REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 503/502 OF 2016

IN THE MATTER OF AN APPLICATION BY KLEEN HOMES SECURITY SERVICES LIMITED

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD DECISION MADE ON 4TH OCTOBER, 2016

BETWEEN

REPUBLIC…….APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD……..…....1ST RESPONDENT

KENYA POWER & LIGHTING

COMPANY LIMITED……...…2ND RESPONDENT

EXPARTE

KLEEN HOMES SECURITY SERVICES LIMITED

RULING ON THE PRELIMINARY OBJECTION

1. On 18th October 2016 this court considered chamber summons under certificate of urgency, dated 17th October 2016 filed by the applicant **Kleen Homes Security Services Limited** and granted it leave to institute Judicial Review proceedings to challenge the decision of the 1st respondent **Public Procurement Administrative Review Board** made on 4th October 2016 dismissing the request for review in respect of Tender No.KP1/9AA-2/0T/02/SS/16-17 for provision of Security Guarding Services to the Procuring Entity (PE) **Kenya Power & Lighting Company Ltd** ; directing the PE to proceed with and complete the procurement process; and that each party to bear their own costs of the

request for review.

2. The court also directed the applicant to file and serve the substantive notice of motion within 21 days from the date of leave, in accordance with Order 53 Rule 3 of the Civil Procedure Rules.

3. The leave granted was also ordered to operate as stay of the proceedings and the decision of the Review Board in Review case No. 74/2016 with regard to the above quoted tender for provision of Security Guarding Services by the 2nd respondent pending hearing and final determination of these Judicial Review proceedings.

4. On 8th November 2016 the exparte applicant dutifully filed the substantive motion. The 2nd respondent Kenya Power & Lighting Company Ltd filed replying affidavit on 23rd January 2017 sworn by Jude Ochieng on the same day. The deponent is the Chief Legal Officer, Litigation and Prosecutions of the Procuring Entity herein Kenya Power & Lighting Company Ltd.

5. At paragraphs 21,22,23 and 24 of the said replying affidavit, the 2nd respondent raised a preliminary point of law contending that pursuant to Section 175(5) of the Public Procurement and Asset Disposal Act No. 33 of 2015, the exparte applicant's application must be heard and determined by this court within 45 days of filing failure to which the decision of the 1st respondent Review Board shall remain valid and final; that as the court record shows that the motion was filed on 8th November 2016 and is yet to be heard or determined to date, such proceedings herein have lapsed by operation of the law thereby rendering the same nugatory, mute, statute barred, ineffective, irrelevant and a waste of judicial time; that in the light of the prevailing circumstances, this court has no jurisdiction to entertain the exparte applicant's application whatsoever and the 2nd respondent shall crave for leave of the court to strike out the application in limine and the decision of the 1st respondent declared final and binding; and that the orders sought by the Exparte applicant are incapable of being granted and/or enforced by this Honourable court as the same have not only lapsed by operation of the law but are also underserved and unjustified and it is only fair, just and lawful that the same be dismissed with costs to the 2nd respondent.

6. The above replying affidavit was followed by a preliminary objection dated 23rd January 2017 and filed in court on 24th January 2017, replicating paragraphs 21, 22,23 and 24 of the replying affidavit of Jude Ochieng.

7. On 30th November 2017 the 2nd respondent's counsel also filed a list of authorities in support of the preliminary objection dated 23rd January 2017. The exparte applicant's counsel filed their list and bundle of authorities on 8th February 2017.

8. The parties advocates orally canvassed the preliminary objection on 9th February 2017 with Mr Muga counsel for the 2nd respondent/objector urging the preliminary objection and Mr Kiplangat representing the exparte applicant opposing the preliminary objection, urging the court to dismiss it with costs.

9. No replying affidavit was filed to the preliminary objection. According to Mr Muga, the court has no jurisdiction to entertain these proceedings pursuant to Section 175(3) and (5) of the Public Procurement Administrative Review Board Act, 2015 which implements Article 227 of the Constitution, that the Act mandates the High Court to hear and determine Judicial Review application within 45 days of the date of filing of the application which 45 days had lapsed. That as the application was filed on 18th October 2016 seeking for leave, the matter ought to have been decided by 3rd December, 2016. As a result, it was contended that the application is spent and in accordance with Section 175(5) of the Act, the decision of the Review Board stands final.

10. Further, it was submitted that this court cannot entertain proceedings which have lapsed by

operation of the law. That the hearing dates in this matter were taken after 5the lapse of time. That there is no room for explanation by the court or by the party or even for an extension of time hence this court has no alternative but to down its tools.

11. It was submitted that the reason for the Section 175 of the PPAD Act is to ensure public procurement proceedings are canvassed within the shortest time possible to avoid any prejudice caused by delay of proceedings, as stipulated in Section 3 of the Act on the objectives of the Act; to provide efficient and timely resolution of disputes.

12. It was further submitted by the objector/2nd respondent's counsel that there is no denial on the part of the applicant that time lapsed.

13. Reliance was placed on **Joseph C. Kiptoo & Another vs Kericho Water & Sewerage Company Ltd [2016] e KLR** where Mumbi Ngugi J held inter alia, that if an Act of Parliament provides for **a mechanism** for dispute resolution, it has to be followed strictly and that as a result, the learned judge struck out the review which was filed after 14 days as stipulated under the Act. Counsel urged this court to uphold that decision and the timelines set up in the Act.

14. Further reliance was placed on **Public Procurement Administrative Review Board & another Exparte Wajir County Government [2016] e KLR** where it was submitted that Odunga J upheld Section 175 of the Act as it relates to timelines for disposal of Judicial Review application.

15. Mr Muga further submitted that even other legislation like the Elections Act provides for timelines within which Election Petitions must be heard and determined which is within 6 months as was held in **Petition No. 1/2014 Christine Talaam Vs Jennifer Nanamut Koipiri & URP & IEBC [2014] e KLR** where the magistrate delivered her decision 4 days after the six months period for determination of such disputes had lapsed. Honourable Ochieng J held that the magistrate had no jurisdiction to deliver a decision after 6 months hence it was a nullity and an appeal could not be mounted to challenge a null decision; and that no explanation for delay can cure a decision delivered after the lapse of 6 months hence, and in the same vein, this court must down its tools.

16. Mr Muga also relied on the decision from other jurisdiction such as the Nigerian Supreme Court in **Senator John Akpanudo Edehe & 2 Others vs Goodwill Obot Akbabio & 3 Others** where the matter had not been concluded outside the Constitutional Provisions of Section 285(6) of the Nigerian Constitution within the set timelines for disposal. The court held that the decision was a nullity as the court could only have jurisdiction if the case before it was still alive and that therefore the petition was dead by effluxion of time hence the issue of fair hearing could not be raised.

17. Mr Muga maintained that these proceedings are extinguished and therefore the court cannot sit to entertain any further proceedings in this matter. He urged the court to uphold the preliminary objection as the matter herein is spent and therefore it is in the interest of justice and fairness that the delay should not be entertained by the court as delay in procuring services for security affects the security of the 2nd respondent's various installations country wide hence the matter should be struck out with costs.

18. In opposing the preliminary objection, the exparte applicant's counsel, Mr Kiplangat submitted on three grounds. It was submitted by the applicant's counsel that Section 175(3) and (5) of the Public Procurement and Asset Disposal Act (PPADA) violates the applicant's rights of access to justice under Article 48 of the Constitution and the right to have the dispute determined by the court: that the provisions of the Act are therefore unreasonable and by fixing timelines it fails to consider individual circumstances of each case, the availability and allocation of Judicial Resources; and that there are other equally important matters which deserve equal time allocation.

19. Further, it was submitted that the Section renders rights ineffective leaving the applicant with no rights or effective remedy and that the Section renders constitutional rights illusory and deprives the court the discretion to manage time within which matters should be dealt with.

20. It was also submitted that the Section of the Act violates Article 24 of the Constitution. That the Constitution does not limit access to justice and that the limitation in unreasonable.

21. That the Section does not limit rights and neither does it expressly limit jurisdiction of the court hence the court has power under Section 11 of the Fair Administrative Action Act to make declaratory orders and under Article 23 (3) of the Constitution to declare any law invalid to the extend of that violation of the Bill of Rights. Counsel urged the court to declare that Section 175(3) and (5) of the Public Procurement and Asset Disposal Act 2015 violates Articles 48 and 50 of the Constitution and therefore null and void.

22. According to Mr Kiplangat, this court vide **Republic V Kenya Revenue Authority exparte Webb Fontaine Group FZ – LLC & 3 Others [2015] eKLR (KRA CASE)** determined a similar issue which affected the previous Section 100(4) of the repealed Act and found the Section unconstitutional hence the court could hear and determine the application beyond the 30 days. It was submitted that in this case, Section 175(3) and (5) of the Act is a replica of Section 100(4) of the Old Act with the difference being the number of days, which does not affect the decision.

23. Further reliance was placed on **Blic vs Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati [2008] e KLR** as extensively cited by Odunga J in the **KRA** (supra) case.

24. It was submitted that this court has power to consider constitutional questions relating to breach of fundamental rights and freedoms. Counsel further relied on **Suchan Investments V Ministry of National Heritage and Culture & 3 Others[2016] e KLR CA** to support the argument that availability of other remedies is not a ground to bar the applicant from pursuing its constitutional rights. That in this case, a petition was unnecessary as the application invokes the Fair Administrative Action Act, 2015 which is relevant.

25. The second ground of opposition to the preliminary objection as submitted by Mr Kiplangat is that Section 175(3) (5) of the Act is unconstitutional in that it violates Article 1(3) of the Constitution on separation of powers and independence of the judiciary as stipulated under Articles 165 and 151 of the Constitution hence the Section is invalid and therefore this court has power under Article 2(4) of the Constitution to declare such law invalid because judicial authority is exercised by courts and not through directives by the legislature.

26. Further, that the management of cases is a judicial function and not for Parliament to allocate time for management of cases otherwise it deprives courts of the discretion to determine priority of hearing cases in the circumstances of each case, which makes the Section of the Act an unjustified legislative and executive intrusion of judicial functions.

27. Mr Kiplangat further submitted that the Public Procurement Administrative Review Board is an executive body hence if its decision becomes effective unless the challenge thereof is determined within the stipulated 45 days from the date of filing thereof in the High Court; the Court's role in the process is removed. Counsel relied on the **KRA** (supra) case where Odunga J held that the sharing of judicial function with the executive and legislature is unconstitutional and urged this court to uphold the same principles.

28. The third ground argued by Mr Kiplangat is that in the alternative, Section 175(3) (5) of the Act is an ouster clause which is to be interpreted by the court restrictively in a manner that preserves the jurisdiction of the court to preside over disputes before it.

29. Further, that the language in Section 175(3)(5) does not oust the jurisdiction of the court to specify the consequences of failure to hear the application within 45 days hence the clause is vague, ambiguous and not an express ouster of jurisdiction of the court. Counsel argued that the 2nd respondents are giving the section literal interpretation as opposed to proper **purposive** interpretation. Reliance was placed on **Regina Vs Soneji & Another [2005] UK HL 49** which case sets principles

applicable to statutory interpretation.

30. It was submitted that in view of the ambiguity in clause (3) of section 175 of the Act, Parliament could not have intended that failure to decide the case within 45 days invalidates the proceedings pending before the court.

31. It was submitted that courts frown upon provisions like Section 175(3) and (5) hence this court should construe such provisions to preserve the jurisdiction of the court.

32. On Mr Muga's submissions and authorities relied upon, it was submitted that they are irrelevant and distinguishable. That in the **Joseph Kiptoo (supra**) case, the matter was concerned with whether the applicant should have filed a constitutional petition to challenge a procurement process and the court reminded the applicant that he could have lodged a review before the Public Procurement Administrative Review Board. That the court in the said case never dealt with Section 175(3) (5) of the Act hence there was no determination of the issues similar to the ones before this court.

33. Concerning the case of **Republic v Public Procurement Administrative Review Board Exparte Wajir County Government**, Mr Kiplangat submitted that the issue was **Section 175(1) of** the Act which stipulates **time for commencement of the Judicial Review application**, and which was not complied with, and not Section 175 (3) and (5) of the Act, as is the case herein.

34. Mr Kiplangat further submitted that the case of **Christine Talaam** (supra) and the **Nigerian decisions** (supra) relied on by the objector concern **election petitions** and timelines for their determination unlike in this case which is not an election petition. Further, that Odunga J in the **KRA (supra**) case dismissed such arguments.

35. It was submitted that the Constitution empowers Parliament to set timelines for determination of election petitions unlike Article 227(1) which does not stipulate timelines for determination of disputes in public procurement matters.

36. Counsel for the applicant urged the court to find the preliminary objection as misconceived, frivolous and dismiss it with costs contending that no explanation for the delay is necessary as it is the court that manages proceedings before it.

37. In a rejoinder, Mr Muga submitted that the preliminary objection is not frivolous as it is anchored on the legal provisions and that 45 days have lapsed since the filing of the Judicial Review proceedings.

38. Further, that Section 100(4) of the repealed Act is inapplicable to these proceedings and that current Act expressly provides that the High Court shall determine the application within 45 days.

39. It was submitted that in any case, all authorities submitted by the exparte applicant relate to Section 100 of the repealed Act whereas the decisions provided by the 2nd respondent are 2016 decisions.

40. Counsel for the 2nd respondent maintained that Section 175 of the Act is not unconstitutional as there is no part of it that ousts the right to a fair hearing and that the section only stipulates the period for litigating disputes in public procurement cases.

41. It was submitted that it appears that the exparte applicant herein is inviting the court to rewrite the law by interpreting Section 175(3), (5) to breath life into this application, when the Section 175(5) is clear that once the decision of the High Court is not made in 45 days, the decision of the Review Board takes effect and becomes binding on all the parties.

42. It was submitted that as matters stand now, the decision of the Review Board has taken effect hence parties are merely engaging in an academic exercise.

43. It was further submitted that it is farfetched for the applicant to claim that jurisdiction of the court to manage cases is being impeded since Parliament and the Constitution grant jurisdiction and that the Section does not allocate time for setting down the hearing.

44. Counsel urged the court to interpret Section 175(3), (5) in accordance with the statutes of interpretation Act, and that since the mandatory language is *shall*, it does not give any room for maneuvers hence the preliminary objection is well grounded in law and should be upheld with costs to the 2nd respondent.

Determination

45. This court has carefully considered the 2nd respondent's preliminary objection, the response by the exparte applicant, and the respective counsel's able oral submissions as supported by constitutional, statutory and case law.

46. The main issue for determination is whether this court has jurisdiction to hear and determine these proceedings which were filed over 45 days ago, as stipulated in section 175(3),(5) of the Public Procurement and Asset Disposal Act that where the High Court does not determine the judicial review within 45 days from date of filing, the decision of the Review Board shall be final and binding on all parties to the review..

47. The commencement point is to define what a preliminary objection is. A rational answer can be found in what the Court of Appeal for Eastern Africa observed in the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696 at page 700** where Law JA observed that:

> ***" a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which, if argues as a preliminary objection may dispose of the suit…….***
>
> ***……a preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argues on the assumption that all facts pleased by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion….."***

48. Therefore the question is whether the preliminary objection taken in this case passes the test. In my view, the preliminary objection raised touching on jurisdiction of the court to hear and determine the Judicial Review application, in view of the provisions of Section 175 (3) (5) of the Public Procurement and Asset Disposal Act, 2015 passes the test of a preliminary objection as it does not seek the discretion of the court.

49. Section 175 of the Public Procurement and Asset Disposal Act, 2015 states:

> ***175. (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.***
>
> ***(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.***
>
> ***(3) The High Court shall determine the judicial review application within forty-five days after such application.***
>
> ***(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.***

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

***(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either* party.**

50. In determining this preliminary objection, this court's attention was brought to the novel case of HC **Miscellaneous Civil Application 1260 of 2007 Republic V Public Procurement Administrative Review Board& Another Exparte Selex Sistemi Integrati[2008]eKLR,** decided by Nyamu J(as he then was) **where** a preliminary objection was raised to the effect that:

1. The notice of motion dated 20th December 2007 is fatally defective and is time barred in accordance with Section 100(4) of the Public Procurement and Disposal Act No. 3 of 2015 as Judicial Review was not declared by the High Court within 30 days from the date of filing;

2. The matter having been filed on 3rd December 2007 because statutory time barred on 3rd January 2008.

51. The preliminary objection in the **Selex Sistemi Integrati** case was predicated heavily on Section 100(4) of the Public Procurement and Asset Disposal Act, 2005 (now repealed) and which is in pari materia with the section 175 (3) of the 2015 Act which stated:

" (4) if Judicial Review is not declared by the High court within 30 days from the date of filing, the decision of the Review Board shall take effect."

52. The new Act did some panel beating to the section but the tenor and spirit is the same. The arguments raised in that case by the objector, just as was the case herein, in support of the preliminary objection were that the spirit behind Section 100(4) of the Public Procurement and Asset Disposal Act, 2005 was to ensure that the public interest is served in the least amount of time possible and that projects are carried out expeditiously by the making sure that Judicial Review applications are heard within 30 days from the date of filing of the application.

53. Further, that the aim is to ensure that there are no delays in finalizing the tenders intended to improve the welfare of Kenyans and that the funds are disbursed expeditiously to commence the project hence the limitation of time on Judicial Review process which guarantees that the process is quick and effective.

54. The objector in the said motion further maintained that the application was statute barred and cited a description of statutes of limitation from **Black's Law Dictionary 6th Edition** thus:

" statutes setting maximum time periods during which certain actions can be brought or rights enforced……..declaring that no suit shall be maintained on such causes of action… unless brought within a specified period of time after the right accrued."

55. It was thus argued that the court was meant to announce clearly an opinion or resolution over the matter within 30 days after filing of the application by the applicant; that the period of 30 days began running from the date of filing of the application for leave and stay by the applicant on 3rd December 2007 and expired 3rd January 2008 which would make that application time barred and hence it could not be heard and determined by the court.

56. Further reliance was placed on Section 57 of Cap 2 Interpretation and General Provisions Act which states:

> ***"In computing time for the purposes of a written law, unless the contrary intention appears-***
>
> ***A period of days from the beginning of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event or the act or thing was done."***

57. Further reliance was placed on **Halsbury's Laws of England 4th Edition VOL 45 paragraph 1134** which addresses the aspect of the period within which an act must be done thus:

> ***"The court has no power to extend a period of time limited by statute for doing an act unless the statute provides"***

58. It was contended that the Public Procurement and Asset Disposal Act, 2005 did not provide for extension of time and hence the preliminary objection should be allowed and the notice dismissed with costs.

59. On the part of the applicant in the Selex Sistemi Integrati case, in opposing the preliminary objection, the court was urged to consider the principle laid down by **Lord Denning in his book: The Discipline of Law 1979 London Butterworth at page 12** as follows:-

> ***" whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity….***
>
> ***The English language is not an instrument of mathematical precision. It would certainly save judges trouble if Acts of Parliament were drafted with divine precision and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman….he must supplement the written word so as to give force and life to the intention of the legislature."***

60. It was contended that Section 100(4) of the 2005 Act was unconstitutional as neither the Constitution, the Law Reform Act nor Order 53 of the Civil Procedure Rules, put any timeline or limit on when the High Court should determine an application for Judicial Review. It was argued that the public interest served by Judicial Review as expressed in Section 65(2) of the then Constitution was to ensure that inferior courts, tribunals and administrative bodies act lawfully, fairly, transparently and reasonably and upholding the preliminary objection would defeat that very reason.

61. Further, and material to this case, that the Public Procurement and Asset Disposal Act, 2005 does not govern the court's procedure in Judicial Review proceedings and that the issue of time within which the court must determine a suit is an issue of procedure set out in Order 53 of the Civil Procedure Rules which does not make any time limits within which the High Court should make a decision; as opposed to Section 100(4) of the Act which only provides for a right to the Judicial Review relief, not a procedure to be followed in Judicial Review proceedings hence Section 100(4) of the Act is absurd, oppressive, unjust and contrary to public policy because the decision of the Review Board is challenged not on time considerations but because it is manifestly unlawful, irrational, unjust and antithetic to the public interest and no effluxion of time should give it, the qualities of lawfulness, rationality or reasonableness.

62. Further, that Section 100(4) of the Act purports to give effect to an otherwise unlawful decision and as such the section is defective, unjust, oppressive and absurd.

63. Reliance was placed on Lord Dennings decision in **Nothman V Barnet Council [1978]1 WLR 220** where he stated:

"it [literal]interpretation is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, needless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable, and sterile. <u>Not with us in this court.</u> The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock describes as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision…It is no longer necessary for judges to wring their hands and say: " there is nothing we can do about it." Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy…by reaching words in, if necessary- so as to do what parliament would have done, had they had the situation in mind."

64. It was submitted in contention that the defect in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of Parliament. That the judge should not only consider the language of the statute but also the social context and conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the legislature.

65. Further, that Section 100(4) of the Act does not apply to situations where it is impracticable to determine Judicial Review proceedings within 30 days from the date of filing, in view of heavy backlog.

66. The court in determining that case framed the following issues.

1. Whether Section 100(4) of the Act ousts the jurisdiction of the court in Judicial Review.

2. Whether the public interest of finality in public procurement procedures outweigh judicial adjudication.

3. Whether Section 100(4) of the Act was unconstitutional for limiting the jurisdiction of the courts to 30 days.

4. Whether Section 100(4) of the Act was in tandem with the applicable law as regards the procedure in Judicial Review proceedings.

5. What is the public interest in the circumstances?

67. In my determination of this matter, I shall only delve into whether this court has jurisdiction to hear the present judicial review application in view of the time lapse stipulated by the Act. As was in the Selex Sistemi Integrati case, it is still important to discuss in brief the significance of Judicial Review and or its basis and where the court derives its jurisdiction. The learned Judge that:

"Judicial Review plays an important role in our society which is to check excesses, omnipotence, arbitrariness abuse of power and also accountability and maintainance of constitutionalism and the rule of law. As Chief Justice Marshall powerfully argued in <u>Marbury V Madison 5 US 137 [1803],</u> Judicial Review provides the best means of enforcing the people's will as declared in the written Constitution, without resort to the drastic remedy of revolution. He warned that, without Judicial Review, the legislative branch would enjoy a practical and real omnipotence and would reduce to nothing what is deemed the greatest. Improvement on political institution a written constitution. The concerns raised in <u>Marbury V Madison</u> are still applicable in our jurisdiction. It should be observed that Judicial Review is the cornerstone of the doctrine of separation of powers and the principle of the rule of law. On the clear provisions of the law, the High court is the principal interpreter and guardian of the Constitution. Section 65(2)of the Constitution provides:……

The High court has powers of Judicial Review arising from an Act of Parliament of Law Reform

Act and the 1938 English Act, and Order 53 of the Civil Procedure Rule. This jurisdiction is distinguishable from the constitutional Judicial Review. The matter before the court fell squarely under ordinary Judicial Review, which is a tool used by the High Court to ensure that public institutions exercise power in accordance with the law.

It is still within the jurisdiction of the High Court to review legislation in order to establish whether it complies with the Constitution. Judicial Review also enables the High Court to review acts, decisions, and omissions of public authorities in order to establish whether they have exceeded or abused their power.

The essence of Judicial Review was posited by Sir Professor Wade as follows:

"The powers of public authorities are essentially different from those of private persons. A man making his will may subject to any right of his dependants dispose of this property just as he may wish. He may act out of malice or a spirit of revenge but in law this does not affect his exercise of power. In the same way a private person has absolute power to allow whom he likes to use his laid regardless of his motives. This is unfettered discretion.

But a public body may do none of those things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses power solely in order that it may use them for the public good"

Michael Fordham in Judicial Review Hand Book [1994] argues that Judicial Review allows the High Court to supervise the activities of public bodies. It brings to the judicial forum a wide range of subject matter and enjoys an increasing prominence in the English legal system. The foregoing is true to the Kenyan Scenario.

68. On whether section 100(4) of the 2005 Act ousted the jurisdiction of the Court, the learned Nyamu J went on to hold as follows and I agree that:

"Ouster of jurisdiction

The High Court's jurisdiction in Judicial Review matters inheres from the Law Reform Act and also Articles 23, 165(6) of the Constitution.

The Constitution is the Supreme Law of the land and the will of the people of Kenya. See Article 2(1) of Constitution. It is superior to all Laws and any law that is inconsistent with it is void to the extent of the inconsistency(4). The legality of the Constitution cannot be challenged before any court or state organ (3).

Section 100 of the Public Procurement and Asset Disposal Act, 2005 submits decisions of the Review Board to Judicial Review by the High Court but imposes a time bar of 30 days within which the High Court must determine the Judicial Review otherwise the decision of the Review Board takes effect.

69. Indeed, Courts of law recognize that their jurisdiction may be restricted by the Constitution (see Article 165(5) (b) of the Constitution as well as by other statutory enactments but they also guard their jurisdiction jealously so as to do justice, for a court of law exists to do justice to the parties (see Article 159 of the Constitution).

70. It is also the same the same Constitution which commands the courts the exercise of judicial authority to ensure that justice is not delayed [Article 159 2(b)].

71. Therefore, the court when faced with such a situation, must deploy balancing technicalities between what appears to be the ouster clause and the challenged decision so as to ensure that access to justice

is not impeded. It must apply the principle of proportionality, for, a court of law does not exists to do an injustice. The court however acknowledges that where a stature is framed in a manner that ousts the jurisdiction of the court, such provisions should be construed strictly and narrowly as was held in **Smith v East ELLOE Rural District Council [1965] AC 736** where Lord Viscount Simonds stated:

> ***" Anyone bred in the tradition of the law is likely to regard with little sympathy legislator provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."***

72. In **Anisminic V Foreign Compensation [1969] 1 ALL ER 208** Lord Reid stated:

> ***" It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."***

73. In the instant case, in my humble view, it can safely be said that Section 175 of the Public Procurement and Asset Disposal Act, 2015 cannot possibly be effective in ousting the jurisdiction of this court. This court must examine the intention of Parliament in Section 2 of the Act, and moreso, the objectives which were intended to be achieved by the Act.

74. Whereas the court agrees that the ouster provision in terms of timelines is designed to ensure fairness, transparency, and accountability in procurement procedures, I am equally in agreement with the applicant that it is impracticable to determine all public procurement Judicial Review matters within 45 days from the date of institution, bearing in mind the rate at which Kenyans are challenging administrative actions taken, in view of the expansive Bill of Rights under the new constitutional order, and in the enforcement of those rights and now that the right to fair administrative action is a fundamental right espoused in Article 47 of the Constitution and implemented by the Fair Administrative Action Act No. 4 of 2015.

75. The Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. The 1st respondent is an administrative body which, besides the jurisdiction granted to it is the Public Procurement and Asset Disposal Act, 2015, must also apply the provisions of Article 47 of the Fair Administrative Action Act No. 4 of 2015 in making any administrative decisions. Therefore, where the decisions of the review Board are subject of challenge before a court of law, the court must not only look at the time within which the challenge must be determined, but as to whether the public interest of finality in procurement procedures outweighs judicial adjudication.

76. The court must examine Section 3 of the Act on the purposes and objectives of the Act in line with Article 227 of the Constitution. I agree that finality of public projects through efficient, accountable and expedition is key and noble intention of the legislature which must be appreciated, and embraced if the development agenda is to be achieved. However, the court must consider the interests of the wider public as opposed to an individual's interest.

77. The integrity of the process is which key and where there is a challenge then the court must ensure that it accords sufficient time to investigate whether the process was done in a transparent, accountable, fair manner.

78. Integrity, transparency and accountability are national values and principles of governance espoused in Article 10 of the Constitution and these cannot be sacrificed at the altar of finality and or expedition. There must be a balance. Adjudication of disputes is a constitutional mandate which courts cannot escape. If that were not the case, then the objectives of the Act will be lost.

79. Therefore, on whether Section 175 is unconstitutional for limiting the jurisdiction of the court to 45

days, as earlier stated, the fundamental basis for Judicial Review is both the Constitution and the Law Reform Act. Article 50 of the Constitution guarantees all persons a 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. Under Article 227(1) of the Constitution, when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a **system** that is far, equitable, transparent, competitive and cost effective.

80. There is no Constitutional time limitation to the court's determination of Judicial Review in public procurement matters.

81. In my humble view, it is safe and sound to construed that where there is no specific time frame provided by the Constitution for the hearing and determination of a dispute, or where the Constitution empowers Parliament to provide for such timelines, then Parliament is expected to having regard to the nature of the case at hand provide for timelines that accord the case a fair hearing within a reasonable time, having regard to the command that justice shall not be delayed ; justice shall be done to all irrespective of status and therefore the practicability of the case, depending on the circumstances of the case and other relevant factors. Those other factors include the fact that the court regulates its own calendar and diary. In the United Kingdom, Judicial Review is determined within 3 months, having regard to judge/population ratio.

82. Sampling out the Nairobi Milimani Law Courts, there were about 670 Judicial Review cases filed in 2016. There are only 2 judges in the Division over a period of time. These judges are not working robotic perfunctory machines. They are mortal men and woman of flesh and blood, not gadgets. And even if they were machines, they would require servicing for efficiency and effectiveness hence the need for time-out in the form of leave, training, medical checkups and family engagements for they do not live in Mars lest they suffer from burn out and breakdown of their body systems and fail to function completely.

83. As I write this ruling, it is anticipated that about 90 files would have been opened by end of February, 2017 in the Judicial Review Division. In January 2017 alone, 32 files were opened. In February, and as at today-this afternoon, as I read this ruling, 70 files have been registered.

84. There is no time allocated to judges and judicial officers for judgment writing, unlike in some jurisdictions like South Korea where judges sit in open court for 3 days and 2 days are dedicated, weekly, to judgment- writing.

85. The recess of between 4 weeks -6 weeks in a year for the High Court was removed by Parliament vide the High Court Organization and Administration Act, 2015. Traditionally, that is the time when judges used to write judgments. However, due to some misnomer that judges were having a rosy affair during the recess, the vacation was removed from the Judicature Act.

86. What the Act literally speaking contemplates is that decisions are expected to be delivered on the spot. Perhaps it requires Parliament to take a tour of duty of the Judiciary to appreciate the magnitude of the problem. And what about quality of the decisions expected within the stipulated timeframe? Should a court of law render a decision for the sake of it?

87. There are about 312 working days in a year thus 26 days per month x 12 months. On average, anecdotal evidence shows that each judge in the Judicial review Division handles 18.5 cases per day.

88. A Kenyan judge of the High Court is never on leave. Those who take leave are in their chambers daily, writing judgments, due to the number of cases. Majority of judges work for 18 hours a day.

89. It is now 1.03 am and on a Saturday night- Sunday morning and yet I have not gone to bed because of writing judgments, this ruling included. I provide this graphic image not because Iam in arrears or seeking any sympathy from anybody but painting the stark reality, noting that in the Judicial Review Division, every case appears to be under certificate of urgency with unsustainable pressure only

equivalent to that of pregnant mother who is due to deliver and therefore delay means a still birth.

90. Therefore, whereas this court appreciates the objectives of the Act, nonetheless, expedition cannot override justice and if that were not to be the case, illegalities will be countenanced by the court merely because an offending party is over zealous to complete the development project which might go counter the objectives of the Act in achieving or promoting integrity, fairness, transparency and accountability of procurement and asset disposal procedures. Deserving litigants are likely to suffer injustice if time in the determination of the dispute is limited to 45 days for all cases filed.

91. In addition, this court finds that in limiting the period for determination of Judicial Review applications to 45 days the legislature was being over ambitious and blind to the doctrine of separation of powers. The 2nd respondent is a self accounting state corporation and therefore a part of the executive and by strictly calling upon it to implement the project if the decision of the court is not rendered in 45 days by the High Court, that is a deliberate encroachment to the operational independence of the judiciary.

92. According to **Sir Professor William Wade in Administrative Law, 8th Edition page 708,**

> ***"Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The judges, with their eye on the long term and the rule of law, have made it their business to preserve the deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."***

93. Furthermore, the procedure applicable for the conduct of Judicial Review in public procurement matters, is Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure rules. Forty five days from 18th October, 2016 would have been on 2nd December, 2016.

94. In **Republic Communications Commission of Kenya & 2 Others Exparte Television Network Ltd CA 175/2000 [2001] KLR 82; [200] 1 EA 199** the Court of Appeal stated:

> ***" The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted….."***

95. Similarly in **Mike J.C. Mills & Another Vs The Kenya Posts & Telecommunications Nairobi HC Miscellaneous Application 1013/1996**, it was held inter alia :

> ***"the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application"***

96. As was correctly observed by Nyamu J in the exparte **Selex Sistemi Integrati** case, I find that the procedure for Judicial Review set out by the Public Procurement and Disposal Act and more particularly Section 175(3) and (5) is in conflict with that laid down by the Law Reform Act and Order 53 of the Civil Procedure Rules. For example, according to Section 175(1) of the Act, Judicial Review must be commenced within 14 days from the date of the decision of the Review Board whereas under Order 53, of the Civil Procedural Rule, the applicant has to file the substantive motion within 21 days of the date when leave was granted.

97. And whereas the Public Procurement and Asset Disposal Act, 2015 sets out the time line within which the Judicial Review proceedings must be determined, the Civil Procedure Rules (Order 53) does not. It is therefore arguable that the novel procedure introduced by the Public Procurement and Asset Disposal Act is impractical and is likely to lead to a miscarriage of justice.

98. In addition, it cannot be gainsaid that some Judicial Review proceedings raise extremely weighty issues that need time be considered, in view of the bulky and complex issues involved, no court of law

is expected to pay lip service to such serious issues merely because it has to beat the deadline set by Parliament which is nonetheless a key stakeholder in the judicial process but who do not the shoe of a judge who, on a daily basis comes from the court room with 4-5 files reserved for judgments and or rulings, with no extra time allocated to him or her to consider and write such decisions.

99. In **Republic vs PPARB & Another Exparte Wajir County Government [2016] e KLR,** although the court observed that it is not for the court to interpret legislation in a manner that completely altars the legislative intent by the enactment and I agree that where there is a lacuna in law, the recourse is to move Parliament to correct the same and not to urge the court to, in effect, amend the same as it is not within the competence of the court to assume that Parliament made a mistake as Parliament is presumed not to make mistakes, and that if blunders are found in the legislation, they must be corrected by the legislature not the functions of the court to repair them, and whereas I agree that one of the objects of the Act is speed hence public policy is geared towards expeditions resolution of disputes in public procurement matters; regrettably, the presumption that the legislature never goes wrong is a rebuttable presumption which existed in the old order when Parliament reigned supreme.

100. In the new constitutional dispensation, it is the Constitution which is supreme as espoused in Article 2 of the Constitution. The Constitution all persons and all state organs at both the National and County levels, and any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the constitution is invalid.

101. It therefore follows that the court's loyalty is to the Constitution, for, it is the same Constitution that gives the courts the power to strike down laws or policies that are inconsistent with the Constitution.

102. It is for that reason that I agree with Hon Odunga J's declaration in the KRA case that:

> ***"whereas Nyamu, J and Musinga, J in the above cases did not expressly carry out their opinions to their logical conclusion based on what Nyamu, J deemed the inability to make declaratory orders in the matter before him, on my part I have no hesitation in declaring which I hereby do that section 100(4) of the Public Procurement and Disposals Act, is unconstitutional and is therefore inconsequential. Since the enactment of the Fair Administrative Action Act, 2015, a piece of legislation which I must observe in passing suffers from a similar malady in its section 8, this Court now has the power, thanks to section 11 thereof, to make declaratory orders. It must also be noted that under Article 23 of the Constitution this Court has jurisdiction to issue declaratory orders.***
>
> ***93. Consequently, I hold that this Court has the jurisdiction to entertain these proceedings and that the decision of the Respondent has not, by operation of law, taken effect."***

103. In the same vein, I have no hesitation in invoking Article 23 of the Constitution and holding that section 175(3) and (5) of the Public Procurement and Asset Disposal Act No. 33 of 2015 is inconsistent with the values purposes, values and principles of the Constitution and therefore unconstitutional and inconsequential to these proceedings. Accordingly, the decision of the Review Board, the 1st respondent herein has not taken effect by operation of law as cited by the 2nd respondent.

104. Article 159(2) of the Constitution is clear that in exercising Judicial authority, the courts and tribunals shall be guided by the principles, among others:

> ***a. Justice shall be done to all, irrespective of status;***
>
> ***b. Justice shall not be delayed.***
>
> ***c. ….***
>
> ***d. …….***

e. The purpose and principles of this Constitution shall be protected and promoted.

105. One such other principle of the Constitution as espoused in Article 160 of the Constitution is independence of judiciary in the exercise of judicial authority as constituted by Article 161, and to be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.

106. The House of Lords in **Regina V Soneji and Another [2005] UK HL 49,** where the question of rigid mandatory and directly distinctions of legislative enactments was considered elaborately, it was stated:

> ***" 23. Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in AG's Ref. No. 3/99, the emphasis ought to be on the consequences of non compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. In my view it follows that the approach of the Court of Appeal was incorrect."***

107. Applying the above decision though persuasively, I would find, without hesitation that such an interpretation would not render wholly ineffective the Parliamentary intent of providing for a specific time limit. The context of this case requires a purposive interpretation, in line with statutory provisions as a whole in order to determine whether or not the failure to determine the Judicial Review application within the stipulated 45 days is of such great significance as to make the whole purpose of judicial review proceedings an nullity; and having regard to the fact that currently, there are many Judicial Review proceedings pending in court undetermined beyond the 30 days of Section 100 of the repealed statute and section 175 of the 2015 statute.

108. In my humble view, this court would not lose its jurisdiction to make determinations which are fair and just if it decided the Judicial Review proceeding after the lapse of 45 days from the date of filing of the Judicial Review application.

109. Iam fortified by Odunga J in **MISC APP 250 of 2015** in the **KRA** case citing several decisions where the learned Judge held, inter alia:

110. ***"It was accordingly held by Rawal, J (as she then was) in Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331 that:***

> ***"Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."***
>
> ***74. In Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57 the Court of Appeal expressed itself as follows:***
>
> ***"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle." See Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.***
>
> ***75. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognized remedy covering the facts of a particular case,***

"Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.

76. That the law must of necessity, adapt itself to the changing social conditions and not lay still was similarly appreciated in Kimani vs. Attorney General [1969] EA 29.

77. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's 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 is achieved. As was rightly stated in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008 it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.

111. I therefore agree with the exparte applicant that Parliament in its wisdom did not intend Judicial Review proceedings to fail in all cases where the time frame contained in Section 175 of the Public Procurement and Asset Disposal Act was not observed. I would therefore proceed to hold that failure to keep the timeline of 45 days stipulated in Section 175(3) of the Act does not invalidate the final order of this court in Judicial Review.

112. **The Regina V Soneji** (supra) case captured the above point more succinctly as follows a page 31 of the judgment that:

"65. The traditional consequence of finding that a provision was merely directory was that substantial performance would constitute a sufficient compliance with the statutory requirement. This concept can be more readily applied where a statute prescribes an exact method of sequence of carrying out specific acts or a time within which they are to be performed. A minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid. A convenient example is to be found in Foyle, Carlingford and Irish Lights Commission V MC Gillion [2002] NI 861 in which it was held that an appellant's failure to serve a copy of a case stated upon the opposite party within the prescribed time was directory and that accordingly late service did not bar his appeal."

113. The court in the above case approached the determination on the basis of "exceptional circumstances" and went on to state at paragraph 66 as follows:

"66. The present case may be approached via this broad construction of "exceptional circumstances." The trial judge, who was best placed to decide the issue of confiscation, was not available to hear that issue within the sixth month period laid down by Section 72A(3). The reason was that he was committed to other cases because of the heavy lists in his court. Other cases may arise where the judge is prevented by illness or some other pressing reason from dealing with confiscation within the prescribed period. The judge himself said, in a somewhat resigned fashion, that listing problems are not exceptional, being an

unhappily common occurrence in these times. He would nevertheless have heard the case within time if he had been free to do so, and I consider that one can properly regard the circumstances as exceptional for the purposes of Section 72A(3).”

114. I cant agree more with the above holding and add that the daily cause list for each of the two judges in the Judicial Review Division at Milimani Law Courts is a minimum of 18 cases. Besides the cause listed matters, each judge is a duty judge per week thereby responsible for handling all certificates of urgency and sometimes encountering highly emotive urgent political disputes that require exceptional sacrifice to render a determination in a record time. Each duty judge also takes away all the new matters adding them to his or her old matters. In a day, 5-10 certificates of urgency are filed. I need not say more, for, that is not to say that the court would nevertheless not hear the cases within time if it had been free to do so.

115. It is also not to say that the court should stretch the provisions of the law to say that Parliament would have so intended that time for determination of public procurement matter is indefinite.

116. This is also not to say that an act done outside the statutory prescribed time is valid. However, if the court has done its best as I believe I have done in this matter and the record speaks for itself, with full and active participation of the parties advocates to ensure that the matter is heard and determined expeditiously, in my view, in the absence of any evidence of prejudice that would be occasioned to any party by regarding the act done out of time as valid, then in my view, this court is entitled to depart from the literal interpretation of Section 175(3)(5) of the PPADA in order to render justice to the parties, which, at all times, is the approach which is consistent with the provisions of Article 159 of the Constitution and the intention of Parliament and that is the proper way of ensuring that Parliament’s intention is carried into effect, so that, as was held in **Savanna Development Company Ltd. vs. Mercantile Finance Company Ltd Nairobi HCCC No. 2113 of 1989 [1992] KLR 463.**

…”litigation must be got on with at a reasonable speed – reasonable expedition, not too quickly; not too slowly, for, in the administration of justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceeding sluggishly fossilizes it.”

117. The court in the **Selex Sistemi Integrati** (supra) case was dealing with a novel, untested and complex situation to unravel and as stated by the learned judge:

“…….and perhaps arising for the first time and without precedent ….with effect, both the legislative and the draftsman appear to have had in view only the interest of sped, expediency, efficiency and finality in procurement matters at the expense of justice and the clear objectives set out in Section 2 of the Procurement Act.” ……whether or not Section 100(4) is effective as an ouster provision raises complex questions of law unsuitable for preliminary objection.”

118. The above decision of Justice Nyamu J (as he then was has never been overruled by the Court of Appeal. It has stood the test of time since 2nd May 2008. It can safely be said that the decision should be rewritten in similar circumstances with necessary modifications as I have done herein.

119. It is for the above reasons that I find that indeed, determining Judicial Review matters arising from public procurement should be considered in line with the wise reasoning of Honourable Justice Nyamu J (as he then was) in the exparte **Selex Sistemi integrati** case, having regard to the disproportionate ratio of judges vis avis the population in this new constitutional dispensation and that to achieve the ideal of a timed determination of sometimes complex procurement matters whose documents (mostly tender documents) are invariably voluminous and also accompanied by complex technical data, giving a determination within 45 days could have been achieved at the expense of quality justice and other matters before the court.

120. Creation of Judicial Review as a division of the High Court in Nairobi was an extremely noble idea

in the new constitutional order for, judicial review remedy has been elevated by the Constitution to a constitutional remedy and therefore sufficient time must be allocated to the courts to examine the applications brought before it for a judicious and well reasoned determination.

121. In the end, I find that it is in the interest of the overriding objectives of case management that no group of litigants are entitled to more judicial time than others. There are, as earlier stated, many more Judicial Review cases that have gone beyond the 45 days since the new Act was enacted and to strike out this matter would be to strike out all other matters filed over 45 days ago.

122. In order to inspire confidence in the court users, the court must be proportional, fair and equitable in the allocation of judicial time. **Gravells 978 pages 383-**4 stated as follows concerning striking of a balance in fast tracking certain cases.

> ***" It is arguable that (this) is a fundamental issue underlying much modern administrative law……ultimately, every challenge to administrative action can be seen to represent a conflict between on the one hand, the constitutional priorities of expediency and finality. Since however, there is in reality no typical administrator, it follows that the resolution of those conflicting priorities will tend to vary with the particular process in question, different considerations will apply in different contexts and the reliance of the same considerations will vary according to circumstances. In other words there can be no such thing as a general solution; rather there must be a series of particular solutions."***

123. It is for the above reasons that I find that in determining the issues raised in this case, I fully associate myself with the decision in **Selex Sistemi Integrati** by Nyamu J and the **KRA** decision by Odunga J which decisions are fit for re-writing in the same language. Although the said decisions were in respect of the repealed Act and with Hon Nyamu J's decision being delivered in the old constitutional order, I find that the two decisions were written and considered in the spirit and letter of the new constitutional dispensation. Section 100(4) of the repealed Act, in my view, is the same as Section 175(3)(5) of the new 2015 Act combined, with the difference being the number of days of determining Judicial Review application in public procurement matters.

124. Although counsel for the 2nd respondent vigorously relied on several decisions that concern limitation of time, none of those cases had the same circumstances or was in *pari materia* as this particular case as the **Selex Sistemi Integrati** case.

125. The **Kiptoo (supra)** case was concerned with alternative remedies and procedures or mechanisms and not time frames stipulated in the Act hence it is useful but irrelevant in the circumstances of this case.

126. Mr Muga also relied on time lines set by the Elections Act and applied several decisions of **Christine Talaam** including the Nigeria Supreme Court cases but again, the cases however useful, were irrelevant as far as this case is concerned as it is not an election petition grounded on Article 87 (1) of the Constitution which stipulates that Parliament shall enact legislation to establish **mechanisms for timely settling** of electoral disputes.

127. The language of the Constitution in Article 227(1) is different from that of Article 87(1). Article 227(1) speaks of the **system *which is fair, equitable, transparent, competitive and cost effective*** and not time bound. it is for that reason that I agree with Mr Kiplangat that the limitation under the new procurement law is unreasonable and therefore the detailed interpretation that I have given to it.

128. And as was held by Odunga J in the **KRA** (supra) case:

> ***"It must be appreciated that election petitions are exceptionally special proceedings. They are special in the sense that such disputes do necessarily come with election cycles hence as opposed to procurement disputes, election petitions are not everyday disputes. They come once in every 5 years as stipulated in the Constitution and therefore must of necessity be determined before the***

next election cycle in order to promote democratic principles. Accordingly, they are disputes which are capable of being determined within the statutory timelines by reorganizing the judiciary for the limited period of the petitions. The same cannot be said of procurement disputes which arise on a daily basis and which have become the bulk of the litigation in this High Court Division. Accordingly, I find that the decisions arising from election petitions though express the law in that field are not necessarily applicable to procurement disputes and I am reluctant to adopt them line, hook and sinker."

129. The learned judge further stated:

"92. It is therefore clear that the Constitution itself imposed an obligation on Parliament to enact legislation to ensure that election disputes are settled timely. This position is traceable to our past history where it was not unheard of for election disputes to spill over to the next cycle of elections thus defeating the whole purpose of filing election petitions. The timelines enacted under the Constitution and the Elections Act relating to electoral disputes settlement are therefore justified by our history and experience, which led the people of Kenya to deem it fit that specific timelines be set for the determination of electoral disputes. Accordingly the timelines in settling election petitions ought to be seen in light of the historical context." As was held in Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA.

130. Similarly, the issues raised in the **Republic Vs Wajir County Government** case related to Section 175(1) of the Public Procurement and Asset Disposal Act which provides for time for instituting or **commencement** of Judicial Review challenging the decision of the Review Board and not for **determination of** the Judicial Review proceedings once commenced hence the case is not applicable to this instant case, where there is no issue with commencement of the proceedings.

131. As correctly observed by Honourable Odunga J in **Republic vs KRA Exparte Webb Fontaine Group FZ-LLC & Others (KRA)** (supra))case, to adopt a literal interpretation of Section 175 (3) & (5) of the Act as proposed by the 2nd respondent under the current judicial set up would amount to punishing persons who come to court to seek justice for reasons beyond their control. To do so would abet impunity.

132. In addition, to subject judges to timeframes within which to determine public procurement or judicial review matters that come to court on a daily basis throughout the year, unlike election petitions which only appear once in five years in an electoral cycle, is, in my humble view, to subject judges and staff working under them to outright slavery, servitude and forced labour in violation of Articles 30 and 41 of the Constitution which espouses that a person shall not be held in slavery or servitude and or be required to perform forced labour; and the right to fair labour practices which include the right to reasonable working conditions.

133. Judges are servants of the people yes, but they ought not to be subjected to unfair labour practices by being made and or forced to work for more than 18 hours without rest throughout the year in order to deliver on their mandate. To demand that all public procurement matters and or judicial review cases be heard and determined within the stipulated timeframes without regard to the available judicial time and human and other resources that are available for such exercise will be subjecting the judges to conditions that will no doubt negatively impact on their physical and mental health, as the existing structure already makes them work beyond the 12 hours in a given day.

134. Qualitative research conducted by Ronald R. Grunstein, & D Banerjee, of Woolcock Institute of Medical Research, Royal Prince Alfred Hospital, Camperdown, Sydney NSW, Australia on **"The Case of "Judge Nodd" and other Sleeping Judges—Media, Society, and Judicial Sleepiness"**, whose objective was to Review cases of judicial sleepiness and subsequent outcomes, including media and community attitudes, revealed that extended work hours resulting in sleep deprivation and sleep disorders, such as obstructive sleep apnea has been found to affect judges' performance not only in the courtroom but behind the motorized wheel.

135. In addition, a study in 2014 by *Akira Bannai* & *Akiko Tamakoshi* on **The association between long working hours and health: A systematic review of epidemiological evidence** concluded that working long hours is associated with depressive state, anxiety, sleep condition, and coronary heart disease, blood pressure, respiratory sinus arrhythmia, and therefore an all cause high mortality rate.

136. It is therefore an opportune time for the people of Kenya and moreso, the honourable lawmakers who are representatives of the people to appreciate that judges are human beings and deserve to live and work not to work and live, for, they might never live to work. Perhaps the lawmakers ought to make some tour of duty of the judiciary to appreciate the magnitude of the issues before setting timeframes for determination of cases. In addition, if the Public Procurement Administrative Review Board did its work well in resolving disputes between parties then there would be minimal applications for judicial review of their decisions.

137. The Constitution having placed the duty of exercising judicial authority on the judiciary on behalf of the people, the courts ought to be permitted to work in an atmosphere that is conducive to the realization of its mandate without being seen to be at the sufferance of the legislature; and to carry out its judicial mandate to advance the constitutional principles, while trying to cope with the pressure to give rulings and judgments within a reasonable time frame, in the midst of a myriad of challenges that I have exposed in this ruling.

138. Therefore, a party to such proceedings who is a genuine litigant ought not to suffer the consequences of the court's inability to hear and determine the dispute in the stipulated timeframe as that would out rightly render disputants mere explorers in the judicial process thereby their right to accessing justice as stipulated in Article 48 of the Constitution being desecrated. This is not to say that judges will sit back and give themselves a holiday to hear and determine cases, but that in view of the scenario described in this ruling, they should be given latitude to hear and determine cases, with dedication and commitment, within reasonable time, having regard to the circumstances of each case.

139. The decision by Nyamu J in **Selex Sistemi Integrati** and the one by Hon Odunga J in **Republic vs KRA Exparte Webb Fontaine Group FZ-LLC & Others** are in my humble view, is in *pari materia* with this case and although this court is not bound by those two decisions, nonetheless, as I have no reason to differ from the holdings by the learned distinguished judges or to distinguish the two decisions with this case, I wholly adopt the reasoning in the two decisions with necessary modifications.

140. Accordingly, I find that the preliminary objection raised by Mr Muga counsel for the 2nd respondent is not well founded and flies in the face of very authoritative decisions which have stood the test of times. The preliminary objection which sought to oust the jurisdiction of this court to hear and determine this matter to its logical conclusion is hereby found to be misconceived and not in touch with the reality. I decline to uphold the preliminary objection and dismiss it. I find that this court has jurisdiction to hear and determine the judicial review proceedings herein which were filed over 45 days ago.

141. Costs shall be in the main motion which motion shall forthwith be set down for hearing on the next available date.

142. This ruling shall apply to Judicial Review 502/2016 with necessary modifications as to the parties and legal representation, as far as section 175 (3)(5) of the Public Procurement and Asset Disposal Act is concerned.

Dated, signed, and delivered at Nairobi this 22nd day of February, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Kiplangat for the exparte applicant

Mr Muga for the 2nd respondent

Mr Odhiambo h/b for Miss Maina for the 1st respondent

CA: George