



**Gitau (Suing on His Own Behalf and on Behalf of the General Public) v Chairperson, NGCDFC-Njoro Constituency & 2 others; Rift Valley Driving Schools (SHG) (Interested Party) (Petition E015 of 2025) [2025] KEHC 16173 (KLR) (10 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E015 OF 2025  
PN GICHOHL, J  
NOVEMBER 10, 2025**

**BETWEEN**

**DANIEL KIMANI GITAU (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE GENERAL PUBLIC) ..... PETITIONER**

**AND**

**THE CHAIRPERSON, NGCDFC-NJORO CONSTITUENCY 1<sup>ST</sup> RESPONDENT  
PROCUREMENT OFFICER, NJORO CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT  
FUND ACCOUNTS MANAGER, NJORO CONSTITUENCY .. 3<sup>RD</sup> RESPONDENT**

**AND**

**RIFT VALLEY DRIVING SCHOOLS (SHG) ..... INTERESTED PARTY**

**RULING**

1. Simultaneously with a Petition dated 13<sup>th</sup> March, 2025, the Petitioner filed a Notice of Motion also dated 13<sup>th</sup> March, 2025 under a Certificate of Urgency and expressed under Articles 227 and 201 of [the Constitution](#) of Kenya, 2010, Rule 13, 23, and 24 of [the Constitution](#) of Kenya (Supervisory Jurisdiction and Protection of Fundamental Right and Freedoms of the Individual) High Court Practice and procedure Rules, 2013 seeking the following Orders: -
  - a. Spent.
  - b. That a conservatory order be issued against the Respondents restraining them either by themselves or their servants, agents, or any other person from releasing and/or utilizing any public funds deposited in Njoro NG-CDF Bank Account Number 1460277706825, Equity Bank, Nakuru Westside Mall Branch, or any other Account belonging to the Respondents,



for purposes of funding short courses (Driving) or disbursing any funds to The Rift Valley National Polytechnic pending hearing and determination of this Application.

- c. That a conservatory order be issued against the Respondents restraining them either by themselves or their servants, agents, or any other person from releasing and/or utilizing any public funds for purposes of funding short courses (Driving) or disbursing any funds to The Rift Valley National Polytechnic pending hearing and determination of the main Petition.
  - d. The Respondents be condemned to pay costs of this Application.
2. That application is premised on the grounds on its face and the Supporting Affidavit sworn by the Petitioner on 13<sup>th</sup> March, 2025. He alleged that there is breach of constitutional principles, procurement laws, and a prior agreement by the Respondents concerning a program for funding driving courses in Njoro Constituency.
  3. He states that the Respondents launched a program on 24<sup>th</sup> December 2024, for funding short courses i.e. driving for residents of Njoro Constituency. This program was a development initiative under Section 48 of the NG-CDF Act, which the Interested Parties Rift Valley Driving Schools (SHG), expected would be subjected to competitive bidding.
  4. However, the Respondents allegedly proceeded to award the tender for executing the program to The Rift Valley National Polytechnic without conducting any public participation, without advertising the program to allow other interested parties to tender their bids, and in breach of *the Constitution* and procurement laws. He complained that the Interested Party specifically has been side-lined in the allocation of driving courses.
  5. The Petitioner highlights that The Rift Valley National Polytechnic was offering the courses at a sum of Kshs. 18,000/= per person, a relatively higher cost compared to what other institutions were offering.
  6. He further states that The Rift Valley National Polytechnic is not located in Njoro Constituency, which is contrary to the NG-CDF Act requirement that projects should generally be awarded to community-based organizations or contractors within the relevant constituency to directly benefit the residents.
  7. He stated that the Interested Party sought information on the tendering process but was informed by the Respondents that the funds would be fully remitted directly as a bursary to the public institution upon completion of the course, stating that bursary is never procured.
  8. It is his case that the Respondents have breached *the Constitution* and Procurement laws on numerous occasions and further, they are in breach of a prior Agreement and Memorandum of Understanding (MoU) dated 8<sup>th</sup> February, 2024 which arose from a constitutional petition; Nakuru High Court Constitutional Petition No. E023 of 2023 withdrawn by the Petitioner, stipulating that NG-CDF Njoro would adhere to fair administrative actions and observe transparency and accountability in tendering, including the requirement that short courses sponsored by the Respondents would be distributed equally. Further, that prior agreement also allowed the Petitioner the liberty to reinstate the petition in the event of a breach.
  9. The Petitioner depones that he sought a meeting with the Respondents regarding the issue of inequality in sharing the positions across the wards on 22<sup>nd</sup> January, 2025, but the Respondents failed to call for a meeting or comply with the law in the procurement process.



10. He is now apprehensive that the Respondents will proceed to withdraw funds from their accounts and remit them to The Rift Valley National Polytechnic, which would render both the Application and the main Petition mute.
11. The Petitioner therefore argues that unless the Court intervenes on priority and issues the orders sought, the Petitioner and the residents of Njoro Constituency will suffer irreparable harm.
12. In conclusion, he states that they have established a prima facie case warranting the grant of conservatory orders pending the hearing of the main petition, in the interest of justice and fairness.

### **Respondents' Preliminary Objection**

13. Upon being served with both the Notice of Motion and the Petition, the Respondents have raised a Preliminary Objection dated 25<sup>th</sup> March, 2025 on the following grounds:-
  1. That the alleged complaints and disputes herein having arisen due to the administration of the National Government *Constituencies Development Fund Act*, No. 30 of 2015 (herein after referred to as "The Act").
  2. That under Section 56 of The Act, the Petitioner/Applicant or such other persons with complaints and disputes arising due to the administration of this Act should forward them to the Board in the first instance.
  3. That consequently, the petitioners have sidestepped the statutory mechanisms for the resolution of disputes under the National Government *Constituencies Development Fund Act*, 2015 with the result that the Honourable Court's jurisdiction to entertain the petition is yet to crystalize.
  4. That further, under section 93 of the *Public Procurement and Asset Disposal Act*, 2015 the Petitioner/Applicant or such other persons who claim to have suffered risks, losses and damages as a result of an alleged breach of duty by the procuring entity were required to seek an administrative review in the manner prescribed under the Act.
  5. That based on the same, this Honourable Court lacks the requisite jurisdiction to entertain a petition or an application alleging contravention of the provisions of the Procurement Act as a violation of *the Constitution* and as such, the alleged dispute should be dealt with in accordance with the provisions of the Act.
  6. That the substratum of the Petitioner's action is a procurement process undertaken by the Respondents and therefore the Court lacks jurisdiction because once a party brings themselves within the provisions of the Act, the party is obliged to comply with the procedure under The Act.
  7. That the instant application and petition are frivolous, baseless and are an abuse of the Court process and therefore fit for striking out with costs.

### **Respondents' Replying Affidavit**

14. In addition to the Preliminary Objection, the Respondents filed a Replying Affidavit sworn on 29<sup>th</sup> May, 2025 by James Gitonga Nguku, the holder of the 3<sup>rd</sup> Respondent office. He Asserts that the subject matter, being the funding of driving courses, is an issue of bursary disbursement and not a procurement tender, therefore refuting the allegations of breach of procurement laws.



15. He states that the Respondents launched a program for funding short courses (driving) on 24<sup>th</sup> December, 2024, to sponsor needy residents of Njoro Constituency. This was an exercise under NG-CDF Bursary Guidelines and the Njoro NG-CDFC Bursary Policy, not a development project under Section 48 of the NG-CDF Act. The Affiant states that a bursary is a grant to a student and is never procured. The selection of beneficiaries was done through public participation in all wards of the constituency.
16. He depones that the decision to sponsor students for driving courses at The Rift Valley National Polytechnic (RVNP) was due to several reasons:- Rift Valley National Polytechnic is a Public Institution, the bursary policy gives priority to students in Public TVET Institutions, The funding of courses in public institutions is an act of promoting public interest and that RVNP has a Memorandum of Understanding (MOU) with the NG-CDFC office, under which the office remits the funds after the beneficiary student has completed the course. This arrangement is described as a secure and prudent way of utilising public funds.
17. Regarding the cost of the course, the Respondent asserts that while the Petitioner alleges that the cost of driving was Kshs.18,000, the same is offered at the rate of Kshs. 16,000/= to the NG-CDF beneficiaries. He argues that the slightly higher rate compared to private institutions is justified by RVNP's status as a public institution and the quality of their services, which promotes prudent use of public funds as required under Article 201(a) of *the Constitution*.
18. On the question of the institution's location, the Respondent argues that while the NG-CDF Act promotes local contractors, the bursary policy prioritises Public TVET institutions over community-based or private driving schools, informing their choice for Rift Valley National Polytechnic.
19. Concerning the prior Agreement and MoU dated 8<sup>th</sup> February, 2024, which the Petitioner claims was breached, the Respondent states they have fully complied with all the clauses.
20. He asserts that the Petition herein is an abuse of the court process as the Petitioner is attempting to equate a bursary program with a procurement tender. The Respondent argues that the Court lacks jurisdiction as the matter is primarily an administrative dispute under the NG-CDF Act (Section 56) and the *Public Procurement and Asset Disposal Act* (Section 93), which provide mechanisms for dispute resolution that the Petitioner has sidestepped.
21. Lastly, the Respondent states that the conservatory orders sought are injunctive and mandatory in nature, which cannot be granted at the interlocutory stage, especially since granting them would interfere with an ongoing, legitimate public program.
22. He asserts that the Petition and the Application are an abuse of the court process and therefore urges the Court to strike them out and allow the Respondents to continue serving the residents of Njoro Constituency.

### **Petitioner 's Supplementary Affidavit**

23. This was sworn on 17<sup>th</sup> June, 2025 where he maintains that the Respondents' assertion that the funding of driving courses is as bursary is a mere cover-up to circumvent procurement laws. To support that averment, the Petitioner presents evidence of a similar arrangement in the Financial Year 2024/2025, where the same Respondents issued a Letter of Tender Award to Amani College (a private institution) for training courses, including driving, at a rate of Kshs. 13,000/= per person.



24. The Petitioner cites this as proof that the actual transaction for the courses involves a procurement process, not a pure bursary grant, and that the Respondents are acting discriminatorily by awarding the tender to The Rift Valley National Polytechnic (RVNP) at a higher rate and without transparency.
25. The Petitioner reiterates that the Respondents are in breach of the Memorandum of Understanding (MoU) dated 8<sup>th</sup> February, 2024, which arose from a previous constitutional petition. He adds that that MoU was intended to ensure adherence to principles of fairness, transparency, and accountability in all NG-CDF matters, including the distribution of short courses. Thus, the current, non-transparent award of the driving course program to RVNP is a direct breach of this agreement.
26. In respect to the issue of Jurisdiction and the Alternative Dispute Resolution mechanism, the Petitioner argues that the Court has the requisite jurisdiction because the dispute involves constitutional issues, specifically the contravention of Article 201(a) (prudent use of public money) and Article 227(a) (fair, equitable, and transparent procurement).
27. He refutes the claim that they should have exhausted the administrative remedies under the NG-CDF Act (Section 56) or the *Public Procurement and Asset Disposal Act* (Section 93) on grounds that:-
  - i. The NG-CDF Act remedy is for a member of the public who is dissatisfied with a project or a person's conduct.
  - ii. The Public Procurement Act remedy (administrative review) is only available to a bidder, tenderer, or proposer who participated in the procurement proceedings.
28. The Petitioner states that he is neither of the above and that he is suing on his own behalf and on behalf of the general public over a constitutional breach.
29. Lastly, the Petitioner states that even if a constitutional breach has already partially occurred (such as some beneficiaries having completed the training), it is not a valid defence to ignore the constitutional violation. The High Court is vested with the power to sanction public officers involved in such breaches.
30. Pursuant to the Directions of this Court, both parties filed submissions on the Application and the Preliminary objection.

### **Applicant's Submissions**

31. While rehashing the factual backgrounds of this case and in support of his Application for conservatory orders to restrain the disbursement of public funds from the Njoro NG-CDF accounts for a driving courses sponsorship program, the Applicant has identified the following three issues for determination:-
  - a. Whether the Petitioner has established a prima facie case with a likelihood of success.
  - b. Whether the Petitioner will suffer irreparable harm if the conservatory orders are not granted.
  - c. Whether the balance of convenience tilts in favour of granting the orders.
32. On the first issue, the Petitioner contends that the Respondents violated Articles 201(a) of *the Constitution* on responsible use of public funds and Article 227 (a) of *the Constitution* on fair and competitive procurement, along with other procurement laws, by failing to subject the public-funded program to competitive bidding and public participation.



33. He argues that Article 227 of *the Constitution* requires any public entity contracting for goods or services to do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective.
34. He submitted that the facts show the driving courses sponsorship program was single-sourced to Rift Valley National Polytechnic at a significantly higher cost than what local institutions were charging, with no advertisement, bidding process, or community consultation which was in breach of Article 10 on National Values, Article 201 on responsible use of public funds and Article 227 of *the Constitution*.
35. Furthermore, Section 48 of the NG-CDF Act mandates that NG-CDF funded projects must benefit the local constituency. Thus, since Rift Valley National Polytechnic is located outside the constituency, this requirement is defeated
36. Based on the foregoing, he argues that a prima facie case is established because the Respondents' actions appear to contravene express constitutional and statutory provisions.
37. On irreparable harm, the Applicant argues that the funds are public resources and therefore, if they are disbursed in breach of *the Constitution*, the people of Njoro Constituency will suffer loss and deprivation of public services. He adds that once disbursed without a competitive or legal procurement process, recovery of the funds is often difficult, lengthy, and expensive, creating a genuine apprehension that imminent disbursement would render the Petition nugatory.
38. On the balance of convenience, he argues that the same tilts in favour of the Petitioner and the public, as granting conservatory orders preserves the status quo and upholds public interest pending the full hearing. Further that preserving the funds pending the determination of the legality of the intended actions will not prejudice the Respondents.
39. Regarding the test for conservatory orders, he cites the case of Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR, that the Court emphasized considering the wider public interest, constitutional values, and the circumstances of the case.
40. Further, the Petitioner submits that he has met the three-pronged test established in the celebrated case of Giella v Cassman Brown [1973] EA 358, that is ; prima facie case, irreparable harm, and balance of convenience.
41. He argues that he has demonstrated a violation of constitutional and procurement requirements in the handling of public funds by the Respondents. Arguing that he has met the legal threshold for conservatory orders, and given that the public interest favours halting the impugned disbursement, the Petitioner urges this Court to grant the orders sought in the Notice of Motion dated 13<sup>th</sup> March, 2025.
42. In respect to the Preliminary Objection regarding this Court jurisdiction to handle this matter, the Applicant asserts that the High Court has both constitutional and statutory authority to hear and determine the petition.
43. He submits that under Article 165 (3) of *the Constitution* High Court has jurisdiction to determine questions of the denial, violation, infringement, or threat to a right or fundamental freedom in the Bill of Rights together with hearing questions respecting the interpretation of *the Constitution*.
44. It is argued that the Petition herein raises substantial issues of constitutional interpretation regarding: Alleged violation of the right to fair administrative action (Article 47), Violation of procurement laws (Article 227), Allegations of abuse of power, lack of transparency, and accountability contrary to Article 10 (national values), and the right to access information (Article 35). Therefore, the High Court is properly seized of jurisdiction under Articles 165(3)(b) and (d).



45. Further, he submits that under Article 165(6) and (7), the High Court has supervisory jurisdiction over quasi-judicial bodies, including procurement-related administrative bodies like the Public Procurement Administrative Review Board (PPARB) and NG-CDF bodies. That this supervisory power allows the Court to ensure these bodies operate within the law and to issue appropriate remedies. He adds that NG-CDF is funded by public funds, and its operations, particularly procurement, are subject to the *Public Procurement and Asset Disposal Act* (PPADA), 2015.
46. While admitting that exhaustion of administrative remedies, like appealing to the PPARB, is encouraged, he submits that the doctrine is not absolute. He supports this argument by citing the Court of Appeal decision in *Geoffrey Muthinja v Samuel Muguna Henry & 1756 Others* [2015] eKLR and argues that where a constitutional petition is brought, the court must satisfy itself that the issues cannot be adequately addressed through alternative forums.
47. Similarly, that in *Speaker of National Assembly v. Karume* [1992] KLR 21, the court acknowledged that constitutional interpretation and enforcement can override the procedural bar of exhaustion.
48. He submits that section 165(1) of the *Public Procurement and Asset Disposal Act* limits the persons who can seek administrative review to a candidate or a tenderer and that, a candidate is defined as a person who obtained tender documents, and a tenderer is one who submitted a tender.
49. He argues that since there was no procurement leading to the appointment of Rift Valley National Polytechnic, the Petitioner does not fit the definition of either a candidate or a tenderer and could not seek administrative review. To support this position, he relies on the case of *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex-parte National Super Alliance Kenya and 6 others* [2017] eKLR where it was established that a person who did not participate in procurement proceedings can approach the court through a constitutional petition. Therefore, that given the single-sourcing, filing the constitutional petition was the only remedy available to the Petitioner.
50. He further submits that the above position was supported in the case of *Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 others* [2016] eKLR, that any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights.
51. Further still, that in *Okiya Omtatah Okoiti v National Government CDF Board & 4 others* [2018] eKLR, the court found that issues relating to mismanagement and procurement irregularities within NG-CDF were justiciable through constitutional petitions.
52. The Applicant further cites the case of *Trusted Society of Human Rights Alliance AG & Others* [2012] eKLR that affirmed the High Court's jurisdiction where violations of constitutional rights are alleged, even if alternative dispute resolution mechanisms exist.
53. In conclusion, he submits that the reliefs sought in this case go beyond the scope of remedies available under PPARB, and there is a clear public interest in transparency and accountability in the use of public funds.
54. He therefore submits that this Court is properly clothed with jurisdiction as the Petition raises constitutional questions under Articles 10, 35, 47, and 227, of *the Constitution* and there is no adequate or effective alternative forum.
55. He thus prays that the Preliminary Objection be dismissed with costs and both the Petition and Application be allowed to proceed to full hearing and determination on merit.



## Respondent's submissions

56. In their submissions, the Respondent, detailed the institutional actions taken under the National Government *Constituencies Development Fund Act* (No. 30 of 2015), asserting that they launched a bursary programme to fund short courses within Njoro Constituency, specifically targeting disadvantaged learners. The process began with a board meeting on 21<sup>st</sup> September, 2023, attended by ten members, where the allocation of Kshs. 39,000,000/= for bursary payments to tertiary institutions, colleges, and universities was discussed and approved using a code list. Further demonstrating a commitment to the constitutional principle of fairness, the committee divided its members by ward to oversee equitable distribution, with one-third of the available slots reserved for the most vulnerable and needy. Following the issuance of a public notice inviting applications for the financial year 2022/2023, the selection process spanned three days, during which 931 interested students were subjected to due process, resulting in the selection of successful applicants, some of whom are now listed pending graduation.
57. He narrowed down the issue for determination into two;
- i. Whether the Court is clothed with the requisite Jurisdiction to adjudicate this matter.
  - ii. Who should bear the Cost.
58. On jurisdiction, the Respondent contends that this Court lacks jurisdiction because the authority to hear and determine the suit is first reserved for the National Government Constituency Development Fund (NGCDF) Board under Section 56(3) of the NGCDF Act, 2015, and the *Public Procurement and Asset Disposal Act*, 2015 under Section 167.
59. It was argued that the locus classicus case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 defines a Preliminary Objection as a pure point of law that can dispose of the suit, such as an objection to the court's jurisdiction.
60. On whether the objection meets the Mukisa Biscuit Case threshold, the Respondents cite the case of *John Musakali v Speaker County of Bungoma & 4 others* (2015) eKLR, and argues that a Preliminary Objection must arise from agreed facts in the pleadings and have the potential to dispose of the suit without trial; if facts are disputed, it is not a suitable Preliminary Objection.
61. Further, he cites the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang, J. (as he then was) stated that a Preliminary Objection must be a point of law that is not blurred by factual details liable to be contested or proved by evidence, and it must not deal with disputed facts.
62. On that basis, he argues that section 56 (3) of the NGCDF Act, 2015 mandates that disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel. He asserts that the word shall in the statute imports a form of command or mandate, making it compulsory and denoting an obligation, a position supported by the case of *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] eKLR.
63. He further submits that section 167(1) of the *Public Procurement and Asset Disposal Act*, 2015 similarly provides that a candidate or tenderer who suffers loss due to a breach of duty by a procuring entity may seek administrative review.
64. He submits that though the Petitioner alleged that he had no recourse since he was neither a Tenderer nor a Candidate under the PPDA Act, taking cue from the case of *Ezekiel Otieno v Funds Account Manager, Mathare National Constituency Development Fund & 2 others*; Public Procurement



- Review Board & 12 others (Interested Parties) [2022] eKLR opined that, regardless of the Petitioner's status, he did not exhaust the remedies provided for under the PPDA Act, 2015.
65. The Respondent contends that the *Public Procurement and Asset Disposal Act* (PPDA) Act, 2015, provides clear statutory mechanisms for redress which the Petitioner failed to exhaust, thus barring the High Court's jurisdiction. Specifically, the Respondent noted that Part XV of the PPDA Act, covering Sections 167 to 175, sets out administrative review avenues, principally for a candidate or tenderer under Section 167(1). However, even while conceding the Petitioner was neither a candidate nor a tenderer, the Respondent emphasized that Section 170 (d) permits the Review Board to enjoin such other persons as the Review Board may determine.
  66. He argues that the Petitioner, possessing substantial information about the tendering process, had failed to seek leave to participate in the review or to report the complaints to the Public Procurement Regulatory Authority (PPRA), whose function under Section 9 (h) is to investigate complaints not subject to administrative review. As Section 174 confirms that the right to request a review is in addition to any other legal remedy, the Respondent maintains that the Petitioner was not locked out from seeking administrative relief under Sections 170 (d), 174, and 175.
  67. According to the Respondent, the alleged non-compliance with the PPDA Act is the main issue and in that case, the first point of call for such breaches is the Review Board or Regulatory Authority, with an aggrieved party only moving to the High Court for Judicial Review after a decision has been made. Hence, given the Petitioner's failure to exhaust these statutory dispute resolution mechanisms, the Honourable Court was imported to lack the requisite jurisdiction.
  68. To support their case, the Respondent relied on the case of *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR, and argued that the Court of Appeal established the important tenet that the High Court, before exercising its jurisdiction under Article 165 of *the Constitution*, must exercise restraint and first give the relevant constitutional bodies or state organs an opportunity to deal with their dispute. The court's jurisdiction should not be invoked until such mechanisms are exhausted.
  69. Accordingly, that the Applicant has not demonstrated that they exhausted the existing statutory mechanism, which involves the selection of a competent arbitrator by the parties, or faced challenges in doing so that required the Court's intervention.
  70. He terms the Petitioner's decision to file suit before this Court as forum shopping and an abuse of Court process, and having approached the Court with unclean hands, he is not deserving of the remedies sought. Reliance is placed on the findings of Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited* [1989] 1 KLR, which states that a question of jurisdiction must be raised at the earliest opportunity, and if a Court holds that it has no jurisdiction, it downs its tools and cannot proceed.
  71. Further, he cites the decision in *Geoffrey Muthinja Kabiru & 2 Others* (supra) that where a dispute resolution mechanism exists outside the courts, it must be exhausted before the courts' jurisdiction is invoked, as courts ought to be fora of last resort. This exhaustion doctrine aligns with Article 159 of *the Constitution*, which commands courts to encourage alternative dispute resolution.
  72. He further cites the case of *Ndiara Enterprises Ltd v Nairobi City County Government* [2018] eKLR where the Court of Appeal upheld the High Court's refusal to admit jurisdiction because a clear and specific procedure for redress provided under the Act must be strictly followed and High Court's power under Article 165 was limited by statute in that instance and that the alternative procedure was less convenient was dismissed as an afterthought.



73. The Respondent submits that Court of Appeal concurred with the High Court's finding that it lacked jurisdiction and was bound to lay down its tools in line with Owners of the Motor Vehicle "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.
74. He maintains that the Preliminary Objection fits the test set out in the Mukisa Biscuit case because jurisdiction is a pure point of law capable of disposing of a matter without delving into its merit. He further submits that the objection achieves the threshold of a pure preliminary point of law and is clear on the provision of law allegedly violated, requiring the Petitioner to have first exhausted the available statutory dispute resolution mechanisms.
75. Reliance is placed on the finding in *Alibea Services Limited v National Government Constituency Development Fund Board & another; Fund Account Manager- National Government Constituency Fund Bondo Constituency & another (Interested Parties) (Civil Case E001 of 2022) [2022] KEHC 10922 (KLR) (22 June 2022)*, where the court upheld the preliminary objection and struck out the suit for want of jurisdiction in the first instance due to failure to exhaust the alternative dispute resolution mechanism.
76. On costs, the Respondents pray that the Preliminary Objection dated 26<sup>th</sup> March, 2025, be allowed and the Petition be dismissed with costs to them.

### **Analysis and Determination**

77. This court has noted the material placed before it. It must be emphasised that directions were that the Notice of Motion and the Preliminary Objection be canvassed by way of written submissions.
78. This Court has considered the Petitioner 's Notice of Motion dated 13<sup>th</sup> March, 2025, seeking conservatory orders, and the Preliminary Objection raised by the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondents challenging this Court's jurisdiction to handle this matter.
79. Having heard the parties, the issues for determination are ;-
  1. Whether Preliminary Objection on this petition is merited.
  2. Whether the Petitioner has established a prima facie case for conservatory orders.
  3. Who bears costs

### **Whether Preliminary Objection on this Petition is merited**

80. On the threshold to be met in Preliminary Objection, the Supreme Court in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR restated the principles in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696* that :

“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...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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.



81. Thus, a Preliminary Objection may only be raised on a ‘pure question of law’ and to do so, the Court has to be satisfied itself that there is no proper contest as to the facts. The facts are deemed agreed, as they are presented in the pleadings on record.
82. In this case, the Preliminary Objection is that this court lacks jurisdiction to hear and the and determine the petition herein. Regarding jurisdiction, it is settled that jurisdiction is everything and without it, a court must down its tools as was settled in the celebrated case of Owners of Motor vessel Lilian “S”(supra) that:-
- “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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority.”
83. In this case, it is alleged the Petitioner has sidestepped the statutory mechanisms provided for dispute resolution. Specifically, they rely on Section 56 of the National Government *Constituencies Development Fund Act*, 2015 (NG-CDF Act), which requires complaints regarding the administration of the Act to be forwarded to the Board in the first instance.
84. In the alternative, that if the issue is one of procurement, Section 93 of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA) mandates the seeking of an administrative review before approaching this Court but the Petitioner has failed to follow that procedure before coming to court thus violating the doctrine of exhaustion.
85. On the other hand, the Petitioner argues that the PPADA remedy is unavailable because he is neither a bidder, tenderer, or proposer. Furthermore, that the statutory mechanisms are inadequate or ineffective for addressing a public interest constitutional violation concerning the transparent use of public funds and therefore, this Court is clothed with original and unlimited jurisdiction under Article 23 (1) and Article 258 of *the Constitution* to determine questions regarding the contravention of *the Constitution*, particularly Articles 201(a) and 227(1).
86. It is therefore clear that in order to determine whether this Court has jurisdiction, the Court has to establish based on evidence and the law whether the funding of driving courses to The Rift Valley National Polytechnic is a procurement of services that must comply with the fair, competitive, and cost-effective requirements of Article 227(1) of *the Constitution*, or is it a legitimate bursary/grant program exempt from competitive procurement as argued by the Respondents.
87. Section 37 of The National Government *Constituencies Development Fund Act* provides that:-
- “All works and services relating to projects under this Act shall be procured in accordance with the provisions of the Public Procurement and Disposal Act, 2005 (Cap. 412A).”
88. Regarding bursaries, section 48 and 48A of NGCAF Act provides that:-
- “48. Social security programmes, etc to be considered as development projects  
The funding of social security programmes, education bursary schemes, mock examinations and continuous assessment tests shall be considered as development projects for the purposes of the Act provided that such projects shall not be allocated more than forty per centum of the total funds



allocated for the constituency in any financial year.” “48A. Education Bursary Schemes and Education Days (1) Notwithstanding section 48, a Constituency Committee shall, with the approval of the Board, allocate funds to cater for education bursary schemes and education days, teaching and learning activities and other learners’ social support programmes (2) The Board shall in consultation with the Committee provide guidelines on the implementation of this section.”

89. Further, Section 2 of NGCAF Act define that “project’ means an eligible development project as described in the Act.”
90. Having defined project to include development Project and since bursaries are considered as development projects. Then section 37 of the Act requires such bursaries to be subjected to procurement procedures.
91. It is thus evident that the bursaries for driving courses to The Rift Valley National Polytechnic is a procurement of services that must comply with the fair, competitive, and cost-effective requirements of Article 227(1) of *the Constitution* and thus governed by procurement laws such as *Public Procurement And Asset Disposal Act*(PPDA Act).
92. Having determined that the money in dispute herein are to be subjected to procurement processes, The *Public Procurement And Asset Disposal Act* establishes the Public Procurement Administrative Review Board (PPARB) as the primary forum for challenging procurement decisions. Section 167(1) limits the right to seek administrative review before the PPARB to a "candidate" or a "tenderer" who suffers or risks loss or damage. A general citizen who is neither a candidate nor a tenderer cannot initiate a review under this section.
93. Section 9 of the *Public Procurement And Asset Disposal Act* give the functions of the authority to include to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.
94. A cursory look at the section above, shows that general public are not meant to be subjected to administrative review as such they are ousted by the Act from being subjected to internal proceedings and are therefore not bound by the exhaustion doctrine.
95. This Court acknowledges the cardinal rule, as illustrated in various precedents, that where a dispute resolution mechanism is provided by statute, that procedure must be exhausted before invoking the High Court’s jurisdiction. However, this rule is not absolute, particularly when the grievance involves the direct contravention of fundamental constitutional provisions. ’s jurisdiction must be construed restrictively. The rationale for this was extensively elaborated by Mativo J(As he then was) in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
96. In this case, the Petitioner is seeking to enforce Article 227(1) of *the Constitution*, which requires that procurement be carried out in a system that is fair, equitable, transparent, competitive, and cost-effective, and Article 201(a), which promotes the prudent and responsible use of public money. The Petitioner is suing on behalf of the general public.
97. The statutory review mechanism under *Public Procurement and Asset Disposal Act* is explicitly limited to participants in the tender process. Since the Petitioner argues that he is not a bidder and hence the statutory remedy is closed off, then that is an issue to be determined in the Petition on merit , that is



whether , the public is barred from challenging an alleged breach due lack of the technical locus standi conferred by the PPADA. That is an issue that cannot dispose of the Petition at this stage.

### **Whether the Petitioner has satisfied the three limbs for conservatory orders**

98. The threshold for the grant of conservatory orders was stated by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* application No. 5 of 2014 eKLR thus: -

“(86) “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...”

99. It is therefore clear that conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. In this case, the Respondents’ alleged act of selecting and paying an institution (RVNP) for services rendered to specified beneficiaries, coupled with the alleged previous issuance of a “Tender Award” for an analogous program, is challenged as a transaction possessing the substratum of a service contract procurement as opposed to a general grant to students.

100. Further, the Petitioner is aggrieved by alleged discrepancy in cost, failure to subject the current program to competition, the breach of the prior Memorandum of Understanding (MoU) which allegedly required the Respondents to adhere to transparency are issue on whether the Respondents have violated Articles 201(a) and 227(1) of *the Constitution*. Therefore, these are issues that can only be determined upon hearing of the main Petition.

101. The Petitioner is apprehensive that the Respondents will proceed to withdraw public funds from the Njoro NG-CDF Bank Account and remit them to RVNP and therefore, if the contested funds are disbursed, the Petition will be rendered moot as the constitutional wrong will have been completed and the public funds improperly spent.

102. However, this Court notes that the Petitioner’s apprehension is that once disbursed , recovery of the funds is often difficult, lengthy and expensive hence his fear that imminent disbursement would render the Petition nugatory. In effect, that is an acknowledgment that it is not impossible to recover funds. Indeed, there are mechanisms of recovering such funds. It is not demonstrated how disbursements of funds would render this petition moot.

103. Further, it is not disputed that there are ongoing legitimate public programs and therefore, granting the conservatory orders sought are likely to prejudice operation of such programs .The orders sought cannot issue at this stage.

104. In conclusion, this Court issues the following orders:-

1. The Respondents ‘ Preliminary Objection is disallowed .
2. The Petitioner’s prayer for conservatory orders is disallowed.



3. The costs of the Application and the Preliminary Objection shall abide the outcome of the Petition.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Kenda for Applicant

Ms. Wafula for Respondent

Kamau, Court Assistant

