REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC CON & HR NO. 1 OF 2017

JOHN KAKINDU MAKAU.....PETITIONER

VERSUS

THE COUNTY GOV'T OF MAKUENI.....1ST RESPONDENT

THE COUNTY SECRETARY, MKN COUNTY....2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER,

MINISTRY OF EDUCATION AND ICT.....3RD RESPONDENT

COUNTY CHIEF OFFICER.....4TH RESPONDENT

OPEN IT LIMITED.....5TH RESPONDENT

INTEGRATED SOLUTIONS LTD.....6TH RESPONDENT

BLUE TWO SOLUTIONS LTD.....7TH RESPONDENT

RULING

1. The Petitioner lodged seeking orders:-

a) THAT the honourable court be pleased to declare that 1st, 2nd, 3rd and 4th Respondents violated the provisions of Article 10(2) (c), article 227 (1) & (1) of the constitution, S. 16 (5) of the Leadership and Integrity Act, S. 55 (2) of the Public Procurements and Benefits Act 2015 as well as Public Procurement and Disposal (County Governments) Regulations in awarding the tenders for procurement of Structured LAN and Wi-fi connectivity at the Makueni County headquarters to the 5th, 6th and 7th Respondents.

b) THAT the honourable court be pleased to declare that the 5th, 6th and 7th Respondents are guilty of corrupt and fraudulent practices and do order that the 1st, 2nd and 3rd Respondents do recover all amounts paid to the 5th, 6th and 7th Respondents for no value as to the work done and subsequently order that 5th, 6th and 7th Respondents be debarred from participating in any procurement and/or asset disposal proceedings within Makueni County for a period of five (5) years.

c) THAT the honourable court be pleased to issue any other or further remedy that it shall deem fit.

2. Same attracted a Preliminary Objection dated 08/05/2017 which raised the following grounds:-

i. THAT this Petition is misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this Honourable Court.

ii. THAT this Honourable Court lacks the requisite jurisdiction to determine this Petition and/or to issue the orders sought therein in view of the mandatory provisions of **The Public Procurement and Disposal Act, 2005, The Public Procurement and Disposal Regulations 2006** and **Article 229 (7) and (8) of the Constitution.**

iii. THAT the Petition is premature and the same is in breach of the mandatory procedure provided under Section 42 (1) of Leadership and Integrity Act, 2012 (Revised 2015).

iv. <u>THAT</u> the Public Procurement and Disposal Act 2015 is inapplicable to the Procurement process relating to Tender number **GMC/P/04/2013-14** owing to the non-retrospective application of Statutes.

3. The parties agreed to canvass same Preliminary Objection via Written Submissions issues which they filed and exchanged.

4. The Respondents No. 5 & 7 who lodged the Preliminary Objection submitted as follows:-

<u>Whether this Honourable Court has jurisdiction to determine the validity of the procurement process in question</u>.

5. It is worth noting that it is an established and cardinal rule that jurisdiction is everything and without it a court of law must down its tools. This was well established in the case of Owners of Motor Vessel **<u>Lilian S' vs Caltex Oil (Kenya) Ltd Civil Appeal 50 of 1989 KLR 14</u>** where the Court of Appeal states as follows;-

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a determination of proceedings pending other evidence. A court of law downs it tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction."***

6. It is not in contention that the entire Petition herein relates to the procurement process of Structured LAN and Wi-fi connectivity at the Makueni County Headquarters procured under Tender No. GMC/P/04/2013-2014 and Tender No. GMC/P/42/2013-14. Indeed the Petition herein purports to question the propriety of the said procurement process, the procedures employed thereunder as well as the choice of successful tenderer.

7. This Honourable Court lacks the requisite jurisdiction to determine these issues since the said issues fall fairly and squarely on the Public Procurement Administrative Review Board in view of the mandatory provisions of the Public Procurement and Disposal Act, 2005 and **the Public Procurement and Disposal Regulations 2006** which were the laws applicable at the time of tendering and which provided the mode and manner of resolving any procurement anomalies.

8. The Public Procurement and Disposal Act, 2005 was the sole determinant provision which provided elaborate guidelines on how to resolve Public Procurement issues and/or disputes for procurement processes prior to the enactment of the **Public Procurement and Disposal Act, 2015 which took over.**

9. In particular, Section **93 (1) of the Public Procurement and Disposal Act, 2005** provided that;

> ***"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, <u>may seek administrative review as in such manner as may be prescribed</u>."***

10. In light of the above, it is clear that the dispute herein being a tendering/procurement dispute does not fall within the jurisdiction of this Court and this Honourable Court cannot and should not get seized of the dispute herein since it has not been demonstrated that the procedure/process provided for under the Public Procurement & Disposal Act failed and/or was exhausted.

11. Any party with an issue touching on tendering or procurement must exhaust all other dispute resolution avenues provided by law before referring it to court either on Appeal or on Judicial Review. Such a party ought to first submit before the jurisdiction of the Tribunal set up under **the Public Procurement and Disposal Act, 2005** otherwise they lose their right to ventilate their issues.

12. Refer to the decision in **<u>Nairobi High Court Petition No. 359 of 2012; Francis Gitau Parsinei –vs- National Alliance Party & 4 Others (2012) eKLR</u>** where it was held that:-

> ***"where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used."***

13. The situation is further exacerbated by the fact that the Petitioner was not a participant in the procurement process in question but merely purports to institute a Constitutional Reference asking the Court to in effect delve into the mandate of the 1st Respondent. This mischief was frowned upon in the apt findings in **<u>Rich Products Ltd –vs- Kenya Pipeline Ltd Company & another Nairobi High Court Petition No. 173 of 2014</u>** where Mumbi Ngugi J. observed as follows:-

> ***"I have not heard any demonstration of the unconstitutionality of the acts of the 1st respondent. It appears to have complied with the requirements of the Public Procurement and Disposal Act, and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement. <u>More importantly, it cannot be open to a party which has not participated in a procurement process to lodge a constitutional reference that in effect asks the court to enter into the mandate of the 2nd respondent at the behest of a party that has not qualified under the provisions of the relevant statute."</u>***

<u>Whether this Honourable Court has jurisdiction to conduct oversight over the County Audit Report in question.</u>

14. The Petitioner seeks that the Court interrogates and/or makes determinations with respect to the 2013/2014 Audit Report Prepared by the Auditor General in respect of the accounts of Makueni County Government. He cites purported inconsistencies enumerated in the report on the structured LAN and Wi-fi connectivity at Makueni County Headquarters.

15. This Honourable Court lacks jurisdiction to interrogate and/or make any determinations whatsoever with respect to the 2013/2014 Audit Report prepared by the Auditor General in respect of the accounts of Makueni County government since this is strictly the preserve and mandate of the County Assembly of Makueni as provided for under Article 229 (7) and (8) of the Constitution to the effect that;

> ***"(7) Audit reports shall be submitted to Parliament or the relevant county assembly.***
>
> ***(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action."***

16. The only way that this Honourable Court would be invited to make determinations on this report is whereby after report has been submitted to the relevant county assembly, a decision is made on whether or not to take appropriate action and this decision is thereafter only amenable to Judicial Review proceedings. In any event, such a decision by the County Government is now time barred in view of the strict provisions of **Section 9 of the Law Reform Act Cap 26 Laws of Kenya.**

Whether this Honourable Court has Jurisdiction to debar parties from participating in procurement processes.

17. The Petitioner seeks that the 5th, 6th and 7th Respondents be debarred from participating in any procurement and/or asset disposal proceedings within Makueni County for a period of five (5) years.

18. It is submitted that, that having established that this Honourable Court lacks jurisdiction to grant the orders sought in the Petition with respect to the declaration that a procurement process was flawed, it is contended that this court similarly lacks the jurisdiction to debar the 5th, 6th and 7th Respondents from participating in procurement and/or asset disposal proceedings.

19. Indeed debarment of tenderers used to be the sole discretion of the Director-General with the approval of the Advisory Board under Section 115 of the **Public Procurement and Disposal Act, 2005** and even then it is now the sole preserve of the **Public Procurement and Disposal Act, 2015**.

20. The **RESPONDENTS 1-4 SUBMISSIONS** was as follows:-

Whether this Honourable Court has jurisdiction to hear this Petition.

21. It is submitted that this Honourable Court does not have the jurisdiction to hear this Petition. Article 229 of the Constitution on the office of the Auditor General provides this:- ***229***

> ***7) Audit reports shall be submitted to Parliament or the relevant county assembly.***
>
> ***(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.***

22. The Petitioner in his petition clearly points out at paragraph 11 that 'the Petitioner has in his possession a report (herein referred to as "the Report") of the Auditor General on Financial Operations of Makueni County EXECUTIVE FOR THE PERIOD OF 1 July 2013 to 30 June 2014.'

23. The Petitioner further states that the report enumerates certain inconsistencies on the procurement of structured LAN and Wi-fi connectivity at the Makueni County Headquarters which inconsistencies and irregularities he lists in his petition.

24. From the plain reading of Article 229 (7) and (8) and from the Petitioners own admission that indeed the Report was that of the Auditor General on the Financial Operations of Makueni County Executive, the proper forum in which he should have aired his grievances is the County Assembly of Makueni.

25. The Petitioner has not demonstrated before this Honourable Court that he has tried to approach the County Assembly of Makueni and table his assertions. The proper channel to follow was to seek redress before the County Assembly of Makueni County before filing his petition before this Honourable Court.

26. Reliance is sought on the decision in **Diana Kethi Kilonzo –vs- IEBC and 2 others, Constitutional Petitional Number 359 of 2013** in which the court held,

> ***"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."***

27. Parliament enacted the **Public Procurement and Asset Disposal Act 2015 No. 33 of 2015. Section 8** of the above Act establishes the Public Procurement Regulatory Authority and Section 9 provides for the functions of the Regulatory Authority. This Honourables' Court attention is drawn to the following provisions:-

The functions of the Authority shall be-

> ***(h) "to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review";***
>
> ***(2) "If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authority."***

28. The Petitioner herein, neglected and/or failed to take into consideration the proper channels in having his claims resolved. The Petitioner at paragraph 19 contends that the tender award to the 5th and 7th Respondents was irregularly done without following due procedure as provided for in the Public Procurement and Disposal Act No. 3 of 2005 or the Procurement and Disposal Regulations 2006 as read together with the Procurement and Disposal (County Governments) Regulations 2013.

29. The **public and Procurement and Disposal Act No. 3 of 2005** establishes bodies involved in the regulations of public procurement. These bodies include the Public Procurement Oversight Authority, the Public Procurement Oversight Advisory Board and the Public Procurement Administrative Review Board.

30. The Public Procurement Administrative Review Board is established to review, hear and determine tendering and asset disposal disputes.

31. This Honourable Court attention is drawn to the Courts' decision of Weldon K Korir J. **in Republic –vs- Public Private Partnerships Petition COMMITTEE (The Petition Committee) & 3 Others Ex Parte APM Terminals [2015] EKLR, Judicial Review Case 298 & 325 of 2015** in which case the learned judge relied on the case of **Kenya Pipeline Company Limited –vs- Hyosung Ebara Company Limited & 2 others (2012) Eklr** in which the Court of Appeal held,

> ***Judicial review power was to be exercised with restrain in the case of the Public Procurement Administrative Review Board. The Review Board was a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it had power to engage an expert to assist in the proceedings in which it felt that it lacked the necessary experience. Section 98 of the Act conferred very wide powers on the Review Board. It was clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act was indeed an appeal. From its nature the Review Board was obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It followed that its decision in matters within its jurisdiction should not be lightly interfered with."***

32. The Public Procurement Regulatory Authority is the body mandated to initiate investigations either on its own motion or through a request in writing by a public institution or any other person. The petitioner does not deny the fact that he has not undertaken any of the above options to have his claim against the Respondents settled by the body mandated under the Constitution to handle matters of the nature of his claim.

33. The public institutions therein mentioned are established Constitutional offices in which offences relating to public and state officers touching on matters on Leadership and Integrity are found. This Court's attention is also drawn to Article 79 of the Constitution. This Article thus reads:-

> ***"79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."***

34. Article 80 goes further to give Parliament the mandate to enact legislation. It provides thus:-

> ***"80. Parliament shall enact legislation –***
>
> ***(a) establishing procedures and mechanisms for the effective administration of this Chapter;***
>
> ***(b) Prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for a contravention of this Chapter;***
>
> ***(c) Providing for the application of this Chapter, with the necessary modifications, to public officers; and***
>
> ***(d) Making any other provisions necessary for ensuring the promotion of the principles of leadership and integrity referred to in this Chapter, and the enforcement of this Chapter.***

35. It is contended that, pursuant to the above provisions of the Constitution that Parliament enacted the Leadership and Integrity Act No. 19 of 2012 to give effect to, establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.

36. The Leadership and Integrity Act provides for the manner in which civil and criminal proceedings can be referred. The Act states at section 43 thus:-

43.

(1) if upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective state officer, the public entity shall refer the matter to –

(a) the Commission or the Attorney-General, with respect to civil matters;

(b) the Director of Public Prosecutions, with respect to criminal matters; or

(c) any other appropriate authority.

37. Thus submission that the Petitioner had all the avenues with which to lodge the complaint which avenues have not been exploited. The Petitioner had recourse to the Ethics and Anti-Corruption Commission, the Attorney General and the Office of the Director and Public Prosecutions.

38. The Honourable Court is referred to the decision of the High Court at Kisii in **Elijah Mwamba Juma & Another –vs- Funds Accounts Manager – Nyaribari Chache Constituency & 3 Others [2015] EKLR**, Petition 38 of 2014 in which James Wakiaga J held:-

"Section 49 of the Constituencies Development Fund Act No. 30 of 2013 stated that all disputes of a civil nature would be referred to the Constituency Development Fund Board in the first instance and where necessary an arbitration panel. However, the provisions of section 49 of the Constituencies Development Fund Act Number 30 of 2013 did not oust the jurisdiction of the Court under article 165 of the Constitution of Kenya, 2010. The provisions only postponed the exercise of the jurisdiction of the court until the dispute settlement mechanism provided under the act had been exhausted. The Petitioners were required to follow the procedure set under section 49 of the Constituencies Development Fund ACT, No 30 of 2013 before coming to Court. The provision was couched in mandatory terms and had no exception. The issues raised in the Petition were capable of being addressed adequately through the provisions of the Constituencies Development Fund Act, No. 30 of 2013 and Public Procurement and Disposal Act. The Petitioners had not exhausted all other legal avenues available to them hence the court was not the correct forum for them to ventilate the issues raised."

39. The Constitution of Kenya 2010 in Article 159 provides for judicial authority. The said Article provides as follows:-

159.

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

40. It was held in **County Government of Nyeri –vs- The Cabinet Secretary Ministry of Education Science & Technology & another, Petition No. 3 of 2014** thus:-

"What these provisions of the Constitution and statue in respect of the dispute resolution between the national and county government does is not to oust the jurisdiction of the court but to postpone the same until the alternative dispute mechanism have been attempted."

41. Further this Honourable Court is referred to the ruling in **Republic –Vs- Independent Electoral and Boundaries Commission and Another Ex Parte Coalition For Reform And Democracy & 2 Others [2017] EKLR, Miscellaneous Application 637 of 2016** in which Odunga GV J stated at paragraph 5 as follows:-

"To an extent, the existence of alternative remedies would affect the availability of judicial review remedies. Where a statute provided an alternative remedy to a party, the court would exercise restraint and give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. However, where the alternative remedy was an inadequate means of redress, the court would not exercise such restraint. The court would consider whether the alternative remedy provided an efficacious and satisfactory answer to the litigant's grievance. Where it was necessary for a litigant to split its case into two or more causes before different Tribunals, in such a situation it would be fair to have the matter commence before a Tribunal that had jurisdiction to hear and determine all questions in controversy and to grant all reliefs sought. In that situation, the availability of alternative remedies would not be a sustainable objection to the High Court as the Tribunal that could grant all the necessary reliefs."

42. In view of the above provisions, it is submitted that this Honourable Court does not have jurisdiction on this matter as the Constitution and statues provide for dispute settlement mechanisms in which matters raised in this petition can be addressed. The Petitioner ought to have exhausted all the other legal avenues provided for in law including reporting the matter before the County Assembly, the Public Procurement Regulatory Authority, the Public Procurement Administrative Review Board, the Ethics and Anti-Corruption Commission, the Attorney General or the Director of Public Prosecutions. None of the above recourse was sought by the Petitioner. It is only when these alternative remedies do not provide an efficacious and satisfactory answer that the Petitioner can move this Honourable court. The Petitioner has not proved in any manner whatsoever that the alternative remedies are unsatisfactory.

43. The Petitioner's submissions is as follows:-

Whether this court is the proper forum to address the issues raised in the Petition.

44. The Petitioner submits that this court has jurisdiction to deal with the Petition and relies on the case of **Owners of the Motor Vessel "Lillian S" –VS- Caltex Oil (Kenya) Limited [1989] 1 KLR** referring to Words And Phrases Legally Defined – Vil. 3 – Vil I-N Page 113, Nyarangi JA said –

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters that are presented in a formal way for its decision. The limits of this authority are imposed by statute charter, or commission under which the court is constituted, and may be extended or instituted in the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

45. It is for that reason Nyarangi JA, continued,

> ***"that a question of jurisdiction once raised must be determined forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of the court may not be heard to raise it after the matter is heard and determined."***

46. In **Samuel Kamau Macharia –vs- Kenya Commercial Bank Limited and 2 Others [2010] EKLR**, the Supreme Court had this to say:-

> ***"(68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."***

47. This court is the proper forum to address this Petition as brought under the provisions of Article 22 and in particular Article 22 (2) (c) of the constitution. The nature of orders the Petitioner seeks fall under the purview of this court, in light of provisions of Article 23 (3) of the constitution, orders which include, but are not limited to declaration of rights and an order for compensation.

48. This court has the requisite jurisdiction to issue declaratory orders where articles 22 and 23 of the constitution provide for access to court by any person to seek enforcement of their fundamental rights under the bill of rights. It is the Petitioner's submission that under article 23 of the constitution the court has power to grant declaratory orders.

49. Declaratory orders should and can only be issued when the subject matter claimed for has specifically been pleaded, are real and not theoretical, as pleaded to by the petitioner as was held in the case of **Matalinga & Others –vs- Attorney – General [1972] E.A 518,** and quoted in **Justice Amraphael Mbogholi Msagha –vs- Chief Justice of the Republic of Kenya & 7 Others [2006] EKLR, H.C. at Nairobi, Misc. Application No. 1062 of 2014.**

50. At the hearing of this suit, the Petitioner shall carve to demonstrate to this court that there exists a real question in which he, acting in the interest of the Residents of Makueni, has real interest in.

51. Article 229 (7) and (8) empowers Makueni County Assembly to inter alia debate and consider the report and take appropriate action. This however does not in any way limit the Petitioner's unalienable right to institute this Petition where national values, principles of governance and rights and fundamental freedoms are breached, violated and/or not adhered.

52. Petitioner did not wish to go the judicial review proceedings way since under judicial review, the court's jurisdiction is restricted to issue orders of Mandamus, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question.

53. The High Court in determining an application for judicial review has jurisdiction to only grant the orders specified in section 8 of the Law Reform Act. In the case of **Khobesh Agenices Limited & 32 others – vs- Minister of Foreign Affairs and International Relatins & 4 Others (2013) eKLR** the court had occasion to consider the scope of the court's jurisdiction in a judicial review application and was emphatic that judicial review is a special jurisdiction given to the court under the provisions of section 8 and 9 of the Law Reform Act and it does not extend to other Civil and Criminal matters. **Odunga, J** in the case stated thus:-

> ***"31. However, whereas, the court is bound in determining an application for judicial review to ensure that the Constitutional provision are adhered to, this does not entitle the court to change, the nature of the judicial review application into a constitutional petition. To do that would defeat the express provisions of section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya. It must always b remembered that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal.***

It is governed by section 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. Any other remedy such as declaration does not fall under the purview f judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making such a declaration. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Accordingly, it would be improper to turn judicial review proceedings into Civil Proceedings or even a constitutional petition whereby virtue of Article 23 (3) of the Constitution, the court has jurisdiction to award inter alia a declaration of rights, on a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights under Article 24, an order for compensation and an order of judicial review. Under the said Article the operative phrase is "a court may grant appropriate relief, including "as opposed to section 8 of the law reform act which employees the phrase. "The High Court shall not." I therefore find that it was incorrect for the applicants to equate the court's judicial review jurisdiction with the court's jurisdiction under article 23(3) of the Constitution. See Commissioner of Lands –vs- Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Ltd –vs- Officer in Charge Nairobi Remand and Allocation Prison (2007) IEA 354."

54. This position was wholly adopted by J.M. MUTUNGI, J in his exposition of the law on the scope of Judicial review in **Republic –vs- Commissioner of Mines & Another Ex-Parte Basu Mining Limited & Cortec Mining Kenya Limited & 5 Others [2015] eKLR.**

Whether the provisions of S. 42(1) of Leadership and Integrity, 2012, (revised 2015) are couched on mandatory terms.

55. Section 42 (1) of the Leadership and Integrity Act, 2012 (Revised 2015) states thus:

S.42

"A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint." (Emphasis ours).

56. The word *"may"* does not convey a mandatory obligation and is simply permissive.

57. As was noted long ago by Tindal CJ in the **Sussex Peerage** case [1844] 11 CI & Fin 85 in explaining the literal rule of statutory interpretation,

"…….the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statue are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the lawgiver."

58. E. M. Githinji J, in **Court of APPEAL No. 37 of 2013** between **Sony Holdings Ltd** and **Registrar of Trade Marks & Another** stated that,

"…..It cannot, therefore, be overemphasized that while the court must rely on the language used in a statue or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provisions."

59. The word *"may"* is precise and unambiguous. As a general rule, the word *"may"* will not be treated as a word of command unless there is something in context or the subject matter of act to indicate that it was used in such a sense. Section 42 (1) of the Leadership and Integrity Act, 2012 (Revised 2015) should be constructed in a manner indicating discretion or choice between one thing and its alternative.

60. The petitioner had the choice of either lodging a complaint with the 'relevant body' or move to this court.

Whether the Public Procurement & Disposal Act, 2015 is exempted from the principle of non-retrospective application of statutes.

61. The Public Procurement and Disposal Act, 2015 was enacted to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities.

62. The Petitioner therefore submits that this Act is exempted by way of necessary implication from the principle of non-retrospective application of Statutes since the intention of Parliament was to give effect to Articles 227 of the constitution.

63. The question whether retrospective statutory provisions are unconstitutional was considered by the Supreme Court, in the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & Others (Sck, Appeal No. 2 of 2011 [2012] Eklr**, where the court stated:-

"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence, are prima facie prospective and retrospective is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature."

64. Francis Bennion in his seminal work – **Statutory Interpretation, 3rd Edition page 235** states:-

> ***"Retrospectively is artificial deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the court apply the general presumption that an enactment is not intended to have retrospective effect. As always the power of Parliament to produce such an effect where it wishes to do so its nevertheless undoubted"*** **(added emphasis).**

65. Constitutional Petition No. 377 of 2015 between **Kevin K. Mwiti & Ohers –Vs- Kenya School of Law & 2 Others 2015 (Eklr)** referred to the case of **Samuel Kamau Macharia and Another –Vs- Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR** above and stated that:-

> ***"A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden. It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively."*** **(Emphasis ours).**

66. The Public Procurement and Disposal Act, 2015 is therefore applicable to the process relating to the tenders awarded to the 5th and 7th Respondents.

67. In any event, even in the absence of the Act, the provisions of Article 227 (1) and (2) are so clear, provisions which the 1st to 4th Respondent failed to adhere to. The constitution, being the supreme law of the land, binds all persons and all state organs at both government levels of government. As such, every person has an obligation to respect, uphold and defend the constitution.

68. The Petitioner prays that the Notice of Preliminary Objection by the 5th and 7th Respondents be dismissed with costs to the Petitioner. The 5th and 7th Respondents raised a Preliminary Objection where certain fact had to be ascertained. Further, what they are seeking, ultimately being the disposal of the Petition, warrants the exercise of judicial discretion. Such improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, confuse the issues, delay access to justice and impinge the rule of law. Such improper practice should stop.

69. The core issues in the instant matter is;

> **a) Whether the matter is properly before this court?**
>
> **b) If answer in negative, what is the appropriate order?**
>
> **c) What is the order as to costs?**

70. The core complaint by the petitioner is that, the Respondents 1st, 2nd, 3rd and 4th violated the provisions of Article 10(2) (c), article 227 (1) & (1) of the constitution, S. 16 (5) of the Leadership and Integrity Act, S. 55 (2) of the Public Procurements and Benefits Act 2015 as well as Public Procurement and Disposal (County Governments) Regulations in awarding the tenders for procurement of Structured LAN and Wi-fi connectivity at the Makueni County headquarters to the 5th, 6th and 7th Respondents.

71. It is contended that Court lacks the requisite jurisdiction to determine these issues since the said issues fall fairly and squarely on the Public Procurement Administrative Review Board in view of the mandatory provisions of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations 2006 which were the laws applicable at the time of tendering and which provided the mode and manner of resolving any procurement anomalies.

72. The Public Procurement and Disposal Act, 2005 was the sole determinant provision which provided elaborate guidelines on how to resolve Public Procurement issues and/or disputes for procurement processes prior to the enactment of the Public Procurement and Disposal Act, 2015 which took over.

73. Section 93 (1) of the Public Procurement and Disposal Act, 2005 provided that;

> ***"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."***

74. Parliament enacted the Public Procurement and Asset Disposal Act 2015 No. 33 of 2015. Section 8 of the above Act establishes the Public Procurement Regulatory Authority and Section 9 provides for the functions of the Regulatory Authority. The functions of the Authority shall be-

> ***(h) "to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review";***

(2) "If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authority."

75. The public and Procurement and Disposal Act No. 3 of 2005 establishes bodies involved in the regulations of public procurement. These bodies include the Public Procurement Oversight Authority, the Public Procurement Oversight Advisory Board and the Public Procurement Administrative Review Board.

76. The Public Procurement Administrative Review Board is established to review, hear and determine tendering and asset disposal disputes.

77. In the case of **Kenya Pipeline Company Limited –vs- Hyosung Ebara Company Limited & 2 others (2012) Eklr** in which the Court of Appeal held,

"……. Section 98 of the Act conferred very wide powers on the Review Board. It was clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act was indeed an appeal. From its nature the Review Board was obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It followed that its decision in matters within its jurisdiction should not be lightly interfered with."

78. In **Diana Kethi Kilonzo –vs- IEBC and 2 others, Constitutional Petitional Number 359 of 2013** in which the court held,

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

79. On this matter the Constitution and statues provide for dispute settlement mechanisms in which matters raised in this petition can be addressed.

80. The Petitioner ought to have exhausted all the other legal avenues provided for in law including reporting the matter before the County Assembly, the Public Procurement Regulatory Authority, the Public Procurement Administrative Review Board, the Ethics and Anti-Corruption Commission, the Attorney General or the Director of Public Prosecutions. None of the above recourse was sought by the Petitioner.

81. It is only when these alternative remedies do not provide an efficacious and satisfactory answer that the Petitioner can move this Honourable court. The Petitioner has not proved in any manner whatsoever that the alternative remedies are unsatisfactory.

82. Thus the court upholds the P O and strikes out the entire petition with no orders as to costs.

SIGNED, DATED and DELIVERED THIS 17TH DAY OF MAY, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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