REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 247 OF 2017

KENYA NATIONAL HIGHWAYS AUTHORITY.....PETITIONER

VERSUS

THE PPP PETITION COMMITTEE.....1ST RESPONDENT

CABINET SECRETARY TO THE TREASURY OF KENYA....2ND RESPONDENT

PPP COMMITTEE.....1ST INTERESTED PARTY

INTL INTERNATIONAL PTE LDT &

HEMBY HOLDINGS LIMITED.....2ND INTERESTED PARTY

JUDGMENT

THE PARTIES

1. The petitioner herein is the Kenya National Highways Authority a State Corporation established under Section 3 of the Kenya Roads Act 2007 and is responsible for the management, development, rehabilitation, and maintenance of national roads.

2. The respondents is the Public Private Partnerships Petition Committee (hereinafter the **"Petition Committee"**) established under Section 67 of the Public Private Partnerships Act (hereinafter the **"PPP Act"**), 2013 with the mandate to consider petitions and complaints submitted by private parties during the process of tendering and entering into project agreements under the PPP Act.

3. The 2nd respondent is a constitutional office established under Article 152 of the Constitution and incorporated under the Cabinet Secretary to the Treasury (Incorporation) Act. The 2nd respondent is the regulation making authority under the PPP Act.

4. The 1st interested party, PPP Committee, is established under Section 4 of the PPP Act with the mandate of, *inter alia*, policy formulation, approval of PPP projects and overseeing implementation of the said projects.

5. The 2nd interested party is a consortium which participated in the bidding process of the Development of 2,000km of Roads Supporting Primary Growth Sectors through Contractor Facilitated Financing Mechanism (Phase1) and was an unsuccessful bidder following evaluation of their tender by the petitioner.

The petitioner's case

6. The petitioner sued the respondents through the petition dated 24th May 2017 in which it seeks the following orders:-

> ***a) A declaration that the 2nd respondent has contravened Article 94(5) and (6) and Article 169 (2) of the Constitution by conferring jurisdiction on the 1st respondent to award costs in petition proceedings vide Regulation 60(1)(e) of the Public Private Partnerships Regulations dated 4th December 2014 and issued under Legal Notice No. 171 of 2014.***
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> ***b) A declaration that Regulation 60(1) (e) of Public Private Partnerships Regulations is unconstitutional, null and void to the***

extent that it confers upon the 1st respondent substantive powers and jurisdiction to award costs which mandate to confer powers upon subordinate court only vests upon Parliament in accordance with Article 169(2) of the Constitution.

c) A declaration that Regulation 60(1) (e) is unconstitutional, null and void for being made in excess of the limits of authority under Article 94(5) and (6) of the Public Private Partnerships Act.

d) A declaration that the 1st respondent's interpretation of Section 67(1) of the Public Private Partnerships Act 2013 is unconstitutional, null and void to the extent that the 1st respondent has arrogated to itself powers not expressly conferred upon it by Parliament in accordance with Article 169(2) of the Constitution.

e) A declaration that the 1st respondent contravened the petitioner's right to a lawful, reasonable and procedurally fair administrative action under Article 47 and the right to fair hearing under Article 50 by awarding costs of the Petition No. 1 of 2015 to the 2nd interested party in a manner that was ultra vires the 1st respondent's powers and/or in excess of its lawful jurisdiction.

f) A declaration that the 1st respondent contravened the petitioner's right to a lawful, reasonable and procedurally fair administrative action under Article 47 and the right to fair hearing under Article 50 by varying the orders it issued on 8th September 2015 in Petition No. 1 of 2015 and transferring to the petitioner herein the entire burden of bearing the costs of the said petition without giving the petitioner herein notice of the proposed course of action and/or affording the petitioner herein and opportunity to address it on the issue.

g) An order of permanent injunction restraining the 1st respondent from purporting to award costs of or incidental to petitions and complaints filed before it in the absence of express power and jurisdiction conferred upon it by Parliament in accordance with Article 169(2) of the Constitution.

h) An order of certiorari removing this Hounorable court for purposes of being quashed Regulations 60(1) (e) of the Public Private Partnerships Regulations 2014 made by the 2nd respondent and purporting to confer upon the 1st respondent the substantive powers and jurisdiction to award costs.

i) An order of certiorari removing this Honourable court for purposes of being quashed, decisions of the Petition Committee dated 8th September 2015 and 12th January 2017 in Petition No. 1 of 2015 INTL INTERNATIONAL PTE LIMITED & HEMBY HOLDINGS LIMITED–VERSUS- KENYA NATIONAL HIGHWAYS AUTHORITY; THE PUBLIC PRIVATE PARTNERSHIP PETITION COMMITTEE & H. YOUNG/GIBB CONSORTIUM in the matter of tender No. KENHA/900/2014 LOT NO. 6 of October 2015 to the extent that the same purports to award costs of the said petition to the 2nd interested party.

j) An order prohibiting the 1st respondent from taking cognizance of, entertaining, hearing, conducting, and/or proceeding with, determining the Taxation of the Bill of Costs dated 27th January 2017 and filed by the 2nd interested party herein in Petition No. 1 of 2015 INTL INTERNATIONAL PTE LIMITED & HEMBY HOLDINGS LIMITED–VERSUS- KENYA NATIONAL HIGHWAYS AUTHORITY; THE PUBLIC PRIVATE PARTNERSHIP PETITION COMMITTEE & H. YOUNG/GIBB CONSORTIUM in the matter of tender No. KENHA/900/2014 LOT NO. 6 of October 2015 for the development of 2,000km Roads Supporting Primary Growth Sectors through Contractor Facilitated Financing Mechanism (Phase 1).

k) Costs of this Petition.

l) Any other reliefs the Honourable court may deem, fit, just and expedient to grant.

7. Concurrently with the petition, the petitioner also filed a Notice of Motion application seeking to stay of the taxation of the impugned costs and on 24th May 2017 this court, differently constituted, granted the stay of taxation orders sought pending the hearing and determination of this petition.

8. The 1st interested party, the 1st and 2nd respondents do not oppose the petition. In effect therefore, the petition is only opposed by the 2nd interested party through the replying affidavit of DANNY SAMUEL sworn on 18th September 2017.

9. The petitioner's case is that as a key State Agency tasked with the implementation of public infrastructure projects in the roads sector, it invited bids for the development of Lot 6 roads in Bungoma, Kakamega, Trans Nzoia, Busia and Siaya Counties under Public Private Partnership (PPP) arrangement to finance, design, build, maintain and transfer the projects over a specified period of time. The petitioner states that pursuant to the mandate conferred to it by Section 43 of the PPP Act as a contracting authority, it prepared and issued tender documents after which binds were received from three entities and thereafter a preferred bidder determined.

10. The petitioner states that the 2nd interested party's bid was less responsive and failed thereby triggering a petition by the said 2nd interested party to the 1st respondent committee on 2nd July 2015 challenging the procurement process and seeking to be declared the preferred bidder and to be awarded the tender together with costs.

11. Through a decision made on 8th September 2015, the 1st respondent annulled the entire tender process and awarded costs of the petition to the 2nd interested party herein.

12. The gist of the instant petition is that the 1st respondent did not have the requisite jurisdiction to make an award for costs. The petitioner is aggrieved with the order on costs and states that the subject tender proceedings before the 1st respondent was a Public Private Partnership (PPP) nature, with the objective of each party bearing the costs of the tender process and proceedings. It maintains that it is against the public policy and the intention of the legislature for the 1st respondent to proceed and award costs which powers is not granted to it by the statute.

13. The petition is filed on the basis that the 1st respondent's decision derogates constitutional principles on the exercise of judicial authority and the petitioner's rights to a lawful, reasonable and procedurally fair administrative action.

14. At the hearing of the petition, Mr Agwara, learned counsel for the petitioner submitted that the 2nd respondent committed a constitutional breach by purporting to grant the 1st respondent powers to award costs. Counsel noted that the 1st respondent relied on the provisions of Regulation 60 of the Public Private Partnerships Regulations 2014 (hereinafter **"the Regulations"**) which regulation provides for a substantive remedy not provided for under the parent Act.

15. Counsel argued that the intention of Public Private Partnerships Act was to assist government manage projects at a minimal cost and this, according to the petitioner, was the reason why Section 67 of the Act does not give the 1st respondent powers to grant costs. It was submitted that under Section 28(5) of the Act, a successful bidder/tenderer is required to pay costs of winning the tender to the government and that nowhere in the Act is it provided that the government should pay or incur any costs. In this regard, the counsel stated that all the parties were from the very onset of the tender process aware that each party will bear their own costs.

16. Counsel referred to the provisions of Section 27 of the Civil Procedure Act which expressly provides for the award of costs in civil proceedings and equated it to Section 173 of the PPP Act 2015 which also expressly grants the Review Board powers to award costs. According to the petitioner, Section 67(6) of the PPP Act only allows for regulations to be made for procedures to be followed and not for substantive remedies such as the awards of costs. Counsel therefore argued that in making regulations for award of costs, the Cabinet Secretary violated Article 94 of the Constitution to the extent that the purported to award a substantive remedy not provided for by the parent Act.

17. It was therefore submitted that Regulation 60(1) (e) of the Regulations should be quashed for contravening Article 94 of the Constitution. It was further submitted that Section 67 of the Act creates the 1st respondent as a Committee that resolves disputes and that ordinarily, Committees do not award costs and that is why the entire Act makes no reference to the award of costs.

18. Counsel contended that the order on the award of costs was null and void ab initio as it did not flow from the provisions of Section 67 of the Public Private Partnerships Act as read with Article 94 and 169 of the Constitution.

The respondent's case

19. The 1st respondent did not file any response to the petition and did not participate in these proceedings.

2nd respondent's and the 1st interested party's case

20. The 2nd respondent and the 1st interested party filed grounds in support of the petition and urged this court to allow the petition on the following grounds:

> **1. The respondent's powers under the substantive provisions of the Public Private Partnerships Act, 2013 (PPP Act, 2013) do not extend to the power to award costs relating to complaint arising out of and/or from tendering/procurement processes and filed before it. By acting contrary to the express provisions of the PPP Act, 2013; the 1st respondent acted in excess of its jurisdiction.**
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> **2. Regulation 60(1) (e) of the Public Private Partnerships Regulations, 2014 upon which the 1st respondent exercised its jurisdiction to award the impugned costs is ultra vires. Section 67(6) of the Public Private Partnerships Act, 2013 hence unlawful, null and void.**
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> **3. The jurisdiction of the 1st respondent can only be conferred by the parent statute, the PPP Act, 2013. As such, any attempt to confer additional jurisdiction in the nature of subsidiary legislation is ultra vires and is therefore null and void.**
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> **4. Regulations 60(1) (e) of Public Private Partnerships Regulations, 2014 is outside the scope of the Statutory Instruments Act, 2013 to the extent that it attempts or otherwise confer jurisdiction on the 1st respondent to awards costs with respect to petitions or complaints filed before it.**
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> **5. The actions of the 1st respondent as against the petitioner herein amount to an express violation of Articles 47 and 50 of the Constitution.**
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> **6. The 1st respondent's action to support to interpret Section 67(1) of the PPP Act, 2013 is unconstitutional as it is not clothes with such powers of statutory interpretation.**
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> **7. Regulation 60(1) (e) of the Public Private Partnerships Regulations, 2014 impairs the objectives of Article 227 of the Constitution as it occasions unwarranted fiscal punishment through the payment of costs attendant to administrative**

decisions of procuring entities.

8. The impugned Bill of costs represents a colossal of public resources contrary to the Intendment Section 29 of the PPP Act, 2013 as read with Article 227 of the Constitution.

9. It is not in the public interest that in a procurement process, procuring entities should be made to compensate private sector actors for the administrative decisions of the public sector as this would amount to a subversion of the noble objectives of public procurement in the country.

21. At the hearing of the petition, **Mr Ogosso**, learned counsel for the 2nd respondent submitted that the powers of the 1st respondent, as a creature of Section 67(1) of the PPP Act, emanates from the said Act and that the section only empowers the Cabinet Secretary to make regulations that guide the 1st respondent in the exercise of its mandate.

22. Counsel submitted that the Cabinet Secretary could only make regulations on the procedure to be adopted at the tribunal and not any other additional remedy such as the award of costs. It was the 2nd respondent's case that the 1st respondent exceeded its jurisdiction in awarding costs and that the regulations 60(1) (e) of the Regulations are ultra vires Section 67(6) of the Act and are therefore unconstitutional null and void as they impair the intentment of Article 227 of the Constitution regarding procurement.

2nd interested party's case

23. DANNY SAMUEL, who describes himself as an authorized signatory of the 2nd interested party, opposed the petition through a replying affidavit sworn on 18th September 2017 in which he explains, in detail, the proceedings that were conducted by the 1st respondent whose outcome culminated in the filing of the instant petition.

24. It is the 2nd interested party's case that it filed the petition before the tribunal and made a specific prayer for costs which prayer was not opposed by the petitioner herein and that in the ruling by the delivered on 8th September 2015, the Committee found, *inter alia*, that the petitioner presided over a tendering process that was unfair and that the evaluation of financial proposal was ambiguous. The tribunal awarded costs of the petition to the 2nd interested party and that a subsequent application for review of the said order on costs yielded a detailed ruling in which the tribunal held, inter alia, that in any judicial process costs usually follow the event.

25. At the hearing of the petition. Mr Darr, learned counsel for the 2nd interested party submitted that the instant proceedings are bootstrapped as a constitutional petition alleging a violation of constitutional rights which violation has not been proved.

26. It was further submitted that the issue before the court was a judicial review application couched as a constitutional petition made completely out of time more than 1½ years after the decision that is challenged was rendered seeking to declare a regulation unconstitutional.

27. On the allegation that the 1st respondent violated the provisions of Articles 47 and 50 of the Constitution, counsel submitted that the submitted that the petitioner was given ample opportunity to ventilate its arguments before the tribunal made its findings.

28. On jurisdiction to award costs, counsel submitted that the Tribunal is established under Article 169(2) of the Constitution and that Parliament was to enact legislation to confer jurisdiction to award costs on the tribunal. According to Mr. Darr, a reading of Sections 67(1) and (5) of the Public Private Partnerships Act, shows that the 1st respondent had jurisdiction to award costs as it would be incomprehensible for Parliament to create a tribunal with inchoate jurisdiction. It was submitted that a specialized tribunal has powers to consider, with finality and issue appropriate orders and that it would be absurd to determine that Parliament did not consider the long established legal principle that costs follow the events.

29. On the construction of statute, reliance was placed on the case of **Law Society of Kenya –vs- Kenya Revenue Authority [2017] eKLR** wherein it was held that the court should give life to the intention of the law makers. It was further argued that the disclaimer in the procurement does not preclude the tendering authority from costs when the said authority acts in an unfair manner.

Analysis Determination

30. I have considered the instant petition, the replying affidavit by the 2nd interested party and the grounds filed by the 1st interested party and the 2nd respondent in its support.

31. The main issues for determination are whether Regulation 60(1) (e) of the Public Private Partnership Regulations 2014 is unconstitutional and further, whether the 1st respondent's actions amounted to an express violation of Articles 47 and 50 of the Constitution. Article 50 provides to the right to fair hearing while Article 47 stipulates that:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"

32. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court of Appeal held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

33. The importance of fair administrative action as a Constitutional right was stated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

34. In **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** it was held:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

35. The ingredients of fairness or natural justice that must guide all administrative decisions are; firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

36. The above cases and principles emphasize the fact that whatever form of proceedings adopted by an authority must meet the basic elements of fairness. In this case. In the case of **Geothermal Development Company Limited v Attorney General & 3 Others 2013] eKLR** it was held:

"*As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well….. Hilary Delany in his book,* ***Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,*** *notes that, "Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."*

37. In the instant petition, it was not disputed that a dispute arising out of the tender process was referred to the 1st respondent Committee for determination and that the said Committee heard the parties before rendering its verdict. It was not disputed that the petitioner herein fully participated in the proceedings before the Committee and that it made an application for the review of the Committee's decision which application was heard by the same committee and a determination made thereby precipitating the instant petition.

38. Under the above circumstances and considering that the petitioner does not claim that he was not given a hearing before the Committee, I am unable to find that the petitioner's rights under Article 47 and 50 of the Constitution were violated. I find that the 1st respondent had the jurisdiction to hear the dispute that was presented before it and that the mere fact that the 1st respondent's decision did not favour the petitioner does not mean that its rights under Articles 47 and 50 of the of the Constitution were violated.

39. Turning to the claim that Regulation 60(1)(e) of the Regulations is unconstitutional, I note that the said regulation was made pursuant to Section 67(6) of the of Public Private Partnership Act. Section 67 of the Public Private Partnership Regulations Act stipulates as follows:

1. There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.

2. The petition committee shall consist of-

a) The chairperson who shall be a person qualified for appointment as a judge of the High Court of Kenya;

b) Four other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the unit, consider appropriate; and

c) The unit director.

3. The members of the Petition Committee shall hold office for a term of three years and shall be eligible for re- appointment for one further term.

4. Where a petition is based on administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.

5. For the decision of the Committee shall be final and binding on both parties.

6. The Cabinet Secretary may by regulations, provide for the procedure for determining a petition under Subsection (1)"

40. Regulation 60(1)(e) of the Regulations on the other hand stipulates that:

"When dealing with a petition or a complaint, the petition committee may allocate costs of hearing the petition or petition to the parties to the petition or complaint."

41. The petitioner argued that a construction of the provisions of Section 67(6) of the PPP Act expressly limits the 2nd respondent to only providing for procedural rules of the 1st respondent and does not extend to the conferment of substantive powers to the 1st respondent. According to the petitioner, the impugned regulation unduly penalizes it and places it at a risk of incurring exorbitant costs of kshs 113,626, 400/- which will only enrich the 2nd interested party who was on unsuccessful bidder in the tender process.

42. My finding is that a reading of Section 67(1) of the Act reveals that the Petition Committee is mandated to consider *all petitions and complaints submitted by a private party during the process of tendering.* In this case, it was not disputed that the issue of costs, was one of the issues presented before the Committee for determination. Indeed the Petition Committee in its ruling following the petitioner's application for the review of its earlier decision made the following findings on the issue of costs:

"Was the award of costs to the petitioner by this committee a grammatical error or typographical error or ambiguity? We do not think so. It was a relief that was prayed for and deliberated by the committee and awarded. To re-look at the award of costs and make a different finding now would be akin to this committee sitting on its own appeal"

43. To my mind, the provisions of Section 67(1) of the Act is all encompassing and grants the Petition Committee the power to determine all complaints which means that the Committee is not limited in the kind of the complaints that it can consider and determine. In this regard I find that it was not necessary for the PPP Act to make a specific provision on the Committee's power to award costs. I find that if indeed the petitioner's position was that the committee was precluded from determining the question of costs or any other issue for that matter, then that is an issue that ought to have been raised by the petitioner before the said committee. This was not done and I therefore find that challenging the said award in the current proceedings is an afterthought and a belated attempt by the petitioner to 'appeal' against the decision of the Petition Committee contrary to the provisions of Section 67 (5) of the PPP Act which stipulates that the findings of the Committee shall be final and binding on both parties.

44. My finding is that the impugned regulation cannot be said to be in conflict with the Parent Act (Public Private Partnership Act) as there is no corresponding provision in that said Act that provides that the Committee cannot award costs. In my humble view, the impugned regulation compliments the provisions of the PPP Act in so far as it clarifies the mandate of the committee on the issue of the award of costs.

45. Having found that Section 67(1) of the Act empowers the committee to consider all complaints and petitions relating to the tendering process. I further find that it was not necessary for the law makers to make a provision for every possible determination/finding that the committee could arrive at upon hearing such petitions or complaints as every decision would then depend on the circumstances of each case.

46. In the present case, I find that it was not disputed that the Petition Committee was a specialized tribunal established by an Act of Parliament in conformity with the provisions of Article 169(1)(d) of the Constitution. A look at the mandate and composition of the committee especially its chairperson shows that it is a committee mandated to decide on questions of law. The question of costs is a legal issue and a natural consequence of litigation which in ordinarily "follow the events". This means that the court or tribunal hearing a dispute may award costs to the winning party. Indeed in Section 27 of the Civil Procedure Act stipulates that:

(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

47. The principle that "costs follow the events" was emphasized in the case of **Solomon v Solomon [2013] EWCA Civ. 1095** Where it was held:

"The judge correctly stated the general rule did not relate to the interim applications he had decided. Costs were then in the discretion of the court, and the principles set out in CPR Part 44 applied. The starting point for what are described as "clean sheet" cases is that costs follow the event. To find that principle one need look no further than Gojkovic v Gojkovic (No. 2) [1991] 2 FLR 233 (CA) where Butler – Sloss LJ (as she then was) said:

There still remains the necessity for some starting – point. The starting point, in my judgment, is that costs prima facie follow the

event….but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court….'

48. When considering the issue of costs following the event, the Supreme Court of Uganda stated as follows in the case of **Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383**:

The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion…While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit…It is trite law that where judgment is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech."

49. Going by the dictum in the above cited cases and the principle that costs naturally follow the outcome of a litigation, I find that it would be inconceivable to have a scenario where a specialized tribunal, such as the Petition Committee herein, could be granted powers to consider all complainants related to the tendering process and be denied the power to consider costs that arise from such proceedings. When faced with a similar question on whether or not the National Environmental Tribunal can make an award of costs in the case of **Jane Ngonyo Muhia vs. Director General, National Environmental Management Authority & another [2017] eKLR** the Environment and Land Court held as follows:

"On the issue of costs, Rule 39 of NET's Rules of Procedure, 2003 provides that NET would not normally award costs but can award costs against a party when it reaches a finding that such a party had acted frivolously or vexatiously or where a party's conduct in making, pursuing or resisting an appeal is wholly unreasonable."

50. My above findings on the nexus between the costs and the outcome of a case notwithstanding, I am still minded to consider the petitioner's claim that Regulation 60 (e) (1) of the Regulations is unconstitutional for being made in excess of the limits of Authority under Article 94 (5) and (6) of the Constitution. The said Article stipulates as follows:

(5) No person or body other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation.

(6) An Act of Parliament or legislation of a county that confers on any state organ, state officer or person authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

51. In the present case, the impugned regulation was made by the Cabinet secretary pursuant to the clear provisions of Section 67 (6) of the PPP Act which is a legislation within the meaning of Article 94 (5) of the Constitution and he cannot therefore be said to have acted in violation of the said Article. It is worthy to note that the Cabinet Secretary in this case is the 2nd respondent in these proceedings. I find that it is therefore quite ironical and indeed baffling that the 2nd respondent herein, who is the maker of the impugned regulations, is the same state officer that is on the frontline in opposing the said regulations. Considering that in any legal proceedings costs may, at the court's discretion, be awarded to any party to the said proceedings, one has to wonder if the petitioner would still be opposing the award of costs if the said award was made in its favour. My finding is that the claim that the impugned regulation is unconstitutional was not proved. No material was placed before me to show that the procedure adopted in the enactment of the said regulations did not conform to the constitution and neither was it proved that the Petition Committee acted outside the law in awarding the impugned costs.

52. Having regard to my findings and observations in this judgment I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs. As a consequence of the order of dismissal of the petition I further order that the interim orders issued on 24th May 2017 are hereby vacated.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 8th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Agwara for the petitioner

Mr Darr for the 2nd interested party

Mr Sekwe for the Attorney General

Court Assistant – Kombo