REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 255 OF 2016

IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 47, 48, 50(1), 73, 75, 156, 159, 165, 258, AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 10, 73, 75, 232 AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND THE BANKING ACT (Cap 488)

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE DECISION BY THE NATIONAL TRANSPORT AND SAFETY AUTHORITY TO ALLOW THE NATIONAL BANK OF KENYA TO ISSUE A TENDER SECURITY ON ITSELF IN TENDER NO. NTSA/ICB-014/2014-2015

BETWEEN

OKIYA OMTATAH OKOITI......................................1ST PETITIONER

NYAKINA WYCLIFE GISEBE.................................2ND PETITIONER

~VERSUS~

NATIONAL TRANSPORT

AND SAFETY AUTHORITY................................1ST RESPONDENT

NATIONAL BANK OF KENYA..........................2ND RESPONDENT

HON. ATTORNEY GENERAL...........................3RD RESPONDENT

RULING

Petitioners' Case

1. The subject of this ruling is the application dated 16th June, 2016 and the preliminary objection dated 22nd June, 2016.
2. The facts of this petition, according to the petitioners herein, **Okiya Omtatah Okoiti** and **Nyakina Wycliffe Gisebe**, are that on 20th March 2015, The National Transport and Safety Authority (NTSA) announced and posted the 'TENDER FOR DELIVERY, INSTALLATION AND MAINTENANCE OF SECOND GENERATION SMART-CARD BASED DRIVING LICENCE AND ASSOCIATED SERVICE'. Tender No. NTSA/ICB-014/2014-2015. According to the petitioners, their interest in the tender was informed by their understanding that driving licences are a very important document in the everyday lives of members of the public since not only do the driving licences ensure safety on our roads, they are relied upon as identification documents in many transactions involving the public, including accessing and gaining entry to buildings and secure areas, conducting banking and related services in the financial sector, and general movements across the country. In a nutshell, they allow one to be identified as a Kenyan in almost the same way the National Identification Cards do. In view of their interest stated above, the Petitioners set out to ensure that the laws governing public procurement were strictly followed hence, they decided to closely monitor the tender process which is the subject matter in these proceedings.
3. It was averred that the technical proposals and bid bonds for the tender were opened on 22nd April 2015, where 23 companies responded to the bid. In the public opening of the tenders, it was announced that the **National Bank of Kenya** (NBK), one of the bidders, had submitted a bid bond issued by themselves. However, no other bidder had submitted a bid bond issued by themselves given that the ***Banking Act*** expressly forbids such action. It was the Petitioners' position that, under the ***Banking Act***, the continued participation of the NBK in TENDER NO. NTSA/ICB-014/2014-2015 was unacceptable, because the document that was submitted by NBK to the tenderer, purporting to be a bid bond, was not one and can never be. To the petitioners, because the purpose of a bond is to shield the respective party to the contract from injury that would be caused by the non-performance of the other party under whatever circumstances, for a document to be considered a bid bond, it must possess two critical characteristics. Firstly, it must be a third party bond and the parties to a contract cannot issue to each other bid bonds drawn on themselves. Secondly, a bid bond must be a surety guarantee in the sense that the third party issuing it must guarantee to assume liability that may accrue to one of the parties to the contract.
4. The petitioners maintained that in the current case, NBK seems to be guaranteeing itself from its own non-performance an act which was also discriminatory to the other bidders who have taken out bid bonds from third parties and amounts to a blatant violation of Article 27 of the Constitution of Kenya 2010, on equality and freedom from discrimination. It was the petitioners' contention that the justification that the 1st Respondent, invoking its powers to determine how securities will be provided, allowed the anomaly is baseless as it is bound to act only pursuant to the law and cannot by tender document oust statutes or the Constitution. Despite the petitioners' protests that the decision to allow the 2nd Interested Party to issue a bid bond on its own behalf in blatant violation of the law, the 1st Respondent has never responded to the letter and it has totally ignored the caution and proceeded to award the Tender to the 2nd Interested Party, instead of disqualifying it.
5. The petitioners' case was therefore that the 1st Interested Party's decision to award the Tender to the 2nd Interested Party is untenable, unreasonable, illegal, unlawful and, therefore, unconstitutional, null and void *ab initio*, since it is tantamount to aiding and abetting illegal conduct.
6. The petitioners disclosed that the award of the tender was challenged by one of the bidders to the Public Procurement Administrative Review Board, which dismissed it. The bidder subsequently filed judicial review proceedings in the High Court which the 1st Petitioner joined. Unfortunately, on Monday, 13th June 2016, the bidder made an oral application to abruptly withdraw JR Misc. Civil Application No. 507 of 2015. The application was not opposed by any of the parties except

by the 1st Petitioner herein, who asked for time to find out why the same was being withdrawn and what considerations were there for the public interest in the rule of law in the matter. The Court adjourned the matter to Wednesday, 15 June 2016, to allow the 1st Petitioner herein make the inquiries he wished to make. However, having failed to get any information on why the JR application was being abruptly withdrawn, and how the public interest was protected in the action, the 1st Petitioner herein was left stranded as the stay orders vacated. This action paved the way for the commencement of these proceedings in which the petitioners urge this Honourable Court to annul the tender award for beinghaphazard, irregular, unreasonable, illegal, unlawful, capricious and, therefore, unconstitutional, null and void.

7. The petitioners consequently seek the following orders:

a. **A declaration be and is hereby issued that the decision by the National Transport and Safety Authority to allow the National Bank of Kenya to issue a tender security on itself in Tender No. NTSA/ICB-014/2014-2015was NOT done procedurally and in accordance with the Constitution of Kenya, the Banking Act, and the Fair Administrative Action Act 2015.**
b. **A declaration be and is hereby issued that the subsequent award of Tender No. NTSA/ICB-014/2014-2015 to the National Bank of Kenya is null and void *ab initio* and of no consequence in law.**
c. **A declaration be and is hereby issued that the 1st Respondent violated the rights and fundamental freedoms of the 1st and 2nd Petitioners to fair administrative action as enshrined in Article 47 of the Constitution of Kenya 2010, and in the Fair Administrative Action Act 2015, by failing/refusing to respond to their letter of May 26, 2015, titled "*Re: Request for comprehensive information on your discriminatory exemption of the National Bank of Kenya in Tender No. NTSA/ICB-014-2014-2015, from the requirement that bid bonds must be provided by third parties – cautionary notice made under articles 4(2), 10, 35, 22 & 258 of the constitution.*"**
d. **A declaration be and is hereby issued that the 1st and 2nd Petitioners are entitled to *payment of damages and compensation for the violation and contravention of their rights and fundamental freedoms by the 1st Respondent herein as provided for under Article47of the Constitution of Kenya, 2010, and the Fair Administrative Action Act 2015*.**
e. ***The court to assess the quantum of damages and compensation to be paid by the 1st Respondent.***
f. **The Honourable Court do issue and hereby issues an order compelling the 1st Respondent to pay *general damages, exemplary damages, and aggrieved damages under Article 23(3) of the constitution of Kenya 2010 for the unconstitutional conduct of the 1st Respondent.***
g. **The Honourable Court be pleased to issue and hereby issues a mandatory order quashing the award by the 1stRespondent to the2ndRespondentof *Tender No. NTSA/ICB-014/2014-2015*.**
h. **The Honourable Court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.**

8. Together with the petition, the petitioners filed a Notice of Motion dated 16th June, 2016 in which the petitioners seek the following orders:

1. **<u>THAT</u> the application be certified as urgent and be heard *ex parte* and service thereof be dispensed with in the first instance.**
2. **<u>THAT</u> pending the hearing and determination of the Application herein, this Honourable Court be pleased to suspend the award by the 1st Respondent to the 2nd Respondent of Tender No. NTSA/ICB-014/2014-2015.**
3. **<u>THAT</u> pending the hearing and determination of the Petition herein, this Honourable Court be pleased to suspend the award by the 1st Respondent to the 2nd Respondent of Tender NO. NTSA/ICB-014/2014-2015.**
4. **<u>THAT</u> consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**
5. **<u>THAT</u> costs be in the cause.**

9. While reiterating the aforesaid averments, the petitioners averred that in regard to the continuing violation of the Constitution and the ***Banking Act***, it is of utmost importance and urgency that the violations and threats to the Constitution be stopped by this Honourable Court without delay. To the petitioners, it is meet and just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.
10. The petitioners contended that unless the application is urgently heard and determined, the Applicants/Petitioners and the people of Kenya will suffer great loss and damage in the likely event that best practice, court orders, rules, regulations, statute and the Constitution continue to be violated. The Court was therefore urged that in view of the above, and pursuant to this Honourable Court's duty to promote and safeguard constitutionalism and the rule of law, it is now incumbent for this Honourable Court to determine the issues raised in this Application to ensure that best practice, rules, regulation, statute and the Constitution are protected, and that the law will henceforth be applied with certainty.
11. It was submitted that granted that the grant of an interim relief depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down, the circumstances herein are such that withholding of the interim relief sought will automatically tantamount to dismissal of the petition itself (as the 1st and 2nd Respondents will make the situation irretrievable by executing the awarded tender). Hence, there is an urgent requirement for orders to protect the main motion.
12. According to the applicant, since prayer (g) of the Petition seeks a mandatory order quashing the award by the 1st Respondent to the 2nd Respondent of Tender No. NTSA/ICB-014/2014-2015 for having been procured in blatant violation of the Constitution and the Banking Act (Cap 488), if the same is granted it would leave the Authority with no options but to retender strictly according to the law and due process. However, this will not be possible where the Court does not grant conservatory orders, and the 1st and 2nd Respondents implement the tender before the petition is determined.
13. In the circumstances, since the case will be rendered nugatory where the Petition succeeds after the tender has been executed, conservatory orders preserving the main motion herein need to be granted as a matter of urgency and priority.

<u>1st Respondent's Case</u>

14. In opposition to the application, the 1st Respondent (hereinafter referred to as "the Authority") filed a notice of preliminary objection in which the following grounds were raised:

> **1. The honourable court lacks the requisite jurisdiction to hear and determine the Petition and Notice of Motion application dated 16th June 2016 as filed herein by virtue of the express provisions of Section 96 and Section 100(2) of the Public Procurement and Disposal Act Cap 412A Laws of Kenya.**
>
> **2. The honourable court lacks the requisite jurisdiction to hear and determine the Petition herein as filed by virtue of being *res judicata* and that the facts and issues raised herein have already been litigated substantively and determined on their merits in PPARB application No. 56/2015 of 12th November 2015 between *symphony Technologies Limited (Kenya) & United Telecoms Limited (India) versus National Transport & Safety Authority* conclusively determining this matter.**
>
> **3. The honourable court lacks the requisite jurisdiction to hear and determine the Petitioners' purported Petition and Notice of Motion as filled herein on 17th June 2016 as the same contravene Article 22& 23 of the Constitution of Kenya and does not disclose any violation of constitutional right or fundamental freedom in the Bill of Rights to warrant the orders sought.**
>
> **4. The Petitioners' purported Petition is misconceived, incompetent, bad in law, incurably defective, frivolous and an abuse of process of this honourable court as the substance of the Petition os in regard to a procurement process in Tender No.**

NTSA/ICB-014/2014-2015 for the Supply, Delivery, Installation and Maintenance of the Second Generation Smart Card Based Driving Licence and Associated service which is duly provided for by the *Public Procurement Disposal Act* Cap 412A Laws of Kenya and has internal mechanisms for appeal or review with adequate remedies available to address the Petitioners' concerns.

5. It is only fair, just and proper that this honourable court protests the integrity of its proceedings and the law by striking out and/or dismissing the purported Petition and Notice of Motion application dated 16th June, 2016 and filed herein on 17th June, 2016.

15. The Authority also filed a replying affidavit. Apart from setting out its statutory mandate and the justification for floating the subject tender, it was averred that in preparing and processing the said Tender document, the Authority strictly complied with all the relevant provisions of the PPDA, 2005 and the Regulations. According to the Authority, clause 2.5.1 of the Tender Document permitted prospective tenderers requiring any clarification of the tender document to do so in writing vide email to the Authority and pursuant thereto, a number of prospective tenderers submitted inquiries relating to the tender document and the Authority duly responded to the inquiries in writing which responses were entailed in Addenda issued on diverse dates by the Authority. To the Authority, upon issuance of an addendum by a Procuring Entity the Addendum becomes part of the tender document and is binding upon the Procuring Entity and all tenderers.
16. It was disclosed that amongst the inquiries submitted to the Authority was by the **National Bank of Kenya,** the 2nd Respondent herein (hereinafter referred to as "the Bank")) concerning whether the Bank can issue its own bid bond or whether it would have to obtain the bid bond from an independent guarantee. Upon receiving the Bank's request for clarification on acceptability of tender security the Authority responded to the request for clarification through Addendum No. 2 issued on 10th April, 2015 and which was made available to all prospective tenderers in full compliance with the requirements of section 53(3) of the ***Public Procurement and Disposal Act, 2005*** (hereinafter referred to as "the Act") which mandates the Authority as a Procuring Entity to require bidders to provide tender security for their respective tenders.
17. According to the Authority, the decision of whether or not to accept a tender security as submitted by a tenderer is well within a procuring entity's purview and the exercise of such mandate solely lies with a procuring entity to the exclusion of third parties such as the purported Petitioners herein. To it, the basis for requiring tender security in a procurement process is to deter frivolous and irresponsible bids and to encourage bidders to fulfil the conditions of their respective bids. Therefore in accepting the tender security submitted by the Bank the Authority did so within its mandate and in any case needed no prior approval of other bidders as well as third parties such as the purported Petitioners herein in exercising its powers of accepting a renderer's tender security. It was averred that the respective bids in the subject tender were opened in the presence of tenderers and/or their representatives on 22nd April, 2015 and the names of the tenderers as well as their respective bid securities read out loud. Thereafter the Authority lawfully and procedurally proceeded with the procurement process in the subject tender and successfully completed the technical and financial evaluation process in strict compliance with the Act, the Regulations and the tender document and communicated to the evaluated bidders on the outcome thereof. Upon conclusion of financial evaluation the subject tender was awarded to the Bank, on account of having submitted the lowest evaluated bid.
18. It was the Authority's case that throughout the procurement process in the subject tender it endeavoured to fulfil and indeed fulfilled its obligation of ensuring fairness, integrity, transparency and accountability.
19. It was however disclosed that following notification of award of the subject tender the procurement process was halted by the Symphony Technologies Limited (Kenya) & United Telcoms Limited (India)which challenged the said tender process vide a Request for Review Application No. 56/2015 of 12th November, 2015: SYMPHONY TECHNOLOGIES LIMITED (KENYA) & UNITED TELCOMS LIMITED (INDIA) =VERSUS= NATIONAL TRANSPORT AND SAFETY AUTHORITY which Request raised the issues claimed herein by the purported Petitioners.
20. It was the Authority's case that under the Act and the Regulations, upon filing of a Request for

Review, the Review Board is mandated to obtain all the original documents in respect to the subject tender process for its consideration and scrutiny which documents include:- list of all the bidders and their contacts, all the original tender documents submitted by all the bidders, the original tender opening report, the original technical evaluation report, the original Tender Committee Report, the blank tender document, the notification letters and so on. It was averred that the above documents are submitted to the Review Board for scrutiny and to aid the Board in determining whether the tender process was procedural, lawful or otherwise and in this case the Authority availed to the Review Board all the above required documents, which documents were considered and scrutinized by the Board for purposes of identifying any anomaly and/or procedural/legal flaw in the tender process during which the Review Board had the occasion to appraise and scrutinize the said documents. At the conclusion thereof, the Authority delivered its decision on the Applicant's Review Application, wherein the Review Board found and dismissed the Request for Review Application in exercise of its mandate under section 98 of the Act.

21. It was contended that parties to a dispute must be afforded a fair hearing by the judicial or quasi-judicial authority which has the mandate to hear and determine the subject dispute. In this case, parties who were competently before the Review Board in Review Application No. 56/2015 were afforded a fair hearing and in making its determination on the Review Application the Board comprehensively considered the respective submissions made on behalf of all the parties.
22. The Authority's view was that in light of the Addendum No. 2 issued on 10th April 2015 by itself the said Addendum was only binding upon bidders and not third parties such as the Petitioners herein who were not candidates in the subject tender and that despite being ostensibly aware of the said Addendum No. 2 of 10thApril, 2015 the Petitioners herein had no locus to enquire into the validity thereof as the procurement process and any issues arising therefrom can only be competently lodged by bidders through the administrative and judicial mechanisms provided by the Act and the regulations thereunder.
23. It was reiterated that the issue of validity of the bid security supplied by the Bank herein was duly raised by Symphony Technologies Limited (Kenya) & United Telcoms Limited (India) in their Request for Review Application No. 56 of 2015 and the issue was conclusively addressed by the Review Board in its decision delivered on 11th December, 2015. Following the Board's decision of 11thDecember, 2015 Symphony Technologies Limited (Kenya) & United Telcoms Limited (India) opted to commence Judicial Review proceedings and filed Miscellaneous Application No. 507 of 2015 which proceedings ostensibly sought to challenge the decision of the Review Board on its merits and the 1st Petitioner herein was joined as a 3rd Interested Party in the said proceedings which were entirely withdrawn by consent at the behest of Symphony Technologies Limited (Kenya) & United Telcoms Limited (India) who were the Ex Parte Applicants therein. Upon the said withdrawal the 1stPetitioner herein was awarded costs which were to be borne by the Ex Parte Applicant therein as the 1st Petitioner herein claimed that he represented the public interest in the proceedings. It was contended that the 1st Petitioner consented to the withdrawal of the suit. However, despite having consented to the said withdrawal and being awarded costs thereon the 1st Petitioner alongside the 2ndPetitioner herein has mischievously and irregularly opted to file the instant purported Petition grounded on issues that have been conclusively heard and determined by the Board in the Request for Review No. 56/2015.
24. It was therefore the Authority's case that this Honourable Court lacks the requisite jurisdiction to hear and determine the Petitioners' Petition and Notice of Motion Application dated 16th June, 2016 as filed herein by virtue of being contrary to sections 96 and 100(2) of the ***Public Procurement and Disposal Act*** Cap 412A Laws of Kenya (hereinafter referred to as "the Act").
25. It was further contended that this Court lacks the requisite jurisdiction to hear and determine the Petitioners' purported Petition and Notice of Motion as filed herein on 17th June, 2016 by virtue of being contrary to Article 22 & 23 of the Constitution of Kenya and as the purported Petition does not disclose any breach of the Petitioners' constitutional right or fundamental freedom in the Bill of Rights by the Authority which warrants the issuance of orders sought. To the Authority, this petition is misconceived, incompetent, bad in law, incurably defective, frivolous and an abuse of process of this Honourable Court as the substance of the purported Petition is in regard to a procurement process in Tender No. NTSA/ICB-014/2014-2015 for the Supply, Delivery, Installation and Maintenance of the Second Generation Smart Card Based Driving License and

Associated service whose redress mechanisms are duly provided for by the Act. Further, the internal mechanisms for appeal or review provided in the Act can adequately and conclusively address the purported Petitioners' grievances.

26. It was reiterated that this Honourable Court lacks the requisite jurisdiction to hear and determine the Petition herein as filed by virtue of being *res judicata* and that the facts and issues raised therein have already been litigated substantively on their merits in Request for Review Application No. 56/2015 between *Symphony Technologies Limited (Kenya) & United Telecoms Limited (India) versus National Transport & Safety Authority* wherein the Review Board conclusively determined the issues raised in the purported Appeal.
27. It was the Authority's case that the orders sought herein would affect other parties who procedurally participated in the subject tender and the said parties have neither been enjoined to purported Petition nor duly served. The Court was therefore urged to exercise restraint before exercising its jurisdiction under Article 165 of the Constitution when the relevant State organs such as the Public Procurement Administrative Review Broad with the mandate to adjudicate upon the grievances has exercised the said mandate in accordance with the relevant provisions of the Act, parent statute relating to public procurement. It was contended that the Petition herein is purely an appeal against the decision of the Review Board in Review Application No. 56/2015. The purported appeal is disguised as a Petition yet the same has been instituted contrary to the express provisions of section 100(2) of the Act, 2005 and Article 22 and 23 of the Constitution.
28. The position adopted by the Authority was that the Petitioners' view of section 11 of the ***Banking Act*** Cap 488 was skewed on the following grounds:-

a. Section 11(1)(h) of the ***Banking Act*** does not place a blanket ban on banks to issue guarantees in favour of third parties.
b. The Petition is speculative as it alleges that the 2nd Respondent's tender security was fraudulent and reckless yet the Petitioners have not demonstrated an iota of recklessness and/or fraud in the 2nd Respondent's bid security.

29. It was contended that the project in the subject tender is of public importance hence ought not to be irregularly delayed by individuals such as the purported Petitioners who are pursuing personal interests under the guise of public interest. To the Authority, the importance and the public interest of the project in the subject tender herein cannot be overemphasized and the purported Petitioners' deliberate attempts to derail the project is overridden by the countervailing public interest in implementation of the project in the subject tender. The Court was urged to take into consideration the public interest of the project in issue, its value to the Kenyan citizens and the efforts the Authority has put in place to carry out the procurement process strictly in accordance with the law and the fact that the purported Petitioners' main intention and objective is to delay the implementation and or to defeat it altogether.
30. It was submitted that the Petitioner's sole grievance upon which the prayer is sought appears at paragraphs 9, 10 and 11 of the Notice of Motion Application and grounds 16-19 of the Petition and that the Petitioners' main issue is the Tender Security issued by the National Bank in form of a bank Security. However, to the Authority, the subject procurement process is complete and the Tender Securities has already been returned to all the Bidders.
31. The Authority submitted that the principles for grant of conservatory orders are well settled and have been reiterated by this Honourable Court on various occasions. To begin with, the grant of conservatory orders by this Honourable Court is entirely discretionary. This Honourable Court is therefore enjoined to exercise such discretion judiciously as it has held in various instances. The Authority relied on **Matatu Welfare Association (Suing Through Its Registered Officials Namely & 3 others vs. Cabinet Secretary for Transport And Infrastructure & 6 Others [2015] eKLR** and submitted that whereas this Honourable Court is clothed with the powers to grant appropriate relief, including conservatory order, an Applicant must claim that a right or fundamental freedom in the bill of rights has been denied, violated or infringed. The Petitioners herein have averred at paragraph 27 of their Application that particulars of violation of the Constitution are presented at paragraphs 44 and 45 of the Petition. However, My Lord, a mere glance at paragraphs44 and 45 of the Petitioners' Petition shows that the Applicants have hopelessly failed to disclose to the required degree of precision the manner in which the

enumerated provisions of the Constitution therein have been infringed by the 1st Respondent or at all and reliance was placed on **Anarita Karimi Njeru vs. The Republic (No 1) [1979] KLR 154; [1976-80] 1 KLR 1272** **and** **Stephen NyarangiOnsomu& another v George Magoha & 7 Others [2014] eKLR** **and it was submitted that** the Petitioners herein have embarked on a futile exercise of regurgitating provisions of the Constitution without setting out, to the required standard of exactitude, the manner in which such provisions of the Constitution have been infringed, if at all.

32. According to the authority therefore, the Petitioners' Petition herein does not disclose a *prima facie* case to warrant the grant of conservatory orders sought in the Application.
33. As regards the test on whether a real danger may be prejudicial to the Petitioners in the event that the conservatory orders are not granted by this Honourable Court as prayed in the Application it was submitted that the Petitioners' Application has fatally failed to disclose such danger hence this Honourable Court's discretionary power to grant conservatory orders cannot be invoked. In support of this position the Authority relied on **Martin Nyaga Wambora vs. Speaker of The County Of Assembly of Embu& 3 Others [2014] eKLR**, where **Mwongo, J** expressed himself as follows:-

"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

34. The Court was invited to note that the Petitioners' complaint is also anchored on the tender security issued by the 2nd Respondent herein during the procurement process of the subject tender. To the Authority, the basis for requiring bid security from bidders in a tender process is to deter frivolous and irresponsible bids and to encourage bidders to fulfil the conditions of their respective bids hence the purpose of a tender security is different from a performance security.
35. According to the Authority, a claim for conservatory orders ought to be made promptly, timeously and without delay and support for this contention was sought from **Matatu Welfare Association (Suing Through Its Registered Officials Namely & 3 others vs. Cabinet Secretary for Transport And Infrastructure & 6 Others** (supra) where it was held that:

"a party seeking the conservatory orders must also do so as soon as the threat of violation to his rights is brought home to him. Where a party waits until the last minute to bring the application, the Court may frown upon such conduct and may decline to grant such an applicant the reliefs he or she seeks."

36. In this case, it was contended by the Authority that the Petitioners' Application and indeed the entire Petition herein assail the tender process in the subject tender. Notably, the Petitioners have conceded they have all along been well aware of the entire happenings of the procurement proceedings in the subject from 20th March 2015 despite the fact that the Petitioners were neither bidders nor representatives of bidders in the subject tender. The period is more than a year and just about 8 months after the award of the Tender. It was submitted that the Petitioners herein have failed the test for prompt action in instituting the application for conservatory orders and that the Application for conservatory orders herein is hopelessly dilatory as the Petitioners have opted to wait until the tender process was completed, and an award made before instituting the instant proceedings to seek conservatory orders. The Court was therefore urged to frown upon the Petitioners' conduct in instituting the instant proceedings and should consequently decline to grant the conservatory orders sought.
37. It was argued that public interest ought to be considered by this Honourable Court before granting conservatory orders sought by the Petitioners and reliance was placed on **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others SCK Application No. 5 of 2014** **where the Supreme Court enunciated that public interest and proportionality ought to be taken into account when granting conservatory orders. To the Authority,** there is no doubt that the project in the subject tender is one that would greatly benefit all members of the public including the Petitioners

herein and therefore the public interest in implementation of the project in the subject tender therefore tilts in favour of permitting the project to be implemented by the 1st and 2nd Respondent. Further, public procurement processes involves deployment of scarce resources drawn from the public, and the continued delay occasioned by frivolous and vexatious court proceedings only occasions more strain to the public the said resources through payment of legal fees. In addition it was submitted that the Authority herein owes the Kenyan citizenry and the entire members of the public a pivotal obligation to implement its statutory mandate regarding issuance of driving licences and therefore conservatory orders that may potentially cripple it's execution of the said statutory mandate ought to be granted with caution. The Court was therefore urged to find that the conservatory orders sought herein by the Petitioners cannot issue as the Petitioners' deliberate attempts to derail the project is overridden by the countervailing public interest in implementation of the project in the subject tender. Consequently the Authority urged the Court to dismiss the Petitioners Application herein with costs.

2nd Respondent's Case

38. On behalf of the 2nd Respondent, the Bank herein, it was averred that the Application and the underlying Petition lacks merit and is self-serving as it seeks to re-litigate matters that have already been dealt with by the Public Procurement Administrative Review Board and the this Honourable Court to advance personal monetary interests and the interests of commercial entities couched as a constitutional and public interest matter. To the Bank, the Petitioners have intentionally withheld and/or concealed important facts relating to the tender process in order to blindside the Court into granting conservatory orders.
39. It was the Bank's case that at all times, in its dealings with regard to the Tender, it fully complied with the terms of the Tender Document pertaining to Tender No. NTSA/ICB-014/2014-2015, the repealed Procurement Act and the Public Procurement and Disposal Regulations, 2006 (hereinafter *"the Procurement Regulations")* and as such, the Award of the said tender to it was not only lawful but also merited. Following the Notification of Award, the Bank was later informed that the contractual processes could not be finalised due to an Application challenging the Award filed with the Public Procurement Administrative Review Board by a dissatisfied bidder being ***PPARB Application No. 56 Of 2015: Symphony Technologies Limited, (Kenya) & Another Vs National Transport and Safety Authority,*** in which review application the Bank was listed as an interested party. In the said challenge, the grounds raised were *inter alia* the validity of the tender security issued by the Bank to the 1st Respondent and whether the decision was in compliance with the principles of public procurement which are enunciated under Section 2 of the repealed ***Procurement Act and the Banking Act***.
40. The Bank contended that the Petitioners were not only aware of the procurement and tendering but were following the same keenly, including the proceedings at the Public Procurement Administrative Review Board. Nevertheless, while the Review Board allowed other interested parties to participate in its proceedings, the Petitioners herein chose not to participate and ventilate any issues they had. To the Bank, the Application before the Public Procurement Administrative Review Board was exhaustively heard and determined and a decision thereon delivered. Being dissatisfied with the decision of the Public Procurement Administrative Review Board in ***PPARB Application No. 56 Of 2015*** the said Bidders proceeded to file ***Nairobi J. R Civil Application No. 507 of 2015: R vs the Public Procurement Administrative Review Board Ex Parte Symphony Technologies Limited, (Kenya) & Another*** in which the 1st Respondent in the present Petition, the Bank and the 1st Petitioner who was an interested party therein supported the said Application, which among other orders, sought the tender to be awarded to Symphony Technologies and its partners, in essence, advancing the latter's commercial interests as opposed to any public interest.
41. It was further noted that the Petitioners have consciously omitted the body whose decision is essentially challenged, namely the Public Procurement Administrative Review Board, from the current proceedings. While citing various legal proceedings, the Bank asserted that it is apparent that in challenging the decision of the 1st Respondent with regard to the Tender Security, which decision was subject to the Public Procurement Administrative Review Board in ***PPARB Application No. 56 Of 2015,*** the Petitioners herein are seeking to have this Honourable Court sit

on appeal of the decision of the Public Procurement Administrative Review Board without following the procedures set out in the Act and complying with the relevant timelines. In the Bank's view, the nature of conservatory orders which are granted under **Article 23(3)** of the **Constitution** is to preserve the status of proceedings until the Petition is heard and determined and not to reach final findings of fact and law.

42. It was the Bank's case that the application for conservatory orders being an exercise of discretion ought to be dismissed since the Petitioners have not met the principles since: -

a. In view of the decision of the Public Procurement Administrative Review Board in ***PPARB Application No. 56 of 2015*** the Petitioners herein have failed to demonstrate a prima facie case against the 1st and 2nd Respondents as the said decision took into consideration all arguments raised with regard to the tender security and the ***Banking Act***.
b. The Petitioners are not seeking to retain the subject matter of the dispute in situ, but are seeking rights which will adversely affect not only the 2nd Respondent but also the public as the procurement process which was determined to have been carried out in accordance with the law by the relevant statutory body will be left in limbo.
c. The Petitioners have not demonstrated how the Petition will be rendered nugatory and any manner in which the Court is required **to protect the subject matter from change, destruction or depletion as contemplated under Article 23(3) of the Constitution.**
d. **It is in the public interest that the** *proportionate magnitude of the Orders sought be weighed and that* this Court does not evaluate all the issues in contention within the Petition at this stage.

43. The Bank therefore prayed that the application be dismissed with costs.

3rd Respondent's Case

44. In opposition to the application the 3rd Respondent filed the following grounds of opposition:
    1. **THAT the petition filed herein is ill-conceived and an abuse of the process of the Court and the same ought to be dismissed;**
    2. **THAT the application portends that the Constitution unsettles other laws of procedure and administration of justice. Particularly section 100 of the Public Procurement and Disposal Act, No. 3 of 2005;**
    3. **THAT the claim herein is disguised appeal/review challenging the decision of the Public Procurement Administrative Board's decision in Application No. 56 of 2015;**
    4. **THAT the claim herein is a disguised appeal/review challenging the decision reached by parties in JR Case No. 507 of 2015.**

Determinations

45. I have considered the issues raised in this application.

46. Since the Respondents raised the issues revolving around this Court's jurisdiction, it is important that the said issue be resolved *in limine*. This was the position adopted by as was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**:

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

47. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It**

is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

48. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

49. The first objection to jurisdiction was based on the fact that there is a procedure under the Act which the petitioners herein ought to have adopted instead of invoking this Court's supervisory jurisdiction. Section 93(1) of the repealed 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.

50. The crucial phrase here is "any candidate". Therefore for one to be entitled to apply for review under the aforesaid section the applicant must be a candidate. A candidate is defined under section 3 of the Act as "a person who has submitted a tender to a procuring entity". The petitioners' do not claim to have been candidates. A strict reading of section 93(1) clearly locks out the petitioners from the purview of the review by the Board for the simple reason that if they were not candidates as defined under the Act they could not invoke the jurisdiction of the Board under section 93 for the resolution of their disputes. Apart from that the petitioners contend that they sought information from the Authority but they were not furnished with the same. If the petitioners' case is correct, it would therefore seem that the petitioners are locked from disputing the decision of the Authority for lack of locus standi. Can it therefore be said that the ex parte applicants have an effective remedy under the Act? In my view I do not think so. 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** (supra) 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 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.**

51. The law is a living thing and 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 causes damage to the property of another. In that event the rule of law will give way to anarchy and impunity. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

52. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. In the present case the petitioners cannot move the Board in order to have their grievances solved for the simple reasons that they do not have locus before the Board. The court in the modern society in which we live cannot deny them a remedy. Our Constitution under Article 1 obliges every person to respect, uphold and defend this Constitution. Article 258 of the Constitution on the other hand provides as follows:

> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members.***

53. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the petitioners have a right they 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.**

54. 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". I fully agree and only wish to add that to allow the preliminary objection based on jurisdiction is likely to render the ex parte applicants remediless and would lead to a situation where in order to avoid transparency in procurement procedures the Procurement Entities would simply award tenders clandestinely and when challenged claim that the Court has no jurisdiction

knowing very well that at that stage the aggrieved party would not be able to obtain any remedy from the Board. Accordingly I find that the taking into account the issues for determination herein the Court's jurisdiction is not limited and/or restricted by the repealed ***Public Procurement and Disposal Act***.

55. Taking into account the foregoing determination I hold that this Court has jurisdiction to entertain the issues raised herein.

56. It was further contended that the issues the subject matter of these proceedings were similarly the subject of ***PPARB Application No. 56 Of 2015: Symphony Technologies Limited, (Kenya) & Another Vs National Transport and Safety Authority.*** Following the Board's decision of 11th December, 2015 Symphony Technologies Limited (Kenya) & United Telcoms Limited (India) opted to commence Judicial Review proceedings and filed Miscellaneous Application No. 507 of 2015 which proceedings ostensibly sought to challenge the decision of the Review Board on its merits and the 1st Petitioner herein was joined as a 3rd Interested Party in the said proceedings which were entirely withdrawn by consent at the behest of Symphony Technologies Limited (Kenya) & United Telcoms Limited (India) who were the Ex Parte Applicants therein.

57. It is not in doubt that in the said judicial review proceedings, the 1st petitioner herein was an interested party. The same proceedings were however withdrawn by the applicant who instituted them before the issues therein could be determined on merits. In other words those proceedings were not compromised. In those circumstances nothing bars the petitioners herein or even the applicant in those proceedings from instituting fresh proceedings challenging the said decision since there is no res capable of becoming judicata.

58. It was further contended that the petition suffers from lack of precision. This argument has found favour with the decisions of **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance, CANO 290/2012 [2013] eKLR,** for the proposition that infringement of human right and fundamental freedoms must be stated with precision and not merely generalized devoid of proof thereof. 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 applicant 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 in 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.

60. 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.

61. In the foregoing premises the preliminary objections which were raised by the Respondents herein are disallowed and I will now proceed to consider the merits of the application.

62. There were a number of issues raised which I am not prepared to delve into at this stage of the proceedings. In determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings of either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application. As **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

> **"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

63. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

> **"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."**

64. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

> **"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."**

65. This position was adopted by the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, the Court held as follows at paragraph 86 and 87:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

i. **the appeal or intended appeal is arguable and not frivolous; and that**
ii. **unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.**

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

66. The first issue for determination is therefore whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.
67. In this case, it is contended that the decision by the Authority flies in the face of the Constitutional provisions since by awarding the tender to the Bank, the Authority violated the principles of public procurement. Article 227(1) of the Constitution provides as follows:

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 fair, equitable, transparent, competitive and cost-effective.

68. Therefore where it is alleged that in awarding the tender the subject of the legal proceedings before the Court, the relevant constitutional provisions were not adhered to, such contention if true may well justify the filing of a constitutional petition.
69. Having considered the foregoing, it is my finding that considering the issue raised, this petition raises *prima facie* arguable issues for trial. In other words it cannot be said that the petition is wholly frivolous or unarguable at this stage.
70. Having passed the first hurdle the second issue is whether the petitioner has satisfied the provisions of Article 23(3)(c) of the Constitution.
71. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.
72. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In this case, the only violation of fundamental right is the right to information under Article 35 of the Constitution. Apart from that, the Petitioner’s *locus* seems to be derived from the provisions of Article 258 of the Constitution

which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with contravention. Apart from themselves, the petitioner has not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights of other persons which they allege to have been denied, violated or infringed or are threatened in order to justify the grant of conservatory orders. In my view, an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that his right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened.

73. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional, that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3)(c) of the Constitution.

74. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory orders under Article 23(2)(c) of the Constitution. What I am saying is that the applicant must go further and show that his allegations bring him within the provisions of Article 22 as well. This Court has of course held that in general conservatory orders are orders in rem and not in personam. However the Constitution itself gives an indicator as to when conservatory orders may be granted.

75. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

> **"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".**

76. Apart from that as the Supreme Court appreciated in ***Munya Case*** (supra), the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution. This view resonates with that of **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606, that:

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

77. As is stated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said

Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

78. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. It has however been held that public interest dictates that the law be adhered to. This was the position in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where it was held thus:-

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

79. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination, especially where the Court is being called upon to exercise judicial discretion.

80. I therefore associate myself with the position of the Court of Appeal in **Kenya Hotel Properties Limited vs. Willisden Investments Limited & 4 Others,Nairobi Court of Appeal, Civil Application 24 of 2012** that:

> **"Turning to the issue of whether the Appeal raises an arguable point of "public interest", we wish to pause (sic) a question as to when public interest is put in motion. In the case of EAST AFRICAN CABLES LIMITED VS. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW &APPEALS BOARD AND ANOTHER [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:-**
>
> **'We think that in the particular circumstances of this case, if we allowed the Application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mills, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable**.'"

81. It is therefore my view that to grant the conservatory orders in the manner sought would be disproportionate to the mischief that is sought to be cured by such orders. As appreciated by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596), proportionality is "*a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues*".

82. In this case the petitioners contend that as a result of the violation of their rights to information, the Respondents have embarked on a process that is unconstitutional and in which the public runs the risk of losing a substantial amount of money due to lack of adherence to procurement

procedures which ensure that the public funds involved in the procurement process is secure. On the other hand the Respondents contend that the public interest dictates that the project ought to continue. Those interests in my view ought to be balanced pending the hearing and determination of the petition. Whereas the petitioners' case is that the Bank ought not to have been awarded the tender, the crux of their complaint revolves around the fact that the Bank submitted a bid bond issued by themselves instead of securing one from third parties.

83. Having considered the issues raised before me, it is my view that in order to secure the public interest which all the parties purport to be advancing, the project ought to be permitted to continue but on condition that the Bank secures a bond for half the sum of the award from a reputable third party financial institution. This is to be done within the next thirty days. In default of compliance the award by the 1st Respondent to the 2nd Respondent of Tender No. NTSA/ICB-014/2014-2015 shall stand suspended.
84. The costs of the application will be in the course.

Dated at Nairobi this 13th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omtatah the 1st Petitioner

Mr Agwara for the 1st Respondent

Mr Sisule for the 2nd Respondent