



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**PETITION NO. 50 OF 2017**

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS & THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLE 3, 10, 19, 20, 22, 23, 27, 47 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSALS ACT NO. 33 OF 2015**

**AND**

**IN THE MATTER OF: THE KENYA PORTS AUTHORITY ACT**

**BETWEEN**

- 1. EL ROBA ENTERPRISES LIMITED**
- 2. SUBISA COMMUNICATIONS LIMITED**
- 3. NORGEN ENTERPRISES LIMITED**
- 4. OLLREGGY INVESTMENTS**
- 5. DIGITAL SANITATION SERVICES ROKEEN ENTERPRISES**
- 6. HANDIBO SERVICES.....PETITIONERS**

**AND**

- 1. JAMES OYONDI T/A BETOYO CONTRACTORS**
- 2. JOHN KIVUNZI T/A JONA PRESTCON**
- 3. THE MANAGING DIRECTOR, KENYA PORTS AUTHORITY**
- 4. THE KENYA PORTS AUTHORITY**
- 5. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENTS**

**JUDGMENT**

**The Petition**

1. The Petition herein dated and filed on 21<sup>st</sup> September, 2017 is filed by the seven (7) Petitioners who allege to be business enterprises trading in Mombasa. The Petitioners have grievances against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are persons carrying on business in Mombasa. The 3<sup>rd</sup> Respondent who is an accounting officer of Kenya Ports Authority, the Kenya Ports Authority and the Public Procurement Administrative Review Board.

2. The Petitioners case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were pursuant to Tender No. KPA/024/2011-12 for provision of Cleaning and Landscaping Services and Tender No. KPA/025/2011-2012 for caretaker services awarded tenders on or about 16<sup>th</sup> December, 2011 for provision of Biennial Contract for provision of the said services which was to lapse by December, 2013. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have illegally in breach of Article 227 of the Constitution, the Public Procurement and Disposal Act, 2005 [No. 3 of 2005] now repealed and the Public Procurement and Asset Disposal Act, 2015 [No 33 of 2015] continued to render the aforementioned services even after the lapse of their contract in December, 2013 without an award through a fresh tendering process being carried out openly, transparently and in an accountable manner as contemplated by Article 10 of the Constitution. In pretended exercise of their powers to procure provision of services the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have been extending the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contracts in breach of the Constitution, the Public Procurement and Disposal Act, 2005 [No. 3 of 2005] now repealed and the Public Procurement and Asset Disposal Act, 2015 [No 33 of 2015]. The aforementioned actions of the 1<sup>st</sup> – 4<sup>th</sup> Respondents, the Petitioners contend, contravenes Article 3, 10, 27 and 227 of the Constitution of Kenya as well as Sections 3, 4 and 72 of the Public Procurement & Asset Disposal Act all of which require transparency, accountability and compliance with the rule of law. It is alleged by the Petitioners that the 1<sup>st</sup> – 4<sup>th</sup> Respondents' actions are in breach of rule of law, good governance, transparency and accountability enshrined in Article 3, 10, 27 and 227 of the Constitution as well as statute law. Further, the Petitioners claim that the 3<sup>rd</sup> Respondent's action of engaging the services of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent with the 4<sup>th</sup> Respondent without due process is inequitable and in breach of rule of law, good governance, transparency and accountability. That indeed the document/agreement/contract of engagement between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents is not within the public domain yet public finances/funds continue being paid arising out of the said contractual relationship that was not entered into through a competitive process as required by the Constitution and statute.

3. It is the Petitioners' case that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent's action of awarding and/or extending the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contracts without inviting bidders or expression of interest by competitors amongst them the Petitioner's members is inconsistent with the Constitution and infringes on the National Values & Principles of Governance under Article 10 and the Petitioner's rights to equal protection and equal benefit of the law as contemplated by Article 27 and is therefore void. The 3<sup>rd</sup> and 4<sup>th</sup> Respondent's aforementioned actions of extending contracts without due process amounts to according undue preference and unfair enrichment to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which is unreasonable, irrational and unfair, in breach of the statute law and inconsistent with the spirit of Articles 27 and 227 of the Constitution of Kenya.

4. The Petitioners allege that the 3<sup>rd</sup> Respondent in discharge of her accounting duty did on behalf of the 4<sup>th</sup> Respondent invite tenders for provision of Housekeeping Services Tender No. KPA/113/2016/17/ADM and Tender No. KPA/111/2016-17/MO for provision of Cleaning and Landscaping services. The Petitioners and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents participated as tenderers in respect of the aforementioned tenders and after the normal processes the Petitioners were awarded the tenders for the provisions of the various services whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were disqualified. In exercise of their right to access justice and the right to a fair hearing, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents instituted proceedings to challenge the procurement process aforementioned at the Public Procurement Administrative Review Board [5<sup>th</sup> Respondent] being Applications No. 76 and 77 of 2017 on the ground of tender validity period that did not form the basis of their disqualification at the preliminary stages.

5. The Petitioners aver that on 1<sup>st</sup> September, 2017 the parties to the aforementioned two Review applications No. 76 and 77 of 2017 before the Public Procurement Administrative Review Board [5<sup>th</sup> Respondent] agreed/consented that a determination/outcome in one binds the other. The aforementioned hearing of the application proceeded before the 5<sup>th</sup> Respondent and a determination was made on the 7<sup>th</sup> September, 2017 allowing the Review application with the consequence that the Awards made to the Petitioners on 9<sup>th</sup> August, 2017 and others were annulled with a direction that the procurement process be commenced a fresh within fourteen days from the date of the decision. The Petitioners state that in arriving at the aforementioned decision the Board [5<sup>th</sup> Respondent] committed a fundamental error of law particularly as relates to the interpretation of Section 170 as read together with the majority of the Sections of the Public Procurement & Asset Disposal Act No. 33 of 2015 as to which party should be sued within fourteen [14] days of notification of award or date of occurrence of alleged breach as contemplated under Section 167 of Act No. 33 of 2015. The Petitioners further state that the 5<sup>th</sup> Respondent committed a fundamental breach of law in its aforementioned decision particularly in relation to interpretation of Section 167 of Act No. 33 of 2015 – Public Procurement & Asset Disposal Act which presupposes that a candidate or tenderer's *locus* to institute proceedings is on account of having suffered or risk suffering, loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the regulations thereunder. The Petitioners allege that the 5<sup>th</sup> Respondent lacked jurisdiction to entertain the Review proceedings under Application No. 76 and 77 of 2017.

6. And so the Petitioners pray for the following orders:

(a) Declaration as unlawful, null and void the extensions and/or extended contracts since January, 2014 between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for offering of Cleaning, Landscaping, Caretaker or Housekeeping services having been obtained/secured in breach of the law and therefore unconstitutional.

(b) An order prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their servants, employees, agents or otherwise whosoever from offering/providing to the 4<sup>th</sup> Respondent Cleaning, Landscaping, Caretaker or Housekeeping services based on the extended contracts since January, 2014 secured without due process of procurement.

(c) An order prohibiting the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from paying the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' for the provision of Cleaning,

Landscaping, Caretaker or Housekeeping services rendered on account of the extended contracts effective January, 2014 without due process of procurement.

(d) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to refund all public funds paid for Cleaning, Landscaping, Caretaker or Housekeeping services rendered to the 4<sup>th</sup> Respondent effective January, 2014 to date on the basis of extended contracts without due process of procurement being followed.

(e) An order of *certiorari* be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision of the 5<sup>th</sup> Respondent given on 7<sup>th</sup> September, 2017 in Public Procurement Administrative Review Board Application Numbers 76 and 77 of 2017.

(f) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents be directed to execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/111/2016-17/MO – provision of Cleaning and Landscaping Services and KPA/113/2016-17/ADM – provision of Housekeeping or Caretaking services.

(g) The costs of these proceedings be provided.

7. The petition is supported by affidavit of Regina Mbithe Kithuku sworn on 21<sup>st</sup> September, 2017 on behalf of all the Petitioners.

### **The Response 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the petition vide a response dated and filed herein on 21<sup>st</sup> October, 2017. In further opposition to the petition the 1<sup>st</sup> and 2<sup>nd</sup> Respondents rely on the Replying Affidavits sworn by James Oyondi and John Kivunzi both sworn on 2<sup>nd</sup> October, 2017.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents invited interested persons to bid for Tender No. KPA/024/2011-12-Provision of clearing and landscaping services and Tender No. KPA/025/2011-12-Provision of caretaker services. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents floated their bids in respect of the aforesaid tenders and the 1<sup>st</sup> Respondent was awarded Tender No. KPA/024/2011-12-Provision of clearing and landscaping services and Tender No. KPA/025/2011-12-Provision of caretaker services together with other persons while the 2<sup>nd</sup> Respondent was only awarded Tender No. KPA/025/2011-12-Provision of caretaker services together with other persons. Further, the aforesaid tenders were for a period of two (2) years i.e. (from 16.12.2011 to 16.12.2013). As such, the aforesaid tender was to lapse on 16<sup>th</sup> December, 2013. However, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents extended the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contracts for two months until the new tender was floated in March, 2014 which extension was duly executed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. In further response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state as follows:

· That in March, 2014 the 3<sup>rd</sup> and 4<sup>th</sup> Respondents invited interested persons to bid for Tender No. KPA/069/2013-14/MO-Provision of clearing and landscaping services and Tender No. KPA/074/2013-14/ADM-Provision of caretaker services. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents floated their bids in respect of the aforesaid tenders and the 1<sup>st</sup> Respondent was only awarded Tender No. KPA/074/2013-14/ADM-Provision of caretaker services together with other persons while the 2<sup>nd</sup> Respondent was awarded Tender No. KPA/069/2013-14/MO-Provision of clearing and landscaping services and Tender No. KPA/074/2013-14/ADM-Provision of caretaker services together with other persons.

· That the persons who were awarded Tender No. KPA/074/2013-14/ADM-Provision of caretaker services are as follows among them being the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner:-

- 1) Zone 1; KPA Old Port Offices: M/s Forbes INT
- 2) Zone 2; Bandari Collge: M/s Alfa Con. Services
- 3) Zone 3; Dockyard: M/s Bidu Agencies
- 4) Zone 4; Pension, Baggage & Clocktower: M/s Frizel Inv
- 5) Zone 5; Port Police Complex: Somakim Tradig Ltd
- 6) Zone 6; Watch Tower Complex: M/s Ratna youth
- 7) Zone 7; Pollution Control, Maritime Museum: M/s Chania
- 8) Zone 8; Conventional Cargo, One Stop Center: M/s Norgen Enterprises
- 9) Zone 9; Bandari Clinic: M/s Nakaj Services
- 10) Zone 10; Mechanical, Electrical: M/s Betoyo Contractors Limited

- 11) Zone 11; Port Fire Brigade: M/s Angie Juice Services
- 12) Zone 12; Kipevu Headquarters Offices: M/s Chenda Inv. Limited
- 13) Zone 13; Section Offices: M/s Diko General
- 14) Zone 14; Kipevu HQ Washrooms Closets: M/s Subisa Communication Ltd
- 15) Zone 15; Kipevu Clinic: M/s Zamilmar Enterprises
- 16) Zone 16; One Stop Center: M/s Simca Agencies Ltd
- 17) Zone 17; Terminal Engineering: M/s Blue Sea Services Limited
- 18) Zone 18; Bandari Pool & Kizingo Swimming Pool: Tudor Services Limited
- 19) Zone 19; Gate Control Dvice & X-Ray Machine: M/s Jona Pestcon Ltd
- 20) Zone 20; Pre-Schools Rooms, Corridors & Pavements: M/s Samjush Contractors
- 21) Zone 21; Sanitary Bins: Jona Pestcon Limited

· That the persons who were awarded **Tender No. KPA/069/2013-14/MO-Provision of clearing and landscaping services** are as follows:-

- 1) Zone 1; Nakaj Services Ltd
- 2) Zone 2; Norgen Enterprises
- 3) Zone 3; Bidu
- 4) Zone 4; Blue Sea Services Ltd
- 5) Zone 5; Jona Pestcon Ltd
- 6) Zone 6; Macada
- 7) Zone 7; Suldanka
- 8) Zone 8; Chenda
- 9) Zone 11; Congonet

· The aforesaid **Tender No. KPA/069/2013-14/MO-Provision of clearing and landscaping services** and **Tender No. KPA/074/2013-14/ADM-Provision of caretaker services** lapsed on 20<sup>th</sup> May, 2016 and 25<sup>th</sup> June, 2016 respectively. However, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents issued extensions of the aforesaid contracts to all the aforesaid persons until when new contractors will be in place.

· That in August, 2016 the 3<sup>rd</sup> and 4<sup>th</sup> Respondents invited interested persons to bid for **Tender No. KPA/124/2015-16/MO-Provision of clearing and landscaping services** and **Tender No. KPA/001/2016-17/ADM-Provision of housekeeping services**. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents floated their bids in respect of the aforesaid tenders. However, immediately after awards were made, the **2<sup>nd</sup> Respondent and Blue Sea Services Limited** filed **Public Procurement Administrative Review No. 61 of 2016** seeking nullification of the awards made by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents therein.

· The matter was heard and on 14<sup>th</sup> September, 2016 the 5<sup>th</sup> Respondent herein made the following orders.

a. **The decision made by the procuring entity on 11<sup>th</sup> August, 2016 awarding the several zones under Tender No. KPA/124/2015-2016/MO hereby annulled.**

b. **The procuring entity is directed to carry out a financial re-evaluation of the tenders that reached the financial evaluation stage and award each zone to the lowest evaluated bidder per zone in accordance with Clause 36.1 of the tender document.**

c. **The re-evaluation process set out in (b) above shall be completed and awards made within Seven (7) days from today's date.**

· The 2<sup>nd</sup> Respondent and Blue Sea Services Limited were dissatisfied by the said decision and they filed Mombasa High Court Judicial Review No. 72 of 2016 challenging the said decision. The matter was heard by Hon Justice P.J Otieno who, on 24<sup>th</sup> November, 2016, made the following orders:-

**“....I grant to the *exparte* applicants an order of judicial review in the nature of Certiorari to bring before this court the decision of the Respondent dated 14/9/2016 in so far as it directed the interested party to within 7 days from the date of the decision carry out re-evaluation of the tenders that reached the financial evaluation stage and award each zone to the lowest evaluated bidder. The entire tender process is annulled and ought to be initiated afresh”.**

· That in March, 2017, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents invited interested bidders to bid for Tender No. KPA/111/2016-17/MO-Provision of cleaning and landscaping services, Tender No. KPA/112/2016-17/MO-Provision of cleaning and landscaping services (Preference group), Tender No. KPA/113/2016-17/ADM-Provision of housekeeping services and Tender No. KPA/114/2016-17/ADM-Provision of housekeeping services (Preference group).

· The 1<sup>st</sup> and 2<sup>nd</sup> Respondent floated their bids in respect of Tender No. KPA/111/2016-17/MO-Provision of cleaning and landscaping services and Tender No. KPA/113/2016-17/ADM-Provision of housekeeping services. The aforesaid tenders provided for a validity period of ninety days (90) days from 6<sup>th</sup> April, 2017 and 5<sup>th</sup> April, 2017 respectively. As such, the tender validity for the aforesaid tenders lapsed on 6<sup>th</sup> July, 2017 and 5<sup>th</sup> July, 2017 respectively. However, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents purported to extend the validity period of the said tenders on 11<sup>th</sup> July, 2017 for 30 days with effect from 16<sup>th</sup> July, 2017 where after on 9<sup>th</sup> August, 2017 the 3<sup>rd</sup> and 4<sup>th</sup> Respondent made awards in respect of the aforesaid tenders to several persons but notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that their bids were not successful.

· That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Public Procurement Administrative Review Board Application No. 76 of 2017; James Oyondi T/A Betooyo Contractors and Another v. Kenya Ports Authority and Public Procurement Administrative Review Board Application No. 77 of 2017; James Oyondi T/A Betooyo Contractors and Another v. Kenya Ports Authority seeking to nullify the said awards for having been made on a non-existent tender.

· That on 7<sup>th</sup> September, 2017, the 5<sup>th</sup> Respondent delivered its Judgment whereby it nullified the said awards and ordered for a fresh tendering process. As such, the Petitioners have misled the court by stating that there has been no other fresh tender which was made after 2013 as demonstrated above.

Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent state that the Petitioners have misled the court and are guilty of material non-disclosure as follows:-

i. The Petitioner misled the court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are still benefiting from Tender No. KPA/024/2011-2012-Provision of cleaning and landscaping services and Tender No. KPA/025/2011-2012-Provision of caretaker services while the Petitioner are fully aware that fresh tenders were issued in March, 2014.

ii. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners failed to disclose to the court that they are also benefiting from Tender No. KPA/074/2013-14/ADM-Provision of caretaker services just like the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein. As such, the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners should have refunded all the public funds which have been paid to them by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as sought in prayer number (d) of the Petition before filing this petition.

iii. The Petitioners failed to disclose to the court the motive as to why they only chose to file the petition herein against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but deliberately left out all the persons stated in paragraph 5 above.

10. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case that they are bonafide suppliers without notice of any irregularities in the tendering process by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents if any. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been executing their services diligently and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have never complained at all. As such, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are legally entitled to the payments which have been advanced to them by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that they filed Public Procurement Administrative Review Board Application No. 76 of 2017; James Oyondi T/A Betooyo Contractors and Another v. Kenya Ports Authority and Public Procurement Administrative Review Board Application No. 77 of 2017; James Oyondi T/A Betooyo Contractors and Another v. Kenya Ports Authority on 21<sup>st</sup> August, 2017 which is within fourteen (14) days as stipulated by Section 167 of the Public Procurement & Asset Disposal Act No. 33 of 2015. Consequently, the 5<sup>th</sup> Respondent did not commit any error in its decision

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents state that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein who were the Respondents in Public Procurement Administrative Review Board Application No. 76 of 2017 and 77 of 2017 did not raise any objection as why the accounting officer had not been sued. Further, in the affidavit sworn by Cosmas Makori it was clear that M/s Addraya Dena Advocates had been instructed by the procuring entity and the managing director thereof. As such, the Petitioners cannot be heard complaining of an injury they did not suffer.

13. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case that this being a constitutional petition, the Petitioners have not demonstrated any constitutional violations. As such, the Petition herein ought to be struck out.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

14. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents oppose the petition vide a response filed herein on 3<sup>rd</sup> October, 2017 and also vide an affidavit of Johnson Gachanja also filed on 3<sup>rd</sup> October, 2017.

15. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were among the successful bidders of Tender No. KPA /024/2011-12 for provision of cleaning and landscaping services and Tender No. KPA/025/2011-2011. That the awards were reduced into contracts and Tender KPA/024/2011-21 commenced on 13<sup>th</sup> of February, 2012 for a duration of two years while Tender No KPA/025/2011-12 began on the date of award which was 16<sup>th</sup> December, 2011 for a period of two years.

16. Further, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents averred as follows:

a) That the 4<sup>th</sup> Respondent in 2011 floated Tender KPA/024/2011-12/HSE for provision of Cleaning Services and Land Scaping Services and Tender number KPA /025/2011-12/HSE for Caretaker Services and consequently the same were awarded to the successful bidder in line with the Procurement Regulations applicable in Kenya. For Tender number KPA/024/2011-12/HSE, the contract commencement date was 13<sup>th</sup> February 2012 while for Tender number KPA/025/2011-12/HSE, the contract commencement date was 16<sup>th</sup> December 2011.

b) The contract durations were for two years (2) which was to lapse; that is for Tender number KPA/024/2011-12/HSE on 12<sup>th</sup> February 2014 while Tender number KPA/025/2011-12/HSE lapsed on 15<sup>th</sup> December 2013.

c) The Procurement process for both tenders began immediately it was noticed that the contract had expired and after the process had been approved and budget set aside for the same. In the Tender No KPA /074/2013-14/ADM which is the former tender KPA /025/2011-12/HSE for caretaker services, the advertisement was placed on 5<sup>th</sup> March 2014 while the contract had lapsed on 13<sup>th</sup> February 2014. For tender no. KPA/069/2013-14/MO which is the former Tender No. KPA /024/2011-12/HSE for cleaning and landscaping, the advert was placed on 6<sup>th</sup> January, 2014. Therefore the 3<sup>rd</sup> and 4<sup>th</sup> Respondents complied with the provisions of the Constitution as captured in paragraph 10 of the Petition.

d) In engaging the services of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents employed a competitive process which was in line with the rule of law, national values, principles of integrity, and principles of public service, good governance, transparency and accountability.

e) That the tendering process for KPA/074/2013-14/ADM and KPA/069/2013-14/MO was completed and the notifications sent out to all the bidders notifying them of the award and those bidders who were successful were given letters of award. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein were among the successful bidders.

f) That the Contract awarding process was however stalled by a probe from the Public Procurement Oversight Authority which delayed the initiation of Contracts for the successful bids and as a result the Authority was forced to extend Contracts KPA /024/2012-2013/HSE and KPA/025/2011-12/HSE so as to ensure the Operation's at the Authority are not curtailed by the lack of these essential services. Therefore, Authority did not contravene any law nor did they impinge the rule of law, good governance transparency and accountability enshrined in the Constitution.

g) That the extensions were paramount to ensure that the Authority's Operations are not impeded by the absence of provision of these crucial services, the secretariat of the 4<sup>th</sup> Respondent recommended that the contracts for the contractors on the ground be extended pending the resolution of the encumbrance that had arisen. Tenders KPA /024/2011 -12 /HSE and KPA /025/2011 -12 /HSE were thus extend to ensure there was no vacuum. The approval was sought and obtained by the 4<sup>th</sup> respondents.

h) That the issues raised by the Public Procurement Oversight Authority regarding how the tenders for KPA/069/2013-14/MO had been processed were consequently addressed. Accordingly contracts with successful bidders were signed for a duration of two years.

i) Upon the lapse of the contract duration of Tender No. KPA/074/2013-14/ADM and KPA/069/2013-14/MO, the 4<sup>th</sup> Respondent on the 15<sup>th</sup> March 2017 placed an advertisement on the dailies inviting bids for provision of House Keeping services and Provision of Cleaning and Landscaping services vide Tender NO. KPA 113/2016-17/ADM and Tender No. KPA /111/2016-17/MO respectively.

j) The Petitioners, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents participated in the tendering process in respect of the aforementioned tenders and 1<sup>st</sup> and 2<sup>nd</sup> Respondents lost the bid and were disqualified at the preliminary stages of the tender evaluation process.

k) As a consequence of the outcome of the tendering process on 21<sup>st</sup> August, 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents instituted with Public Procurement Administrative Review Board the 5<sup>th</sup> Respondent herein a challenge to the Procurement process of the aforementioned Tenders being Application Nos. 76 and 77 of 2017.

l) Upon hearing the Applications the 5<sup>th</sup> Respondent herein

i. allowed the Request for review dated 21<sup>st</sup> August ,2017 in respect of Tender number KPA /113/2016-17/ADM and KPA /111/2013-14 MO ;

ii. the awards of the subject Tenders to the successful tenderers be and is hereby annulled ,

iii. the procuring entity is instructed to start the procurement process a fresh within fourteen days from the date of the Boards decision .

m) The 4<sup>th</sup> Respondent was thus forced to extend contracts for Tender No. KPA/074/2013-14/ADM and KPA 069/2013-14/MO in order to ensure continued provision of Caretaker Services and the Provision of Cleaning and Landscaping Services while the review proceedings were taking place and further to ensure compliance with the Board decision delivered on 7<sup>th</sup> August 2017.

n) The Authority therefore ,acted within its powers and mandate as enshrined in the Kenya Ports Authority Act and in tandem with the spirit of the Constitution of Kenya

17. The 5<sup>th</sup> Respondent did not participate in the matter. Its counsel Mr. Guyo Wachira submitted that the 5<sup>th</sup> Respondent will abide by the decision of the court on the matter.

### **Submissions**

18. The Petitioners filed their submissions on 30<sup>th</sup> October, 2017; the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 16<sup>th</sup> November, 2017; while the 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their submissions on 6<sup>th</sup> November, 2017. The submissions were highlighted in court on 7<sup>th</sup> March, 2018. **Mr. William Mogaka** appeared for the Petitioner, **Mr. Gikandi** for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and **Ms. Ikagu** for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

19. **Mr. Mogaka**, learned Counsel for the Petitioners submitted that Section 167 of the Public Procurement and Asset Disposal Act requires a person lodging a review with the 5<sup>th</sup> Respondent to have suffered loss or to be likely to suffer loss. Counsel argued that in the proceedings before the 5<sup>th</sup> Respondent the applicants therein, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, did not demonstrate or suggest that they had suffered loss or were likely to suffer loss in their pleadings. As such, Counsel opined that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no locus before the 5<sup>th</sup> Respondent.

20. Mr. Mogaka submitted that Section 170 of the Public Procurement and Asset Disposal Act stipulates persons against whom review proceedings are constituted. One of these persons, Counsel stated, was the accounting officer of the procuring entity. Counsel contended that in the proceedings before the 5<sup>th</sup> Respondent the accounting officer of the 4<sup>th</sup> Respondent (the 3<sup>rd</sup> Respondent) herein was not a party in the proceedings. Counsel opined that the 5<sup>th</sup> Respondent had no jurisdiction to entertain the proceedings since a relevant party had been left out. Counsel pointed out that no application for amendment was made before the 5<sup>th</sup> Respondent to enjoin the 3<sup>rd</sup> Respondent to the proceedings. Counsel faulted the 5<sup>th</sup> Respondent's decision of imputing the principal and agent relationship to the case and claimed that in doing so the 5<sup>th</sup> Respondent had acted in excess of its jurisdiction.

21. Mr. Mogaka submitted that any services rendered without a procurement process are a breach of law thus since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to render services outside the procurement period they cannot benefit from the illegality. Further, Counsel contended that Article 227 of the Constitution enjoins all public entities to procure services whenever public funds are involved. Counsel argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had received payments after the tenders had lapsed hence they should refund the money received.

22. **Mr. Gikandi**, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that there was material non-disclosure by the Petitioners. Counsel contended that some of the Petitioners had been providing services to the 4<sup>th</sup> Respondent even after lapse of the tenders yet they are not being asked to refund the payments received.

23. Mr. Gikandi admitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed review with the 5<sup>th</sup> Respondent. Counsel submitted that in the reviews the Respondents cited the 4<sup>th</sup> Respondent and its accounting officer, one Mr. Oyaró. Counsel claimed that the 4<sup>th</sup> Respondent was the principal procuring entity encompassing the accounting officer. Alternatively, Counsel contended that omission of the 3<sup>rd</sup> Respondent from the proceedings was a mere technicality that could be resolved by Article 159 of the Constitution.

24. Mr. Gikandi argued that the Petitioners should have approached the court by way of a Judicial Review as the claim herein originates from a procuring process. However, Counsel opined that this court can treat this as a mere technicality and disregard the same.

25. **Ms. Ikagu**, learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that they support the Petition to the extent that it seeks quashing of the decisions of the 5<sup>th</sup> Respondent in Application no. 76 of 2017 and 77 of 2017. To this end, Counsel supported the submissions by Mr. Mogaka adding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the proceedings before the 5<sup>th</sup> Respondent relied on confidential materials in violation of Sections 66 and 67 of the Public Procurement and Asset Disposal Act.

26. As to alleged violations of the Constitution by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, Counsel insisted that the Petitioners had not proved any violations by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

27. In rejoinder, Mr. Mogaka submitted that the Petition includes judicial review remedies and is the most suitable way of approaching the court since the Petitioners are also alleging violation of their rights. To support this assertion, Counsel contended that the 5<sup>th</sup> Respondent's interpretation of Sections 167 and 170 of the Public Procurement and Asset Disposal Act was in violation of the law.

### **The Determination**

28. The following issues arise for determination by this court:

- a) Whether the proceedings before the 5<sup>th</sup> Respondent were a nullity as the accounting officer of the 4<sup>th</sup> Respondent had not been enjoined.
- b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lacked locus standi to appear before the 5<sup>th</sup> Respondent as they had not demonstrated that they had suffered loss or were likely to suffer loss.
- c) Whether the Petitioners should be granted the orders sought.

**a) Whether the proceedings before the 5<sup>th</sup> Respondent were a nullity as the accounting officer of the 4<sup>th</sup> Respondent had not been enjoined**

29. The Petitioners while relying on Section 170 of the Public Procurement and Asset Disposal Act claim that parties to a review should include the accounting officer of the procuring entity. In their view, the accounting officer is a relevant party to the proceedings and the 5<sup>th</sup> Respondent acted in excess of its jurisdiction by entertaining proceedings that exempted the accounting officer of the procuring entity.

30. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the 4<sup>th</sup> Respondent was the principal of the accounting officer and since the principal had been enjoined to the proceedings it was not necessary to include the accounting officer.

31. I have perused through the copies of the proceedings before the 5<sup>th</sup> Respondent in review applications 76 of 2017 and 77 of 2017 annexed to the affidavit of REGINA MBITHE KITHUKU sworn on 21<sup>st</sup> September, 2017. According to the proceedings the accounting officer of the procuring entity (the 4<sup>th</sup> Respondent) is not a party. This issue was addressed by the 5<sup>th</sup> Respondent in its decisions dated 7<sup>th</sup> September, 2017. The 5<sup>th</sup> Respondent noted that the Procuring entity's response to the review application was supported by the affidavit of one COSMAS MAKORI who claimed to be the Principal Procurement Officer (tenders) of the Procuring entity. Further the 5<sup>th</sup> Respondent observed as follows:

**“It is common knowledge that the Procuring Entity is a state corporation with perpetual succession. As a state corporation the Procuring Entity discharges its functions through its employees, including the accounting officer. Employees of the procuring entity when performing their duties in accordance with their terms of employment do so as agents of the Procuring Entity.**

**It is evident from the affidavit of Cosmas Makori that he was authorized to act on behalf of the procuring entity in the request for review. Having been so authorized to act, Cosmas Makori was an agent of the Procuring Entity. The role of Cosmas in this request for review could have been handled by any other competent officer of the procuring entity so long as the officer was authorized to do so. The accounting officer of the Procuring entity would equally have been authorized by the procuring entity to participate in the proceedings on the procuring entity's behalf.**

**It is therefore true that the accounting officer of the Procuring Entity is an agent and the principal is the Procuring Entity. Under the principle of vicarious liability the actions of the agent are attributable to the principal. It is also a basic principle of the law of agency that the principal is bound by the actions of its agent. The Board finds and holds that the accounting officer is an agent of the procuring entity and where an agent and the principle are known as it is the case here, the principle is the one to be sued and not the agent. The accounting officer acts on behalf of the procuring entity but the procuring entity does not act of behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this request for review and was properly sued and, equally, was properly represented in the proceedings.”**

32. Section 170 of the Public Procurement and Asset Disposal Act No. 33 of 2015 provides as follows:

**The parties to a review shall be—**

- (a) the person who requested the review;**
- (b) the accounting officer of a procuring entity;**
- (c) the tenderer notified as successful by the procuring entity; and**
- (d) such other persons as the Review Board may determine.**

It is evident that the Act requires the accounting officer of the procuring entity to be a party to a review. Does that mean that the 5<sup>th</sup> Respondent cannot entertain a review in which the accounting officer of the procuring entity is omitted? Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that such lack of inclusion of the accounting officer should be viewed as a procedural technicality that can be cured by Article 159 of the Constitution which provides that the justice shall be administered without undue regard to procedural technicalities.

33. Is the omission of the accounting officer from the proceedings of the 5<sup>th</sup> Respondent a mere technicality? As I understand it, Section 170 of the Public Procurement and Asset Disposal Act mandates the inclusion of the accounting officer of the procuring entity in review proceedings so as to ensure that the Procuring Entity is properly represented in the proceedings.

34. The Public Procurement and Asset Disposal Act 2015 came into operation on 7<sup>th</sup> January 2016. Prior to this the Public Procurement and Disposal Act, 2005 was in effect. Section 96 of the repealed Act read as follows:

**96. The parties to a review shall be—**

**(a) the person who requested the review;**

**(b) the procuring entity;**

**(c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and**

**(d) such other persons as the Review Board may determine.**

This provision did not require the accounting officer of a procuring entity to be a party to a review. However, under the current Public Procurement and Asset Disposal Act, the accounting officer is named as a party to the proceedings before the Review Board.

35. In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term “shall” is used. According to the Black's law dictionary the term “shall” is defined as “has a duty to; more broadly, is required”. As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.

36. In the case of **Raila Amolo Odinga & another vs. IEBC & 2 others Petition No. 5 of 2013 [2013] eKLR**, the Supreme Court discussed Article 159 (2) (d) of the Constitution and observed as follows:

**“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”**

Further, in the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others [2014] eKLR**, the Supreme Court reiterated that Article 159 of the Constitution was never meant to overthrow the rules of procedure. The apex court held as follows:

**“I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”**

37. Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5<sup>th</sup> Respondent is not a procedural technicality. The Applicants (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5<sup>th</sup> Respondent. The failure do so meant that the 5<sup>th</sup> Respondent could not entertain the proceedings before it. The 5<sup>th</sup> Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications.

38. As for issue No. 2, the Petitioners averred that under Section 167 of the Public Procurement and Asset Disposal Act, the Applicants in Review applications no. 76 of 2017 and 77 of 2017 needed to demonstrate that they had suffered loss or were likely to suffer loss which they failed to do hence they lacked locus standi to appear before the 5<sup>th</sup> Respondent.

Section 167 (1) of the Public Procurement and Asset Disposal Act reads:

**(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

A keen perusal of the proceedings and pleadings before the 5<sup>th</sup> Respondent reveals that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, then the Applicants, did not state or suggest that they had suffered damage as a result of the procuring entity breaching its duty. It should be noted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were disqualified at the preliminary stage of the tender process. What loss or damage had they suffered or were they likely to suffer if they did not even proceed to the other stages of the procurement process? It is the finding of the court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had suffered no loss and hence could not have access to the review Board.

***c) Whether the Petitioners should be granted the orders sought***

39. The Petitioners seek the following orders:

(a) Declaration as unlawful, null and void the extensions and/or extended contracts since January, 2014 between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for offering of Cleaning, Landscaping, Caretaker or Housekeeping services having been obtained/secured in breach of the law and therefore unconstitutional.

(b) An order prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their servants, employees, agents or otherwise whosoever from offering/providing to the 4<sup>th</sup> Respondent Cleaning, Landscaping, Caretaker or Housekeeping services based on the extended contracts since January, 2014 secured without due process of procurement.

(c) An order prohibiting the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from paying the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' for the provision of Cleaning, Landscaping, Caretaker or Housekeeping services rendered on account of the extended contracts effective January, 2014 without due process of procurement.

(d) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to refund all public funds paid for Cleaning, Landscaping, Caretaker or Housekeeping services rendered to the 4<sup>th</sup> Respondent effective January, 2014 to date on the basis of extended contracts without due process of procurement being followed.

(e) An order of *certiorari* be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision of the 5<sup>th</sup> Respondent given on 7<sup>th</sup> September, 2017 in Public Procurement Administrative Review Board Application Numbers 76 and 77 of 2017.

(f) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents be directed to execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/111/2016-17/MO – provision of Cleaning and Landscaping Services and KPA/113/2016-17/ADM – provision of Housekeeping or Caretaking services.

(g) The costs of these proceedings be provided.

40. With regard to orders (a), (b), (c) and (d), the Petitioners claim that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide Tender No. KPA/024/2011-12 and Tender No. KPA/025/2011-12 awarded tenders on or about 16<sup>th</sup> December, 2011 for the provision of services. The said tenders allegedly lapsed in December 2013. The Petitioners allege that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to render services after the lapse of the tenders despite the fact that a fresh tendering process was yet to be conducted contrary to Article 227 of the Constitution. Further, the Petitioners contend that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have been extending the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's tenders in breach of the repealed Public Procurement and Disposal Act, 2005 and the Public Procurement and Asset Disposal Act, 2015. The actions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are said to be in breach of Articles 3, 10, 27 and 227 of the Constitution.

41. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that once the tender lapsed on 16<sup>th</sup> December, 2013, the tenders were extended for two months and in March 2014 the 3<sup>rd</sup> and 4<sup>th</sup> Respondents invited interested persons to bid for Tender No. KPA/069/2013-14/MO and tender no. KPA/074/2013-14/ADM. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents claim that the tenders were awarded to successful bidders who included some of the Petitioners. When these tenders lapsed on 20<sup>th</sup> May, 2016 and 25<sup>th</sup> June, 2016 respectively the same were extended until a fresh tendering process was started in August 2016 but when awards were made an application was filed before the 5<sup>th</sup> Respondent and later an appeal was filed in the High Court where the tender process was annulled and an order given to initiate the tender process afresh.

42. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, a fresh tender was initiated in March 2017 and bidders invited to bid for tender no. KPA/111/2016-17/MO and KPA/112/2016-17/MO (preference group), KPA/113/2016-17/MO and KPA/114/2016-17/MO (preference group). These are the tenders which led to the filing of this claim.

43. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents in their response explained that the tenders that had lapsed in 2013 were extended to ensure that the 4<sup>th</sup> Respondent was not impeded by the absence of provision of crucial services and therefore the 3<sup>rd</sup> and 4<sup>th</sup> Respondent did not contravene any law.

44. Article 10 of the Constitution provides the national values and principles of good governance that shall govern all person. These values include good governance, integrity, transparency and accountability. Article 27 of the Constitution guarantees the equality of all persons before the law while Article 227 provides that all state organs and/or entities shall procure goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Petitioners contend that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have breached these Articles of the Constitution.

45. The Petitioners allege that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to offer services when the tenders (KPA/024/2011-12/HSE and KPA/025/2011-12/HSE) had already lapsed. However, the Petitioners did not tender any evidence to show that extension of the said tenders by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was indeed a breach of the constitution or the substantive statute. The Petitioners did not also dispute the allegation by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that some of the Petitioners who were also successful bidders as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had continued to offer services to the 4<sup>th</sup> Respondent despite the alleged lapse of the tenders. A keen perusal of the pleadings filed by the parties reveals that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners had benefited from the tenders alleged to have lapsed. Further, the Petitioners did not seek a refund of the money paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners on account of provision of services after the alleged lapse of the tender. This court can therefore not conclude that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent did not act in a transparent and accountable manner.

46. As to the order of certiorari, Article 22 enjoins this court to grant appropriate relief in matters involving violation of the bill of rights including an order of judicial review. The Judicial Review remedy of certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision (See the case of **Cortec Mining Kenya Limited v. Cabinet Secretary, Attorney General & 8 others [2015] eKLR**). This court has found that the applications (review applications no. 76 of 2017 and 77 of 2017) were incompetent and ought not to have been entertained by the 5<sup>th</sup> Respondent. The decision by the 5<sup>th</sup> Respondent can therefore not stand. An order of certiorari would therefore be appropriate in this case.

47. With regard to prayer (f), this court finds no reason as to why the 3<sup>rd</sup> and 4<sup>th</sup> Respondents should not execute in favour of the successful bidders the contracts for awards in tenders no. KPA/111/2016-17/MO and KPA/113/2016-17/ADM. As a consequence of quashing the decision of the 5<sup>th</sup> Respondents in review applications 76 of 2017 and 77 of 2017, the parties revert back to the positions they were prior to the filing of the review applications which was that the aforementioned tenders had been awarded to the successful bidders.

48. The Petition herein is therefore allowed and orders issued as follows:

a) An order of certiorari be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision of the 5<sup>th</sup> Respondent given on 7<sup>th</sup> September, 2017 in Public Procurement Administrative Review Board Application Numbers 76 of 2017 and 77 of 2017.

b) The 3<sup>rd</sup> and 4<sup>th</sup> Respondents are hereby directed to execute in favour of the successful tenderers the contracts for awards in respect of Tender Numbers KPA/111/2016-17/MO – provision of Cleaning and Landscaping Services and KPA/113/2016-17/ADM – provision of Housekeeping or Caretaking services.

c) The costs of these shall be for the Petitioners and shall be paid in equal measure by all the Respondents.

**Dated, Signed and Delivered at Mombasa this 11<sup>th</sup> day of July,**

**2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Kiptum holding brief Mr. Gikandi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Ikagu for 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Mr. Kaunda Court Assistant