs. China National Complete Plant Export Corporation (Complaint) Now T/A Covec & Another. Nairobi (Milimani) HCCC No. 572 Of 2000 [2002] 1 KLR 384**.

229. Therefore going the 1st Respondent's case as presented in ***Nairobi HC Petition No. 568 of 2017*** the 3rd Respondent, ***De La Rue***

International Limited, could not lawfully qualify for preference under the relevant law. The 1st Respondent, in these proceedings has however contended that in submitting its tender number CBK/37/2017-2018, the 3rd Respondent applied for sub-contracting and demonstrated that the goods to be supplied to CBK will be produced and assembled locally in Kenya through their affiliate company. Accordingly, the 1st Respondent granted the application of a 15 percent preference as set out in the law to **De La Rue International Limited** who sought to be granted preference and provided satisfactory evidence in accordance with the provisions of section 155(3)(a) of the **PPADA**. The margin of preference was not applied on the basis of shareholding but rather on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya.

230. One therefore wonders the stage at which the 1st Respondent realised that **De La Rue International Ltd** in their bid demonstrated that the goods to be supplied to CBK would be produced and assembled locally in Kenya through their affiliates, the very affiliates who instituted **Nairobi HC Petition No. 568 of 2017** and in which petition the 1st Respondent was categorical that the threshold for grant of preference was not met by them. In light of its averments in **Nairobi HC Petition No. 568 of 2017**, the decision made by the 1st Respondent in granting preference to the 3rd Respondent herein, **De La Rue International Limited**, cannot be said to have been free from doubt. In other words, while there is no satisfactory evidence that it was as a result of collusion, it cannot be said to have met the constitutional threshold of transparency.

231. Therefore to purport to give the 3rd Respondent preference would be contrary to Article 227 of the Constitution which requires that the contracts for goods or services by a State organ or any other public entity, be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. A system cannot be said to be fair when a tenderer is given an undeserved preference. I associate myself with the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** where it was held that the Review Board cannot disregard mandatory provisions of the Act and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void. The Court went further to state as follows;

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

232. To my mind, the grant of undeserved preference, is not only unlawful but goes against the letter and the spirit of the Constitution.

233. In this case it is not controverted that the Cabinet Secretary concerned had not operationalised the provisions of the **PPADA** by gazetting the regulations required under the Act. In those circumstances the question arises as to which Regulations, if at all, would be applicable. According to the petitioner, the application of a preference margin of 15% as provided by section 28 of the **Public Procurement and Disposal Regulations, 2006** (Legal Notice No. 174 of 30th November, 2006) was invalid, null and void as the said Regulations had expired pursuant to section 21 of the **Statutory Instruments Act (No. 23 of 2013)**, which provides for the automatic revocation of statutory instruments “on the day which is ten years after the making of the statutory instrument.” Similarly, the 1st Respondent was barred from relying on Regulation 177 of the **Public Procurement and Asset Disposal Regulations, 2017**, which is intended to operationalise section 157 (8) (b) of the **PPADA** since the Regulations are yet to be gazetted and/or to be tabled before Parliament for scrutiny and approval as required by section 11(1) of the **Statutory Instruments Act**.

234. The CBK was however of a different view. According to the CBK, the Rules were expressly imported to the **PPADA, 2015** by virtue of section 182(2). It further relied on section 24 of the **Interpretation and General Provisions Act**.

235. It is however clear that the correct provision is not section 11(1) of the **Statutory Instruments Act** but section 21(1) of the same Act. The provision provides as hereunder:

Subject to subsection (3), a statutory instrument is by virtue of this section revoked on the day which is ten years after the making of the statutory instrument unless—

(a) it is sooner repealed or expires; or

(b) a regulation is made exempting it from expiry

236. However, section 182(2) of the **PPADA** provides thus:

(2) Despite subsection (1), every order, direction or appointment which was issued, given, or made pursuant to the provisions of the repealed Public Procurement and Disposal Act, 2005, and every office created in pursuance thereof shall remain valid until otherwise cancelled, revoked, varied or abolished under the provisions of this Act.

237. Section 5(1) of the repealed Act, which I have found is the applicable statute, provides as follows:

(1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters

relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.

238. Similarly, section 5(1) of the **PPADA** provides as hereunder:

This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

239. It is therefore clear that section 5(1) of both the repealed Act and the **PPADA** if in conflict with section 21(1) of the **Statutory Instruments Act**, the former prevails over the latter. In this case it is clear that to interpret section 21(1) of the **Statutory Instruments Act** in manner that nullifies the provisions of the Regulations made under the procurement legislation would render section 5(1) of the both the repealed Act and the current Act a dead letter of the law. It is not the duty of this Court to do that. I therefore find that any legislation made under the procurement legislation is, by virtue of section 5(1) aforesaid, still in force. Therefore despite the fact that no regulations have been lawfully made under the current Act, by virtue of the Third Schedule to the **PPADA** as read with section 24 of the **Interpretation and General Provisions Act** the Regulations made under the repealed Act still exist, at least as of now. For avoidance of doubt section 24 of the **Interpretation and General Provisions Act** provides thus:

“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.”

240. I therefore agree with the CBK that these sections expressly operationalise and apply the Regulations to the new Act. In support of this position I rely on the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR** where at paragraphs 118-119, it held thus:

“118. At this juncture it is important to note that the Regulations in force are the Public Procurement and Disposal Regulations of 2006 vide Legal Notice No. 174; Kenya Gazette Supplement No. 92 dated 29th December 2006. These Regulations are still in force pursuant to Section 24 of the Interpretation and General Provisions Act which states that:

“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.”

119. The 2006 Regulations also remain in force pursuant to Section 182 (2) of the Public Procurement and Asset Disposal Act of 2015. (Note: in reading the 2006 Regulations, references to the sections should be construed mutatis mutandis to reference to the Public Procurement and Asset Disposal Act, 2015 as appropriate.)”

241. I also agree with the decision in **Kenya Pharmaceutical Distributors Association vs. Kenya Veterinary Board & 3 Others [2017] eKLR**, where **Mwita, J** held at paragraph 120 that:

120. On whether the regulations can be invalidated for creating a body corporate, that alone cannot make a regulation illegal or unconstitutional. The petitioner’s contention that regulations only last for 10 years in terms of section 21 of the Statutory Instrument Act is not sustainable. The section provides a cure for such an eventuality where either the statutory instrument may be repealed, may expire sooner than its 10th anniversary or a regulation may be made exempting the regulations from expiring. These are options available to the regulations making authority, and the Court cannot decide on the suitability of the regulations establishing corporate entity.”

242. It is also important to note that section 27 of the said **Statutory Instruments Act** imports all these instruments as if they were made under the said Act and continue to be in force under the Act unless the same are repealed by the parent statute. It provides thus:

(2) Despite the provisions of subsection (1), any regulations, order or notice issued immediately before the commencement of this Act shall continue in force as if it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.

243. In this regard I agree that the 10 year period can only begin to run from the commencement date and not before and associate myself with the decision in the case of **Vipul Kakad T/A Kavico Auto Spares & 328 Others vs. Kenya Bureau of Standards [2017] eKLR**, where **Majanja J** held at paragraph 18 that:

“The petitioners have argued that the Guidelines also violate section 5 of the Statutory Instruments Act, 2013 for failing to provide for public participation in the manner set out by the Act. In response, counsel for the respondent pointed out that since Legal Notice No. 28 came into force in 2005, it is exempted from application of the Act because of section 27(2) of the Act which provides:

Despite the provisions of subsection (1), any regulations, order or notice issued immediately before commencement of this Act shall continue in force as if it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.

I agree with the respondent's submission that section 27 of the *Statutory Instruments Act, 2013* preserves existing subsidiary legislation passed before the Act came into force and does not therefore apply to Legal Notice No. 78 of 2005 (see *Richard Dickson Ogeno and 2 Others v Attorney General and 5 Others NRB Petition No. 70 & 92 of 2014 [2014] eKLR*)."

244. Having considered the issues raised in this petition it is my view and I hold that the manner in which the 1st Respondent awarded the tender to the 3rd Respondent did not meet the constitutional threshold in Article 227 of the Constitution that binds it to contracts for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. By applying the *PPADA*, rather than the repealed procurement law, the 1st Respondent ended up granting to the 3rd Respondent an undeserved margin of preference. The 1st Respondent's decision was therefore not only unlawful but was also unfair, inequitable, lacked transparency and could not be said to have been competitive and cost effective. In other words the decisions flouted all the constitutional principles of public procurement.

245. As regards the other issues raised by the petitioner, it is my view and I hold that they did not disclose any constitutional issues. As was held in *Bahadur vs. AG (1986) LRC Const 297*:

"The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution."

Order

246. In the premises the orders which commend themselves to me and which I hereby issue are as follows:

- 1. A declaration that The award on 30th November 2017 by the CBK to De La Rue International Limited of the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018 was both unlawful and unconstitutional and, therefore, invalid, null and void.**
- 2. The award on 30th November 2017 by the CBK to De La Rue International Limited of the Restricted Tender for Printing and Supply of New Design Kenya Currency Banknotes: Tender Reference No. CBK/37/2017-2018 is hereby removed into this Court and is hereby quashed.**
- 3. An order compelling the 1st respondent to transparently re-evaluate the bids of all compliant tenderers and to award the tender strictly according to the law.**

247. As this litigation was occasioned by the manner in which the 1st Respondent conducted the procurement process, the costs of this petition are awarded to the petitioner and the same will be borne by the 1st Respondent.

248. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 9th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: