



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 542 OF 2015

IN THE MATTER OF: ARTICLES 10,22,23,35 AND 227 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT NUMBER 3 OF 2005 (“THE ACT”)

IN THE MATTER OF: AN APPLICATION BY WEBB FONTAINE GROUP FZ-LLC FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT NUMBER 3 OF 2005(“THE ACT”), THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF: ARTICLE 10,35 AND 227 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: AN APPLICATION FOR ORDERS PURSUANT TO ARTICLES 22 AND 23 THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: A TENDER FOR SUPPLY, INSTALLATION, TESTING AND COMMISSIONING OF AN INTEGRATED CUSTOMS MANAGEMENT SYSTEM (ICMS) AND RELATED MODERNISATION SERVICES AT THE KENYA REVENUE AUTHORITY

BETWEEN

ELIAS MWANGI MUGWE.....PETITIONER

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

TRADEMARK EAST AFRICA.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

WEBB FONTAINE GROUP FZ – LLZ.....1ST INTERESTED PARTY

BULL SAS LTD.....2ND INTERESTED PARTY

RULING

1. These proceedings were commenced by way of a Petition dated 4th December, 2015 in which the following prayers are sought by the petitioner:
 1. **Pending the hearing and determination of this Petition, conservatory Orders be issued in terms of the Chamber Summons filed herewith.**
 2. **An injunction do issue compelling the 1st and 2nd Respondents to confirm by way of evidence to the Petitioner and to this Court whether or not in appointing the 3rd Respondent as an agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the provisions of Section 28 of the Public Procurement and Disposal Act were complied with.**
 3. **A declaration be issued to declare that the Respondents conduct infringed Articles 10, 35 and 227 of the Constitution.**
 4. **A declaration be issued to declare that in appointing the 3rd Respondent as its agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the 1st Respondent breached Section 28(1) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**
 5. **A declaration be issued to declare that in failing prevent and/or investigate the 3rd Respondent's appointment as a procuring agent in respect of the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services, the 1st Respondent is in breach of Section 28(2) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**

The Petitioner's Case

2. According to the Petitioner, the petition seeks to impugn and have declared unlawful, the procurement process by the 2nd Respondent relating to the Tender for supply, installation and commissioning of an Integrated Customs Management System (ICMS) and related modernization services, which tender was advertised in the local media and was stated as being conducted by "Trademark East Africa on Behalf of Kenya Revenue Authority" (the TMEA).
3. It was disclosed that upon the conclusion of the subject tender, the same became the subject of a Request for Review filed before the Public Procurement Arbitration Review Board (the Board). According to the Petitioner, it is the matters arising in the said proceedings before the Board that compelled the Petitioner to file the current Petition informed by the imperative to ensure that the subject procurement process is in compliance with the law, and in the event that the same is not, then the same must be stopped in the public interest. To the Petitioner, the subject tender is for the procurement of a system for revenue collection by the procuring entity, Kenya Revenue Authority (KRA), and it is in the interest of the public that the same be carried on lawfully to ensure that Kenyans get maximum revenue from the system that is eventually implemented.
4. To the Petitioner, in the course of the proceedings before the Board, it became crystal clear that the manner in which the tender was conducted did not comply with the law as stated in the **Public Procurement and Disposal Act** (the Act) and therefore the same poses grave danger of loss of

public funds exceeding Kshs. 1,000,000,000/=. It was the Petitioner's case that in its denial before the Board, KRA and TMEA were acting against public interest a position frowned upon by the PPARB which stated as follows:

“To uphold the 1st and 2nd Respondents argument on this ground would also endanger Public Interest since it would remove the procurement process from oversight by the Public bodies charged with the oversight function such as the Public Procurement Oversight Authority, the Public Procurement Review Board and all the other bodies charged with the mandate under the Law”

5. To the petitioner, in its ruling PPARB went on to find that contrary to KRA's assertion, the subject tender would be utilizing public funds. The Petitioner acting through his Advocates therefore wrote to the KRA and to the Public Procurement Oversight Authority (PPOA) posing the following questions:

- a. Is Trade Mark a duly appointed agent under the provisions of Section 28 of the Public Procurement and Disposal Act?
- b. Did KRA competitively appoint Trade Mark as its agent in compliance with Section 28 of the Public Procurement and Disposal Act?
- c. Was Trade Mark pre-qualified by the PPOA to act as a procuring entity in compliance with Section 28 (2) of the Public Procurement and Disposal Act?
- d. Was the entire subject procurement null and void?

5. Though it was the Petitioner's legitimate expectation that KRA and PPOA would address its concerns, this was not done and to the Petitioner, unless compelled by this Court, they shall not address these matters which have an obvious bearing on public interest. To the Petitioner, TMEA was not properly appointed to conduct the subject tender on behalf of KRA and hence the same is a nullity in law and an endeavour in vain which is contrary to public interest.

6. The Petitioner therefore seeks the following orders:

1. **Pending the hearing and determination of this Petition, conservatory Orders be issued in terms of the Chamber Summons filed herewith.**
2. **An injunction do issue compelling the 1st and 2nd Respondents to confirm by way of evidence to the Petitioner and to this Court whether or not in appointing the 3rd Respondent as an agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the provisions of Section 28 of the Public Procurement and Disposal act were complied with.**
3. **A declaration be issued to declare that the Respondents conduct infringed Articles 10, 35 and 227of the Constitution.**
4. **A declaration be issued to declare that in appointing the 3rd Respondent as its agent in the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority, the 1stRespondent breached Section 28 (1) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**
5. **A declaration be issued to declare that in failing prevent and/or investigate the 3rd Respondent's appointment as a procuring agent in respect of the tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services, the 1st Respondent is in breach of Section 28 (2) of the Public Procurement and Disposal Act and by extension Article 227 of the Constitution.**
6. **The Honourable Court be pleased to uphold the Articles 10and 227 of the Constitution by issuing an order of injunction :**
 - a. **Restraining the 2nd and 3rd Respondents from proceeding any further with the Tender for supply installation and commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority.**
 - b. **Compelling the immediate cancellation of the Tender for supply installation and**

commissioning of an integrated customs management system ICMS and related modernization services at Kenya Revenue Authority.

7. **This Honourable Court do issue such Orders and gives such Directions as it may deem mete, just and appropriate in the circumstances of this matter.**
8. **The Costs of the Petition be awarded to the Petitioner.**

Preliminary Objections

7. Before the Petition could be heard, the 1st and 3rd Respondents raised the following preliminary objections:

1. **The subject of the application and the petition herein is a complaint by the petitioner against the respondents relating to an alleged breach of law in public procurement process for *Supply, Installation, Testing and Commissioning of an Integrated Customs Management System (ICMS) and Related Modernisation Services at the Kenya Revenue Authority.***
2. **Under section 93 of the public Procurement and Disposal Act, 2005 (“the Act”), the petitioner or such other persons who claims to have suffered risks, losses and damage as a result of an alleged breach of duty by the procuring entity were to seek an administrative review in the manner prescribed under the “the Act”.**
3. **The Petitioner/Applicant has not shown that he referred the complaint for an administrative review in a manner under the “the Act”.**
4. **Whereas the Petitioner/Applicant admits knowledge of the proceedings before the Public Procurement and Administrative Review Board in Application No. 27 of 2015, he fails to demonstrate why he ignored to participate in the said proceedings being the first port of call in resolving public procurement disputes before filing this petition in court.**
5. **There are ongoing proceedings in the High Court Misc. Civil Application No.250 of 2015 and Civil Appeal No. 356 of 2015 emanating from the administrative review proceedings before the Public Procurement and Administrative Review Board within the meaning of section 100 of the Act. The Petitioner has not demonstrated why he did not seek to be enjoined in those proceedings instead of clogging the court with another suit on issues which are *sub judice* in other pending suits.**
6. **The conditions precedent to invoking this Honourable Court’s jurisdiction has not therefore been met for this Honourable Court to entertain the application and the Petition herein.**

7. **Accordingly, the proceedings herein are frivolous, premature; an abuse of the due process of court and the same should be struck out with costs.**

Submissions in support of the Preliminary Objections

8. In support of the preliminary objections, **Mr Kamau Karori**, learned counsel for the 1st interested party submitted that since the petition was expressed to be brought under Articles 22 and 23 of the Constitution, it was incumbent upon the petitioner to show that the matters complained of infringed his rights and freedoms under the Bill of Rights from Article 19 to 59 of the Constitution. It was contended that it was therefore necessary for the petitioner to show that the manner in which the procurement was undertaken infringed upon his rights.
9. However, learned counsel submitted, a reading of the entire complaint shows that the only complaint is that the procurement infringed Article 227 of the Constitution which according to him does not fall within the Bill of Rights. It was therefore contended that to that extent the Court lacked the jurisdiction to entertain this petition.
10. With respect to Article 35 of the Constitution, it was contended that that is not the same as infringement since the complaints in respect thereof arose after hence cannot amount to infringement of the petitioner’s rights.
11. According to learned counsel, even with reference to the procurement process there was nothing

- to show that there was any infringement. According to him, Articles 10, 35 and 227 which were relied upon have nothing to do with the Bill of Rights. It was contended that under Articles 22 and 23 of the Constitution, one has to identify that which is alleged to have been infringed.
12. According to learned counsel, since the findings of the Board are the subject of an appeal, it is trite that where a matter is before a competent Court it cannot be made the subject of collateral attack in the same Court. To learned counsel, there is a risk of embarrassment hence the principle of *sub judice* applies to deprive this Court of the jurisdiction to entertain the matter. Based on **Kenya Planters Cooperative Union vs. Kenya Commercial Bank and Others Petition No. 8 of 2014** and **Rich Productions Ltd vs. Kenya Pipeline Co. & Another [2014] eKLR** this Court was urged to strike out this petition.
 13. On behalf of the 3rd Respondent, **Mr Wanga** submitted that the petitioner's complaint relates to a procurement by KRA under the Public Procurement and Disposals Act. In his view there is a redress mechanism in section 93 of the said Act detailing how such disputes are to be dealt with and where a party is unhappy with the decision of the Board the party is at liberty to appeal pursuant to section 100 thereof or to apply for Judicial Review.
 14. It was contended that the dispute herein has been ventilated before this Court in JR No. 250 of 2015. Apart from that there is Civil Appeal No. 356 of 2015 before the High Court. It was contended that at the time of the filing of this petition, the petitioner was aware of the said proceedings and therefore ought to have addressed his grievances thereunder by applying to be joined to the said proceedings. It was contended that the remedies being sought in this petition could be properly granted in the said appeal or in the JR application.
 15. It was therefore submitted that this petition amounts to trivialisation of this Court's jurisdiction. To learned counsel, under Article 159 of the Constitution, this Court ought to promote alternative modes of redress which modes ought to be sought first. In support of his submissions learned counsel relied on **Peter Ochara Anam & Others vs. Constituencies Development Fund & Others [2011] eKLR** and **Bernard Samuel Kasinga vs. Attorney General & 7 Others Nairobi High Court Petition No. 402 of 2012** and strike out this petition.
 16. On behalf of the 2nd Respondent, **Miss Mburugu** submitted, while associating herself with the above submissions that the issues the subject of this petition are the same as those in HCCA No. 356 of 2015 hence the petition is sub judice as there is a likelihood of embarrassing the said proceedings. The Court was urged that in light of the provisions of Article 23 Rules, this Court ought to expedite these proceedings.
 17. **Miss Barno**, learned counsel for the 1st Respondent was contented with associating herself with the foregoing submissions.
 18. **Mr Arum**, learned counsel for the Petitioner as was expected opposed the objections. In his view, since the petitioner has never been a party to the proceedings referred to, these proceedings cannot be sub judice. In his view, these proceedings being in the nature of a constitutional petition under Article 22 of the Constitution which overrides all laws, sub judice is inapplicable.
 19. It was submitted that since the petitioner was not a candidate, section 93 is not applicable and he could not participate in the proceedings before the Board. According to the petitioner, there is a confirmation that Trade Mark was not qualified though this information was not disclosed. In his view there is a close connection between Article 227 and the right to information.
 20. To the petitioner the crux of the matter is Article 227 of the Constitution. Though the petitioner sought information, he only received a lukewarm response and it was not until these proceedings were instituted that there was Article 227 and the right to information. Since Constitutional petitions are timeless, it was contended that any Kenyan has a right to address any violation thereof.
 21. On behalf of the 2nd interested party, **Mr Marete** while opposing the objection, submitted that it was clear that the 2nd interested party's actions were being used as a shield in this petition and this, in his view was erroneous. He disclosed that his client was a candidate in the subject procurement. This matter, he contended was of immense public interest. Although the Board overruled the 2 other objections, it upheld the objection with respect to time. According to him, the issues in the Court of Appeal matter are therefore not the subject of this petition and similarly not the subject of the pending appeal.
 22. In his understanding, Articles 3 and 22(2)(c) of the Constitution leads to the conclusion that the objections were misplaced. According to him the petitioner was upholding Article 227 of the

Constitution hence under Article 258 of the Constitution the petitioner was properly before this Court. In this era of constitutionalism, it was submitted that this petition raises serious issues of accountability and transparency which the Court to rule upon hence the Court ought to determine the petition on its merits.

Determinations

23. I have considered the issues raised and which are the subject of this ruling.

24. Since the matter before me is a preliminary objection, it is important to consider the principles which guide determination of preliminary objections. In the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**, Law, JA was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

As for Newbold, P:

“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

25. Similarly, in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177**, it was held that:

“The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.”

26. Dealing with the same issue, Ojwang, J (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**, expressed himself as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or

if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”

27. It was contended that although the petition was expressed to be grounded on Articles 22 and 23 of the Constitution, the substance of the petition seemed to have been based on Articles 35 and 227 of the Constitution. With respect to Article 35, which no doubt falls within the Bill of Rights, it was contended that the issues being raised arose after the decision was made and therefore cannot be a basis of the infringement of the Bill of Rights. With respect to Article 227, it was contended that the said provision falls outside the Bill of Rights.
28. Before dealing with this issue it is important to rehash what Article 19(3) of the Constitution. The said provision provides:

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

29. It is therefore clear that the rights and fundamental freedoms in the Bill of Rights are not exclusive of any other rights whether recognised under any other part of the Constitution or under any other law. Therefore if there are any rights and freedoms conferred by Article 227 of the Constitution, they do not cease to be rights and fundamental freedoms simply because they are in a part of the Constitution which does not fall under the Bill of Rights. Whether or not Article 227 as read with Article 201 of the Constitution reserves rights (under Article 19(3)(a) the Bill of Rights only recognises rights and fundamental freedoms but does not confer them) or not is a matter which can only be determined at the hearing of the petition. What is however clear is that this Court is obliged under Article 20(3)(a) and (b) to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
30. It was contended that it was necessary for the petitioner to show that the manner in which the procurement was undertaken infringed upon his rights. In my view this objection seems to have been premised upon the principle set out in the case of **Anarita Karimi Njeru vs. The Republic**

(1976-1980) KLR 1272 and reiterated in the **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] KLR.** In the former, it was held that:

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

58. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Attorney General** (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

59. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

31. In my view, where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of, would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR**, declined to adopt the **Anarita Karimi** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

“Although section 84(1) was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154, the High Court interpreted the provision narrowly so as to

deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal...The narrow approach in ANARITA KARIMI NJERU was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*.”

32.I associate myself with the decision in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

33.Consequently, I decline to terminate these proceedings on the ground of lack of precision in the pleading.

34.According to those respondents who opposed the petition, since the findings of the Board are the subject of an appeal, it is trite that where a matter is before a competent Court it cannot be made the subject of collateral attack in the same Court. To learned counsel, there is a risk of embarrassment hence the principle of *sub judice* applies to deprive this Court of the jurisdiction to entertain the matter. The doctrine of *sub judice* is grounded on the basis that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits. See Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993 [1994] IV KALR 39.

35.This doctrine has its statutory recognition in section 6 of the *Civil Procedure Act* which provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

36.First and foremost the parties in the matter before the Court of Appeal is neither between the same parties herein or parties claiming under them since the petitioner herein cannot be said to be the *alter ego* of any of the parties in the said Appeal. Similarly whereas the issues on which the Tribunal made its decision terminating the proceedings before it and which issue this Court upheld was on the time bar, the issues before me are not on the same issues. Does the Court of Appeal have the jurisdiction to grant the reliefs that the Petitioner herein seeks? If the Court of Appeal reverses this Court’s decision, it will mean that the decision of the Board declining the request for review would be reversed and the Board would be enjoined to deal with the issues raised by the 2nd interested party herein. There is however no certainty that that is the course the Court of Appeal will adopt. Therefore to terminate these proceedings on the speculative nature of the said proceedings may occasion injustice to the Petitioner.

37.Similar arguments apply with respect to the appeal filed by the interested party in the High Court. In my view, the petitioner herein cannot be permitted to “hijack” the said appeal as it were and use it as a leverage to regurgitate his grievances touching on the violation of the Constitution.

38.It was however contended that the Petitioner could have participated in the proceedings before the Board. Section 93(1) of the *Public Procurement and Disposal Act* provides that:

Subject to the provisions of this Part, any candidate who claims to have suffered or to risk

suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

39. It is therefore clear that under section 93 aforesaid the only person who can seek administrative review is a candidate. The petitioner was obviously not a candidate and therefore could not take advantage of the said provision. The Respondents and interested parties who were seeking the termination of this petition, however contended that the petitioner could have sought to be joined to the said proceedings under section 96 of the Act. The said provision provides that:

The parties to a review shall be—

(a) the person who requested the review;

(b) the procuring entity;

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

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

40. It is clear that a person other than the procuring entity, the person who requested for review, who pursuant to section 93 must be a candidate, the successful candidate, any other person can only be a party to such proceedings if allowed to do so by the Board. In other words there is no automatic right to such a party to participate in such proceedings. It cannot therefore be said that the petitioner was at liberty to join the said proceedings.

41. Section 99 of the said Act however provides that:

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

42. Therefore any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights. In my view, 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 is 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, 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 Wenesi 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.**

43. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised 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.**

44. As was held in Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57 citing Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:

“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.”

45. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen’s rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See Rookes vs. Barnard [1964] AC 1129 and Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.

46. In Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to “illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

47. In the premises, I decline to accede to the Respondents’ position as I am not satisfied that the remedies available under the Act can be said to be efficacious, satisfactory and adequate. This was the position adopted by the Court of Appeal of Trinidad and Tobago in the case of *Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004* that where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court stated that:

“The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship’s words:

‘Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court’s process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights’”

48. Having considered the preliminary objection, herein it is my view that the same is unmerited and must fail.

Order

49. In the premises, the said objection fails and is dismissed. The costs therefor will however be in the cause.

50.Orders accordingly.

Dated at Nairobi this 3rd day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mumbo for Miss Barno for the 1st Respondent

Mr Gaya Ochieng for Miss Mburugu for the 2nd Respondent

Mr Kithumi for Mr Wanga for the 3rd Respondent

Mr Ahavi for Mr Karori for the 1st interested party