



Portside Freight Terminals Limited & 2 others v Okoiti & 10 others (Civil Appeal E130 of 2023) [2024] KECA 169 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 169 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E130 OF 2023
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

**PORTSIDE FREIGHT TERMINALS LIMITED 1ST APPELLANT
PORTSIDE CFS LIMITED 2ND APPELLANT
HEARTLAND TERMINALS LIMITED 3RD APPELLANT**

AND

**OKIYA OMTATAH OKOITI 1ST RESPONDENT
KENYA PORTS AUTHORITY 2ND RESPONDENT
CABINET SECRETARY FOR NATIONAL TREASURY & ECONOMIC
PLANNING 3RD RESPONDENT
KILINDINI TERMINALS LIMITED 4TH RESPONDENT
MOMBASA GRAIN TERMINAL LIMITED 5TH RESPONDENT
KAPA OIL REFINERY 6TH RESPONDENT
AFRICA PORTS & TERMINALS 7TH RESPONDENT
MULTISHIP INTERNATIONAL 8TH RESPONDENT
KIPEVU INLAND CONTAINERS EPZ LIMITED 9TH RESPONDENT
DOCK WORKERS UNION 10TH RESPONDENT
KATIBA INSTITUTE 11TH RESPONDENT**

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (J.N. Onyiego, J.) delivered on 18th July 2023 in Constitutional Petition No. E045 of 2021 Consolidated with Petition No. 18 of 2022)



JUDGMENT

1. This appeal arises from two petitions lodged by Okiya Omtatah Okoiti, the 1st respondent herein, before the High Court at Mombasa being Mombasa High Court Constitutional Petitions Nos. E045 of 2021 and E018 of 2022. The former petition was lodged against the 2nd and 3rd respondents herein while the latter was lodged against the 2nd respondent and the appellants herein. The other parties were joined as interested parties.
2. In those petitions, the 1st respondent alleged contravention of fundamental rights and freedoms under Articles 10, 27, 47, 201 and 227 of the Constitution and sought the following reliefs as hereby paraphrased:
 - a. A Declaration that the decision of the 2nd respondent's Board of Directors contained in the letter dated 11th March 2021 to approve the grant of license for the operation of the second bulk grain facility rests with the management and is not a decision of the Board.
 - b. A Declaration that the 2nd respondent's Board of Directors acted ultra vires, without jurisdiction and usurped the powers conferred to the management and the accounting officer with respect to the tendering process in purporting to approve and grant the 1st appellant a license to operate a second bulk grain handling facility.
 - c. A Declaration that the 2nd respondent took into account irrelevant factors and consideration that the 1st appellant's proposal was attractive due its "uniqueness and creativity deployed" thus meriting the consideration.
 - d. A Declaration that the 2nd respondent's Board of Director's decision dated 11th March 2021 purporting to approve a proposal that sought to construct a facility outside the approved location under the Master Plan is excessive, abuse of power and irrational.
 - e. A Declaration that the decision dated 11th March 2021 to invoke the use of Specially Permitted Procurement Procedure under Section 114A of the Public Procurement and Asset Disposal Act is in violation of the Constitution and does not lie with the Board of Directors, but with the Accounting Officer, who initiates and undertakes the entire procurement process for a state corporation.
 - f. A Declaration that the decisions and /or action of the 2nd and 3rd respondents dated 11th March 2021 and 28th June 2021 in so far as they purport to use Specifically Permitted Procurement Procedures in favour of the 1st appellant, is unconstitutional, illegal and/or irregular as it contravenes the provisions of the Constitution and regulation 107(3) of the Procurement Regulations.
 - g. A Declaration that the 2nd and 3rd respondents' decision to solely consider the 1st appellant's proposal, despite the same being in conflict with the Master Plan, proceed to approve the same and adopt the use of Specially Permitted Procurement Procedure in its favour is unlawful, illegal, irrational and ultra vires.
 - h. A Declaration that its wrongful and un-procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by the 2nd respondent's Port Master Plan, which Master Plan is yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.



- i. A Declaration that the 2nd respondent's intended award of contract and license to the 1st appellant for the development of the Second bulk grain handling facility gravely violates Articles 10, 201 and 227 of the Constitution of Kenya, 2010.
 - j. A Declaration that the procurement and license for the development of a second bulk grain handling facility has to be procured through competitive bidding as required by the Constitution and the law.
 - k. An order of Certiorari to remove into this Court and quashing the decision of the 3rd respondent contained in the letter dated 28th June 2021 granting the 2nd respondent's approval to use Specially Permitted Procurement Procedure for the Procurement of a second bulk grain handler facility in favour of the 1st appellant be and is hereby issued.
 - l. A Mandatory Order be and is hereby issued compelling the respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa must be undertaken strictly in accordance with the law, including through competitive bidding.
 - m. An Order of Prohibition to restrain the 2nd and 3rd respondents from implementing the decision contained in the letter dated 28th June 2021 approving the use of Specially Permitted Procurement Procedure to award the 1st appellant the contract for development of the second bulk grain handling facility be and is hereby issued.
 - n. An Order of Prohibition to restrain the 2nd and 3rd respondents from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the public procurement laws be and is hereby issued.
 - o. That the costs of this petition be provided for.
 - p. That such further and other reliefs that this Honourable Court may deem just and expedient to grant in the circumstances.
3. The gist of the 1st respondent's case, as can be gleaned from the petitions, was that the 2nd respondent developed its first Master Plan in the year 2004; that the said Master Plan was later reviewed in the year 2009; that, due to ever evolving maritime industry and changes in government policy, the 2nd respondent on 7th August 2019 launched its Master Plan for the period 2017-2047, which was a blue print to define its development mandate and activities for the next 30 years; that among the flagship activities outlined in the said Master Plan was the establishment and development of a second grain bulk handling facility by the year 2023; that the plan was geared towards taking advantage of the development of Dongo Kundu as a special Economic Zone, the Lamu Port and the revitalized Kisumu port; and that, according to the said Master Plan, the 2nd respondent identified and projected that the second grain handling facility was to be located at either Dongo Kundu or Lamu Port.
4. According to the 1st respondent, the 1st appellant submitted its application and proposal to the 2nd respondent vide its letter dated 6th April 2020 to construct a new berth (green field project) contrary to the 1st respondent's Master Plan and outside the earmarked areas of Lamu or Dongo Kundu. It was the 1st respondent's case that the 1st appellant proposed that the license for the bulk handling grains was to facilitate adequate capacity in handling grains for Kenya; that a way leave was to be issued for the development of an over-head conveyor belt through the G-Section area of the port of about 450 metres length to the portside facility; that a counter-part team was to be formed to work with the 1st



- appellant in developing an island berth; that the 1st appellant would finance the development of the said island berth; that the counter-part team was to be engaged in forming technical specifications including routing of overhead conveyors and the life of the project; and that the team was to work closely with the 1st appellant's management team in developing designs and doing financial analysis of the project to ensure smooth timely roll out and knowledge transfer.
5. It was averred that, after the technical team appointed by the 2nd respondent reviewed the proposal by the 1st appellant, it found the same not in conformity with its Master Plan as it was proposing to put the facility outside Dongo Kundu zone and outside the land not utilized by the 1st respondent; that, at the same time, the 4th to 8th respondents had submitted their respective proposals, which were in conformity with the 2nd respondent's Master Plan, and that the 2nd respondent's board had approved that they be subjected to competitive bidding by the 2nd respondent; that, however, the 2nd respondent vide its letter dated 23rd October 2017, approved the 1st appellant's proposal thus granting it a wayleave to operate at berth 11 subject to the conformation of the SGR port relief line operations, the 2nd respondent's berth 11-14 rehabilitation designs and development as well as the fulfilment of the Public Private Partnership Act, 2013; that, without any basis and in flagrant violation, abuse, and breach of its own Master Plan, the 2nd respondent's board, through its Memorandum No. 33 of 2020, reviewed the 1st appellant's proposal by recommending the Master Plan to be amended to accommodate the 1st appellant's proposal describing it as unique; and that, by the board purporting to approve the establishment of a facility outside its Master Plan while considering irrelevant factors, amounted to acting in excess and abuse of its power, and in contravention of *the Constitution*.
 6. The 1st respondent averred that, pursuant to the 2nd respondent's letter dated 11th March 2021 addressed to the Cabinet Secretary Ministry of National Treasury and Planning, the 3rd respondent herein, the 2nd respondent sought permission to invoke the Specially Permitted Procurement Procedure under section 114A of the Public Procurement & Asset Disposal Act, 2015 (herein "the Act") and regulation 107 of the Public Procurement and Asset Disposal Regulations, 2020 (herein "the Regulations") to award the tender to the 1st appellant; that the said permission was granted by the 3rd respondent's letter dated 28th June 2021; that the said act was illegal and unconstitutional; that the process of initiating the Specially Permitted Procurement Procedure is the role of the accounting officer of the 2nd respondent and not the 2nd respondent's board; that the application of the Specially Permitted Procurement Procedure was discriminatory to other bidders whose bids were not subjected to competitive bidding; that the procurement process where the 1st appellant was accorded preferential treatment without the entire process subjected to competition was unjust and unfair; that there was no equity, transparency and competitive bidding, and hence the process was unconstitutional, unreasonable and unjustified.
 7. It was averred that during the pendency of Petition No. E045 of 2021 and before Petition No. E018 of 2022 was filed, but during the subsistence of conservatory orders issue in the former petition, the 2nd respondent awarded a license to the 1st appellant to develop a second bulk grain handling facility; that the 1st respondent sought clarification as to the circumstances of the award; that Executive Order No.2 of 2018 required all tenders or procurement of all public goods or works be published through the government public portal; that the 2nd respondent adamantly declined to furnish the 1st respondent with the necessary information hence contravening the 1st respondent's right to access to information under the *Access to Information Act* No.31 of 2016 and Article 35 of *the Constitution*, Article 19 of the International Convention on Civil and Political Rights and Article 9 of the African Charter on Human and People's Rights.



8. The petition was supported by the 10th respondent herein, the Dock Workers Union. According to them, the award of special license was contrary to the 2nd respondent's Master Plan, 2017 to 2047 which could only be reviewed through public participation and engagement, and not by the 2nd respondent board through board room resolution; that the arbitrary award of the special licence to the 1st appellant was in total disregard of other applications eyeing the same permit, which were never considered, and hence a violation of *the Constitution*; that the 2nd respondent's action amounted to blatant abuse of power, and was in excess of authority; that no procurement process was initiated by the accounting officer, hence failure to uphold the minimum procurement rules and, in particular, the criteria set out under section 114A of the Act as no exceptional circumstances prevailed to warrant use of the Specially Permitted Procurement Procedure; that their effort to complain towards the irregular award was ignored; and that any changes to develop a second bulk grain handling facility would only apply within the parameters of the prevailing Master Plan and the identified area.
9. The 11th respondent's case in support of the Petition was that the award of the contract and license to the 1st appellant was a procurement for goods and services within the Act, and hence compliance with sections 2(1), 67(1), 44 and 227 thereof was necessary.
10. In response to the petitions, the 2nd respondent averred that the *Kenya Ports Authority Act* does not provide for development of a Master Plan and that, therefore, it is the responsibility of the board as a policy decision; that the petition was devoid of factual basis, and a misconstruction of the role of the board; that, although there was a Master Plan developed by the 2nd respondent contemplated to run for 30 years, the same was subject to amendments at any time, or even done away with, and that any infringement thereof cannot attract any constitutional redress in the manner prayed for by the 1st respondent; that failure to adhere to a policy document cannot raise a constitutional issue; that the initial plan to construct a second grain bulky handling facility at Dongo Kundu or the port of Lamu was informed by the presumption that the land for setting up the facility was to be provided by the 2nd respondent; and that while Dongo Kundu was attractive due its proximity to EPZ, Lamu port was identified because of availability of land.
11. It was further averred by the 2nd respondent that it was contemplated in the Master Plan that any prospective stake holder or developer could table a proposal for review to the 2nd respondent's board for consideration just as it happened in 1992 when the 1st Grain Bulk Handlers Limited (GBHL) did apply for review of the then prevailing license to accommodate the acquisition of a way leave; that, subsequently in the year 2018, GBHL did make several requests for review of the license to accommodate the prevailing special circumstances, which the board allowed; that there was nothing unusual with the review of license some of which technically affected the substratum of the Master Plan, and hence the necessity to review thereof.
12. It was further contended that there is no pre-set limit by the 2nd respondent on the number of grain handlers that should be set up at any of its ports as long as the proposed project meets the 2nd respondent's standards; that, in a bid to enhance competition and efficiency in grain handling at the port, there was need to have other players on board by making provisions in the 2019 approved Master Plan that would run for 30 years; that the 2nd respondent received several unsolicited proposals from various interested parties, a move that precipitated the establishment of a technical committee on 14th July 2020 to evaluate the proposals on merit; that it was therefore necessary that some proposals had to attract review or amendment of the Master Plan; that, after evaluation, the technical committee found the 1st appellant's proposal attractive, viable, reasonable and in compliance with the provisions of the Master Plan for expansion of the port to the west end; that the technical committee found the proposal unique and viable as the 2nd respondent would not spend any money towards its establishment since



- the proponent was ready to bear the cost at 100%, and hence no need for any procurement method to apply; that the benefits of the project were cost-effective and enormous which would then save the government revenue; that each proposal was/or will be evaluated independently and licenses issued on merit; that the 2nd respondent therefore properly and legally recommended the 1st appellant for the license as its proposal.
13. The 2nd respondent urged the trial court to find that the evaluation of the 1st appellant's proposal does not mean that the process was a public procurement method in order to warrant court's intervention; that the 2nd respondent's board in compliance with Section 10 of the *Kenya Ports Authority Act* properly forwarded the proposal to the 3rd respondent explaining reasons why they had recommended issuance of the license to the 1st appellant; that the grant of the permission by the 3rd respondent was procedurally done; that it was on the basis of the special permission that the 1st appellant submitted its proposal on 15th July 2021, and the 2nd respondent opened the same on the same day, which the tender evaluation committee found responsive after opening and subsequently evaluated the same on 27th July 2021 and the award made; that the role of the board terminated upon the 3rd respondent granting the permission; and that the procurement processes were followed by the Acting Managing Director, who constituted the tendering committee.
 14. Regarding the license allegedly issued during the existence of the conservatory orders, the 2nd respondent averred that the same was issued in 2017 to build and handle a grain handling facility and was renewed in 2018. Concerning the claim that the 2nd respondent failed to supply information sought for, it was averred that there was no proof that the 1st respondent applied for the same but that the same was applied for by an organization known as KEJUDE; that the 1st respondent lacked capacity to seek any redress as he never sought for any information from the 2nd respondent; that the right to access information is personal and not corporate; that the 2nd respondent has since made available all documents requested for by KEJUDE trust.
 15. The 3rd respondent took the position that under Section 114A of the Act and regulation 107 of the Regulations, an accounting officer of a procuring entity is allowed to seek the National Treasury's approval to use the Specially Permitted Procurement Procedure for procurement of goods and services; that the accounting officer of the 2nd respondent, while requesting for procurement of a second bulk grain handler, had stated that there existed exceptional requirements that made it impossible and uneconomical to comply with the Act; that the 1st appellant had expressed interest to put up a berth and auxiliary facility for common use at its own cost, and hence the special ground for the 2nd respondent to explore the opportunity of private partnership; and that, the port of Mombasa being a sensitive security area, it was imperative that proper vetting be done to accommodate national security considerations in the selection process.
 16. The petitions were also opposed by the appellants who adopted the same positions as that of the 2nd and the 3rd respondents. The court's attention was drawn to what the appellants termed as "the studious silence and absence of the other interested parties" claimed by the 1st respondent as having been discriminated against in the award of the contract or license; that the petitions herein are devoid of merit, lack substance and filed for self-enrichment; that the award of the contract to the 1st appellant was procedurally done and that nobody complained; and that the petitions were just but a fishing expedition.
 17. The 4th to 9th respondents did not respond to the petitions.
 18. In his rejoinder, the 1st respondent averred that the Master Plan was a public document developed after extensive consultation and stake holders' engagement which consumed huge public money and,



therefore, could not be reviewed in a boardroom; that the Master Plan having not been altered or reviewed, the impugned license could not issue; that the 2nd respondent was bound by Articles 10 and 232(1) (d), (e) & (f) to be accountable, transparent and promote transparency; that no invitation was floated inviting interested investors to consider setting up a grain bulk handling facilities on private land adjacent to the port; that the denial that there was no procurement process deployed was defeated by the 2nd respondent's own admission in their explanation on how they processed tender documents to award the tender to the 1st appellant.

19. In his judgement, the learned Judge identified the following issues as falling for his determination:
 - a. Whether the petitions met the threshold of a constitutional petition.
 - b. Whether the 1st respondent had locus standi to file the petitions.
 - c. Whether the 2nd respondent's Board of Directors' decision to review and approve the grant of license to the 1st appellant was lawful.
 - d. Whether the procurement process by the 2nd respondent leading to the grant of a license to the 1st appellant to establish a second bulk grain handling facility at the port of Mombasa met the relevant statutory and constitutional legal threshold.
 - e. Whether the 1st respondent's constitutional right of Access to Public information was violated or denied.
 - f. Whether the 1st respondent was entitled to the reliefs sought.
 - g. Who was to bear the costs
20. The learned Judge, based on the decision in *Sollo Nzuki vs. Salaries & Remuneration Commission & 2 Others* (2019) eKLR, found that the 1st respondent like any other member of society had a right to question certain constitutional violations or threats, which in this case was the award of a controversial license and subsequently a tender in violation of Article 227 of *the constitution*, and that the 1st respondent had locus and was within his rights to institute the proceedings; that the 2nd respondent had sometime in the year 2019, after extensive engagement with the stake holders among them state and private agencies, and with a view to promoting and enhancing infrastructural capacity of the Indian Ocean Port Network, approved a Master Plan to run from 2017 to 2047 for a 30-year period; that, considering that the only existing Grain Bulk Handlers Limited (GBHL) was overstretched leading to time wastage and overcrowding, the new Master Plan made provision for the establishment or development of a Second Grain Bulk Handling facility to be established; that such second facility was to be developed either at Dongo Kundu due to its proximity to the EPZ zone so as to leverage on tax collection, or the port of Lamu due to the availability of land owned by the 2nd respondent, which was cheaper and less capital intensive; that, under section 114A of the Act, the institution or office mandated to apply for the permission/authority/license is the procuring entity; that, for all intents and purposes, the 2nd respondent's board was not a procurement entity in seeking the use of the specially permitted process, which is the preserve of the accounting officer; and that the 2nd respondent board's mandate was to evaluate proposals for the establishment of a second grain bulk handling facility only, and to inform and guide on policy direction and implementation, but not to engage in the procurement process, which is the mandate of the accounting officer, the 2nd respondent's Managing Director.
21. According to the learned Judge, the issues of procurement are the preserve of the 2nd respondent's management, and not the board, and that is why after the license was issued by the 3rd respondent,



the 2nd respondent's acting Managing Director constituted a tender committee and, on 15th July 2021, issued an invitation to tender to the 1st appellant which re-submitted its proposal on 26th July 2021; that, on 27th July 2021, the Technical Evaluation Committee found the proposal responsive and, on 28th July 2021, invited the tenderer for negotiation, which was held on 29th July 2021 whereupon the tender was awarded and accepted on 2nd August 2021; that the specially permitted procurement method is one of the prescribed methods of procurement under which the 2nd respondent's Board had no mandate to evaluate any proposal for that purpose other than for policy direction or implementation; that to enter into the arena of procurement amounted to exercise of authority in excess of the power donated by the [Kenya Ports Authority Act](#) and, therefore, ultra vires.

22. The learned Judge further held that a critical look at sections 8 and 10 of the [Kenya Ports Authority Act](#) would reveal that the general power to oversee efficient and economical operation and use of the port lies with the Board and those powers extend and include review or alteration of the Master Plan as it may be deemed necessary or relevant from time to time; that the Master Plan is not cast in stone but meant to serve its users effectively depending on changing circumstances; that, however, such changes must not be done in a board room without engaging other stakeholders; that, consequently, though the board has powers to amend or review the Master Plan, the same should not be done unilaterally to suit a specific isolated case or interest as it happened in this case; that, although the 2nd respondent's Board has the mandate to review and alter or amend the Master Plan, it is bound by the law among them Article 10 of [the Constitution](#), which requires among other things good governance, integrity, transparency and accountability from public officers or state organs; that, by virtue of the Board approving the 1st appellant for the award of the contract which was to run the whole period of 30 years, it created a second monopoly outside the parameters of the existing Master Plan, and before amendment subject to public participation; and that the Board acted ultra vires by discriminating against the rest of the Kenyans the 1st respondent and the 4th to 9th respondents, thus dashing away their legitimate expectation to not only participate, but also benefit from such an opportunity to open a 2nd Bulk Grain Handling facility.
23. According to the learned Judge, the Board had no intention of opening the door to competition pursuant to Article 227 of [the Constitution](#) and wondered what the difficulty was in amending the Master Plan after public participation and floating the tender to the public and, if it turned out to be non-responsive, then result to specially permitted procedure. According to him, in a situation where there are interested people willing to render same services within the parameters provided under the Master Plan, he did not see the reason for opening a new avenue which is non-compliant to the Master Plan. It was his finding that the 2nd respondent acted beyond its powers, irrationally, illegally, unjustly, and in bad faith in acting in the manner it did; that the 2nd respondent equally acted improperly and irrationally by issuing a license before being satisfied that due process was followed; and that, to that extent, the license issued to the 1st appellant was null and void; and that the 2nd respondent board's approval of the 1st appellant to establish a second grain bulk handling facility before amending the 2nd respondent's Master Plan, and that the subsequent issuance of the license by the second respondent and, later, the tender award by the 2nd respondent management was ultra vires, and void ab initio.
24. Regarding the contention that the 2nd respondent did not publish on the portal a copy of the said license/permit which it granted to the 1st and 2nd appellants, the learned Judge found that Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities (The Executive Order), was a policy direction, the breach of which does not amount to a constitutional violation to warrant redress in a constitutional court.
25. On the grant of the licence during the existence of orders suspending the license/permit issued by the 1st respondent to Portside Freight Terminals Limited and Heartland Terminals Limited, and to any



other person or agent to develop the Bulk Grain Handling facility in Mombasa, the learned Judge found that any license that may have been issued under similar circumstances during the pendency of the proceedings under petition No E045 of 2021 and, in particular, the conservatory orders in place, is null and void.

26. On the allegation of the violation of the 1st respondent's right to access to information, the learned Judge found that, since the letter requesting for information for a copy of the license/permit issued to the 1st and 2nd appellants in reference to the 2nd Bulk Grain Handling Facility at the Port of Mombasa was authored by KEJUDE Trust For Justice and Development, the 1st respondent, even if an officer of the said entity could not authoritatively claim that his right to information was violated; that the right to access to information is a personal right that was individually invoked by KEJUDE Trust; that, in any case, the request for information was not received by the 2nd respondent and, therefore, the 2nd respondent could not be held liable for failure to respond to a request that it never received; that the 1st respondent identified himself in the petition as an individual, and that the request, though made by the 1st respondent, was made in his capacity as the executive director of KEJUDE Trust, and the response thereto could only be addressed to KEJUDE Trust and not the 1st respondent as an individual; and that, therefore, the 1st respondent's right to information was not violated.
27. On the issue of damages, the learned Judge found that, even though the 1st respondent urged the court to consider awarding damages, no specific injury was suffered; that, the matter being a public interest litigation, the 1st respondent could not purport to benefit from it; and that public interest litigation cannot confer a benefit upon the 1st respondent. Otherwise, it will turn out to be a commercial enterprise.
28. On costs, the learned Judge decline to make an award in that regard, the matter being a public interest litigation.
29. In conclusion, the learned Judge granted the following reliefs:
 - i. A declaration that the 2nd respondent's Board of Directors' decision dated 11.03.2021 to invoke the use of Specially Permitted Procurement Procedure under section 114A of the PPAD Act was in violation of *the Constitution*, and does not lie with the Board of Directors, but with the Accounting Officer who initiates the entire procurement process for a state corporation.
 - ii. A declaration that the decision dated 11th March 2021 to invoke the use of Specially Permitted Procurement Procedure under Section 114A of the PPAD was in violation of *the Constitution* and does not lie with the Board of Directors, but with the Accounting officer who initiates and undertakes the entire procurement process for a state corporation.
 - iii. A declaration that the decisions and/or action of the 2nd and 3rd respondents dated 11th March 2021 and 28th June 2021 in so far as they purported to use Specifically Permitted Procurement Procedures in favour of the interested party, was unconstitutional, illegal and/or irregular as it contravened the provisions of *the Constitution* and regulations 107 (3) of the Procurement Regulations.
 - iv. A declaration that the 2nd and 3rd respondents' decision to solely consider the 1st appellant's proposal despite the same being in conflict with the Master Plan, proceeded to approve the same and adopt the use of Specially Permitted Procurement Procedure in its favour was unlawful, illegal, irrational and ultra vires.
 - v. A declaration that it was wrongful and procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by the 2nd respondent's Port



Master Plan, which Master Plan was yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.

- vi. A declaration that the 2nd respondent's intended award of contract and license to the 1st appellant for the development of the Second bulk grain handling facility gravely violated Articles 10, 201 and 227 of the Constitution.
 - vii. A declaration that the procurement and license for the development of a second bulk grain handling facility has to be procured through competitive bidding as required by the Constitution and the law.
30. The learned judge then proceeded to issue the following orders:
1. An Order of Certiorari to remove into the Court and quash the decision of the 3rd respondent contained in the letter dated 28.06.2021 granting the 2nd respondent approval to use of Specially Permitted Procurement Procedure for the procurement of a second bulk grain handler facility in favour of the 1st appellant be and is hereby issued.
 2. A mandatory Order compelling the 2nd and 3rd respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa be undertaken strictly in accordance with the law through competitive bidding.
 3. An Order of Prohibition to restrain the 2nd and 3rd respondents from implementing the decision contained in the letter dated 28.06.2021
approving the use of Specially permitted Procurement Procedure to award the 1st appellant the contract for development of the second bulk grain handling facility be and is hereby issued.
 4. An Order of Prohibition to restrain the 2nd and 3rd respondents from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the Public Procurement Laws be and is hereby issued.
 5. Each party to bear own costs.
31. It was this decision that aggrieved the appellants, who seek to overturn the said decision in this appeal.
32. We heard this appeal on the Court's GoTo Meeting virtual platform on 29th November 2023 during which learned counsel, Mr. Sanjeev Khagram, appeared for the appellants; Mr. Okiya Omtatah Okoiti, the 1st respondent, appeared in person; learned counsel, Mr. Karichia and Mr. Kongere, appeared for the 2nd respondent; learned counsel, Mr. Kongere, held brief for Ms. Lagat for the 3rd respondent; Mr. Nyaundi appeared for the 10th respondent; and Ms. Imbosa held brief for Ms. Nkonge for the 3rd respondent. There was no appearance for the 4th to 9th respondents though duly served. On that day, it turned out that only the appellants and the 10th respondent had filed submissions. Learned Counsel for the 2nd and 3rd respondents informed us that they did not intend to file any submissions, and that they would abide by the outcome of the appeal. We therefore directed that the appeal be disposed of by way of written submissions, and that the 1st and 11th respondents do file and serve their submissions by close of business on 5th December 2023 with liberty to the appellant to file a rejoinder thereto if necessary, and only on matters of law, by close of business on 7th December 2023.
33. Those directions were duly complied with.
34. It was submitted on behalf of the appellants that, although the 1st respondent's case was based on alleged discrimination against the 4th to 9th respondents, it was apparent from the record that the 4th



respondent's application to build and operate a bulk grain facility at the Port of Mombasa was granted on 23rd October 2017, subject to certain conditions and that, therefore, the question of discrimination or unfair treatment cannot be substantiated in the absence of evidence from any other party. It was also submitted that the matter was purely a procurement issue in terms of the alleged infringement of the Public Procurement and Asset Disposals Act; that the said Act specifically provides for the manner in which an affected party may challenge the procuring entity in the event of any infringement on the Act or Regulations; that the High Court's jurisdiction is limited to judicial review of the Review Board's decision as opposed to an original jurisdiction; and that the petition was therefore an abuse of the court process in so far as the prescribed laid down procedures were not followed. The appellants further submitted that the petitions offended the exhaustion doctrine as laid down in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others*; *Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR*; *Okiya Omtatah Okoiti & Another vs. Kenya Power & Lighting Company Limited [2020] eKLR*; *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another [2015] eKLR*; and *Geoffrey Muthunia & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR* where the Court decried the seeking of redress from a Court of law without pursuing available remedies before the agency itself.

35. It was also submitted that, closely related to the exhaustion principle is the constitutional avoidance doctrine set out in *COD & Another vs. Nairobi City Water & Sewerage Co. Ltd [2015] eKLR*, which frowns against the use of constitutional petition mechanisms under the guise of infringement of rights to avoid legally and statutorily laid down alternative mechanisms. It was submitted further that the learned Judge refused to consider the twin doctrines of exhaustion and avoidance by simply stating that he had ruled on them. Yet, the said ruling was made before the two petitions were consolidated.
36. In the appellants' view, the petitions, though termed as 'public interest litigation', were actually brought to ventilate the rights of the 4th to 9th respondents, who the 1st respondent alleged were discriminated against; that there was no evidence placed before the trial court that any of the said respondents, save the 4th respondent, had made any application or request for approval; that the finding that the Board acted ultra vires by discriminating against the rest of the Kenyans was not only unfounded, but also unsubstantiated; that the 1st appellant was seeking approval as a further grain handling operator, and for a wayleave to be granted for an overhead conveyor belts, and not for a contract and licence for development of the second grain bulk handling facility; that no grain handling facility was being developed at the Port of Mombasa, and no contract was issued for the development of such a facility; that, rather, the 1st appellant was seeking to develop a common user Island berth (available to the use and benefit of all port users) in the underutilized 'G' section, and for grant of a wayleave for overhead conveyor; that, in the premises, the suit was not brought as a public interest litigation, but to protect private interests whether already vested or otherwise; that wider public interest lay in the need for competition as acknowledged by the 1st respondent; that, given that the 1st respondent was obliged to show that the 4th to 9th respondents could not act in their own interests, and that he was acting bona fide, he failed to satisfy the criteria for bringing public interest litigation and, hence, lacked the locus standi to bring the petition. Based on the decisions in *Brian Asin & 2 Others vs. Wafula W. Chebukati & 9 Others [2017] eKLR*; and *Daniel Muthama Muoki vs. Ministry of Health & 5 Others [2020] eKLR*, it was urged that the petitions ought to have been struck out on the ground that they were not brought to address legitimate grievances.
37. In the appellants' submissions, the 1st respondent having pleaded that he brought the proceedings to protect the 4th to 9th respondents' interests and the alleged unfairness and discrimination against them, it was not open for the learned judge to expand the scope of such locus beyond the interests pleaded. According to the appellants, since legitimate expectation is a personal matter, only the person affected



- can complain that such expectation has been infringed or hindered, but not a stranger; that, having been served with the petitions, the 4th to 9th respondent ought to have appeared and supported the petition; and that, in their absence, the court was not in a position to make a finding that they were discriminated against, or that their legitimate expectations were compromised. In this regard, reliance was placed on the case of *Samson Gwer & 5 Others vs. Kenya Medical Research Institute & 3 Others* [2020] KLR.
38. As regards the propriety of the Specially Permitted Procurement Procedure under section 114A of the Act, it was submitted on behalf of the appellants that the matter ought to have been referred to the Public Procurement Administrative Review Board (hereinafter referred to as “the Review Board”) which is empowered under section 28 of the Act to review, hear and determine tendering and asset disposal disputes, an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the 1st respondent; and that, in the circumstances, the court ought not to have entertained the petitions.
39. It was further submitted that the learned Judge failed to consider the contents of the 2nd respondent’s affidavit evidence that the 2nd respondent’s managing director, the accounting officer, was the one who made the application to the National Treasury for invocation of the Specially Permitted Procurement Procedure under the provisions of section 114A of the Act, and hence arrive at the wrong decision that the Board acted ultra vires by approving the award of the contract to the appellants. It was also submitted that, contrary to the findings by the learned Judge, the 2nd respondent’s Managing Director was seized of the matter right from the outset when the 1st appellant’s proposal was received, and when he constituted the Technical Committee which compiled a report and handed it over to the board; that it was only after this that the Board Memo was presented for noting and deliberation and providing further guidance or approving the grant of Wayleave and Licence; that there was no evidence that the board approved the grant of the wayleave and/or licence, or evaluated any proposals at that meeting as the learned Judge found; and that, from the 2nd respondent’s Managing Director’s letter to the National Treasury, it is apparent that further guidance was provided to him by the Board of Directors on the premise of which the second respondent’s Managing Director sought to invoke the Specially Permitted Procurement Procedure pursuant to section 114A of the Act as read with regulation 107 of the Regulations.
40. It was contended that the Board was well within its mandate under section 10(g) of the *Kenya Ports Authority Act* to provide guidance having considered the report of the Technical Committee and all the unsolicited proposals received; that National Treasury responded to the aforesaid letter and set out its approval and the reasons for granting such approval; that the learned Judge erred in finding that everything was done with lightning speed and within 4 days when in fact more than 15 months lapsed from the time the 1st appellant first expressed its interest and made the application on 6th April 2020 to 28th June 2021 when the National Treasury issued its approval; that the learned judge erred in finding that, in approving a contract for 30 years, the 2nd respondent created a second monopoly when, in fact, a second licence had already been granted to the 4th respondent; and that, based on the authority of *Watt (Or Thomas) vs. Thomas* [1947] 1 All ER 582, this Court has the jurisdiction, of course, to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.
41. As regards the requirement for public participation, it was submitted that Master Plan unlike Standards, Guidelines and Training Curriculum, are not commissioned pursuant to any constitutional or statutory requirements; that no terminal was being developed in the Port of Mombasa, and hence the question of deviation from the Master Plan did not arise; and that the 1st appellant’s proposal was for development of a common user Island Berth (at no cost to the 2nd respondent) by investing US



\$45,000,000.00 as long as it was granted a wayleave licence for the passage of overhead conveyors to its grain handling terminal on its private land outside the Port precincts (but close to it) through the 'G' section area of the Port which is heavily underutilized.

42. In their view, the learned Judge erred in elevating the Port Master Plan document to a perch above the statutory provisions applicable; that the Master Plan is only a policy document not underpinned on any express statutory or constitutional provisions, and can be reviewed, altered or changed without the necessity of public participation; that there was no evidence that the Board had no intention of opening the door to completion as the learned Judge held and that an explanation was proffered why the said method was adopted, which explanation the learned Judge ignored.
43. In support of the submission that public participation was unnecessary, the appellants cited *The Commission for Human Rights and Justice vs. Board of Directors, Kenya Ports Authority & 2 Others* as affirmed in *Richard Owuor & 2 Others vs. Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives & 7 Others* [2021] eKLR where the High Court held that the determination of whether or not public participation is necessary depends on the particular case, and whether the issues involved or of a technical nature. Reliance was also placed on the decision of the Supreme Court in *British American Tobacco Kenya, PLC vs. Cabinet Secretary Ministry of Health and 2 Others* [2009] eKLR for the proposition that the allegations of non-compliance with public participation requirement must be considered within the peculiar circumstances of each case.
44. It was the appellant's case that the process was undertaken in a transparent and competitive manner for purposes of ensuring cost-effectiveness, and that no goods or services were being procured.
45. Opposing the appeal, the 1st respondent submitted that the approval of the request by the 2nd respondent's for the Specially Permitted Procurement Procedure to award the 1st appellant the contract was unlawful as the Board was not the authorised officer; that the Public Procurement Regulatory Authority established under section 8 of the Act has no capacity to determine the disputes which need the application of the law to determine pursuant to Article 50(1) of *the Constitution*; that the Review Board has no jurisdiction to deal with disputes involving public interest litigants as primary complainants; that procurement process is a clear constitutional affair pursuant to Article 227 of *the Constitution*, whose violation warranted the 1st respondent to move the court; that, in those circumstances, the principle of avoidance was not applicable; and that, based on the Supreme Court decision in *NGOs Co-ordination Board vs. EG & 4 Others* [2023] eKLR, the doctrine of avoidance is not applicable in similar circumstances where denying access to court would leave the petitioner without recourse.
46. In the 1st respondent's view, the right forum for the matter was the High Court; that, based on the decision in *Okiya Omtatah Okoiti & Another vs. National Transport & Safety Authority and 2 Others* [2016] eKLR; and *Republic vs. Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR, the 1st respondent had no capacity to move the Public Procurement Administrative Review Board since he is not one of the persons mentioned in section 167(1) of the Act; that, based on the authority of *Dawda K. Jawara vs. Gambia ACmHPR 147/95-149/96*, for the doctrine of exhaustion to apply, the reliefs available in the alternative forums must be available, effective and sufficient; that, since the 1st respondent was neither a tenderer nor a candidate for the tender, based on the decisions in *Erick Okeyo vs. County Government of Kisumu & 2 Others* [2014] eKLR; and *Mohamed Ali Baadi and Others vs. Attorney General & 11 Others* [2018] eKLR, his only option was to move the High Court pursuant to Articles 22 and 23 of *the Constitution*.



47. On locus, it was submitted that the 1st respondent had locus standi pursuant to Articles 3(1), 22(1) and 258(1) of *the Constitution* to bring the petitions; that the prayer for compensation did not void the public interest litigation since a public interest litigant whose rights are infringed upon during litigation is entitled to damages for those violations; that the mere fact that the 4th to 9th respondents did not participate in the proceedings did not take the proceedings out of the purview of public interest litigation; that there was legitimate expectation that, because the rule of law applies equally, the Port Master Plan bound all who use the Port of Mombasa; and that, since the Board had the power to review the Master Plan on a need basis, it was legitimate to expect that it would do so through due process, including public participation whenever the need arose, but that it was not available for the Board to ignore and disregard the Master Plan altogether. The 1st respondent relied on *R vs. Nairobi City County & Another ex parte Wainaina Kigathi* [2014] eKLR; *Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others* [2015] eKLR; *Kalpana H. Rawal vs. Judicial Service Commission and 4 Others* [2015] eKLR; and *Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others* [2014] eKLR, for the proposition that legitimate expectation arises where a person, as a result of a promise or conduct, expects that he will be treated in one way, and the public body wishes to treat him or her differently.
48. It was submitted that the alleged grant of licence to the 1st appellant does not demonstrate equal treatment of entities who wished to set up shop at the Port of Mombasa; that the approval of the application by the 4th respondent in 2017 to build and operate a bulk grain handling facility at the Port of Mombasa was before the 2018-2047 Master Plan came into effect having been launched on 7th August 2019; that the coming into effect of the Master Plan voided the award of that contract; that the use of the Specially Permitted Procurement Procedure is only available in specific cases such as where the use of other methods is impractical or uneconomical; that there was no basis for using the said method in this case; that the meddling by the 2nd respondent's Board in the procurement process was ultra vires and voided the procurement; that the consolidated petitions met the threshold of constitutional pleadings; and that the learned judge was not biased.
49. Also opposing the appeal was the 10th respondent. In its submissions, the appellant having not appealed the trial court's ruling on jurisdiction, the appellants cannot raise the issue as they are time barred; that, whereas a party wishing to appeal the interlocutory order must wait until there has been a final judgement in the case before the interlocutory order may be appealed, there are exceptions such as where the order rules upon the court's jurisdiction (see *Alba Petroleum Limited vs. Total Marketing Kenya Limited* [2019] eKLR); that the trial court rightly declined to revisit the issue of jurisdiction having determined the same; that the gist of the dispute being whether the process employed by the 2nd respondent met the minimum threshold of a procurement under Article 227 of *the Constitution*, whether the Board acted in a discriminatory manner towards the 4th to 9th respondents, and whether Article 10 of *the Constitution* was contravened, vested the court with the jurisdiction to entertain the petitions; that the proposition that the Review Board or Authority is statutorily empowered to determine the dispute prior to the involvement of the Court is misplaced since, under section 167 of the Act, only a tenderer or candidate can seek a review; that the 1st respondent was neither a tenderer nor a participant in the tender proceedings; that, since there was no procurement process undertaken, the 1st respondent could not invoke any dispute resolution under the Act; and that, from the nature of the dispute, neither the Review Board nor the Environment and Land Court was vested with jurisdiction to entertain the dispute.
50. On the issue as to whether the trial court erred in holding that the 2nd respondent's Board acted ultra vires the existing Port Master Plan, it was submitted that the functions of the Board under section 8 of the Act do not include its involvement in tendering or procurement process; that the Board,



through its Memorandum Number 33 of 2020, acted ultra vires its powers when it usurped a role that is the preserve of the Accounting Officer/Management, and proceeded to award the appellant a licence for the development of the facility contrary to the Master Plan; that, since the Master Plan is a policy document, the 2nd respondent was bound by Article 10 of *the Constitution*, which stipulates the binding national values and principles of governance; and that, since the Master Plan was a product of a public participatory process, any review or variation ought to have been subjected to public participation. In support of that submission, reliance was placed on *Federation of Women Lawyers (Fida- Kenya) & 3 Others vs. Attorney General & 2 Others* [2019] eKLR to the effect that a decision to withdraw a public policy document must be subjected to the constitutional dictates.

51. On the invocation of the Specially Permitted Procurement Procedure, it was submitted that a board resolution is not a method of procurement recognised under the law, and that Article 227 of *the Constitution* must be strictly observed. *Republic vs. Public Procurement Administrative Review Board & Another exp SGS Kenya Ltd* [2017] eKLR and *Republic v IEBC & 3 Others ex parte Coalition for Reform and Democracy Misc. Appl. No. 637 of 2016* were cited for the holding that where the procurement is not fair, transparent, competitive and cost effective, the courts have the power to intervene.
52. According to the 10th respondent, a Specially Permitted Procurement Procedure may only be used where a competitive procurement has been undertaken; and that the use of the said method was invoked post the Memorandum Number 33 of 2020, which was allegedly aimed to favour the 1st appellant.
53. To the 10th respondent, the Managing Director of the 2nd respondent did not undertake any procurement but merely communicated the 2nd respondent's final decision, seeking permission to award the tender to the appellant; that the board initiated the procurement, evaluated and approved the same and proceeded to instruct the Managing Director to inform the 3rd respondent of the best candidate to get a rubber stamp to issue the licence.
54. The 10th respondent adopted the same submissions made by the 1st respondent with respect to jurisdiction and added that, under Articles 22 and 258 of *the Constitution*, the 1st respondent had the locus standi to institute the petitions; that, based on the holding in *Okiya Omtatah Okoiti vs. Head of the Public Service & 6 Others* [2016] eKLR, the petitions were instituted in the public interest pursuant to Articles 3(1), 22 and 258 of *the Constitution* to protect the sanctity of Article 227 of *the Constitution*; that the 1st respondent, having joined the 4th to 9th respondents to the petitions, was not obliged to follow them up to ensure their participation in the matter; and that the 1st respondent was entitled to seek damages on account of breach of his right to information under Article 33 of *the Constitution*.
55. It was further submitted that the appellant's submissions was for a proposal to KPA for the development and operation of a bulk grain handling terminal and, in conclusion of its proposal, requested that the approval be granted for a second grain handling operator; that, throughout the flawed process, it was clear that the 2nd respondent intended to undertake a procurement; that the 2nd respondent procured a service from the appellant through the licence for the said development of a second bulk grain handling facility; and that the 2nd respondent relied on the provisions of the Act, which is the framework for public procurement of goods and services to grant the licence to the 1st appellant.



56. It was the 10th respondent's position that the 1st respondent proved violation of the right to equality and freedom from discrimination under Article 27 of *the Constitution* as well as Articles 10 and 227 of *the Constitution*, hence entitling the 1st respondent to the reliefs sought.
57. In the 11th respondent's view, the appeal presents two questions for our consideration: whether the court erred in finding that it was seized of jurisdiction, and that the exhaustion doctrine did not apply; and whether the Court erred in finding that the consolidated petitions raised matters of public interest, and the Petitioner had locus standi in instituting the Petition.
58. On the first issue, it was submitted that pursuant to section 167(1) of the Act, the 1st respondent, being neither a candidate nor a tenderer, lacked locus before the Review Board; that instead, his petition invoked Article 10 and 227 of *the Constitution*, contending that the disputed procurement had not been fair, equitable, transparent, competitive and cost-effective; that, on the authority of *Okiya Omtatah vs. Central Bank of Kenya & 7 others* (Petition No. 597 of 2017) [2018] eKLR; *Okiya Omtatah Okiiti vs. Nairobi City County & 5 Others* [2016] eKLR; and *R vs. Independent Electoral and Boundaries Commission & Another Ex: Parte Coalition for Reform and Democracy & 2 Others* [2017] e KLR, section 167(1) only gives candidates and tenderers locus before the Review Board; and that a person who is disqualified from instituting administrative review proceedings before the Review Board is entitled to commence any other available judicial proceedings to challenge an award of tender by a public entity; that, on the authority of *Mark Mdumia Ndung'u vs. Nairobi Bottlers Ltd & Another* Petition No. 325 of 2015 [2018] eKLR, alternative remedies should be accessible, affordable, timely and effective; that, if the availability of a remedy is not evident, it cannot be invoked to the detriment of a petitioner; and that, where a party argues that a petition is inadmissible before this court because alternative remedies have not been exhausted, that party bears the burden of demonstrating the existence of such remedies, and that they have not been exhausted.
59. The 11th respondent further submitted that the Supreme Court in *NGO Co-ordination Board vs. EN & 4 Others* [2023] KESC 17 (KLR) identified a three-step process for determining whether the doctrine of exhaustion of administrative remedies applies thus: did Parliament clearly provide a statutory dispute resolution mechanism that was available to the Petitioners and if so, was that statutory appeal procedure suitable for determining the issue? According to the 11th respondent, if these two questions are answered in the affirmative, the Court will ask a third question: were these sufficient reasons for the Court to hear the case even if a statutory appeal procedure was available and suitable for resolving the issue?
60. It was submitted that, in this case, the Act does not provide for a dispute resolution mechanism capable of addressing the issues presented in the petition; that the only plausible statutory dispute resolution mechanism referred to by the respondents in the Superior Court was that of section 9(1) (h) and 35(2) of the Act which provide room for anybody, including the 1st respondent, to lodge a complaint to the Authority for investigation; that, however, the authority has no clear timelines to undertake its role or mandate to forestall any act of abuse of office pending the outcome of such investigation; that, accordingly, sections 9(1) (h) and 35(2) do not meet the standards outlined in the *NGO Co-ordination Board Case* (supra) since the sections do not provide a dispute resolution mechanism to address the claim raised by the Petitioner; that the respondents failed to comply with the law and procedure in amending the Master Plan 2017-2047, thereby rendering the bid illegal and a nullity in law; and that the respondents' decision to use the Specially Permitted Procurement Procedure to award the 1st appellant the contract and license, without invitation and evaluation of proposals and tenders from the 4th to the 9th respondents violated Articles 10, 27, and 227 of *the Constitution* and the principles of good



governance, as well as their right to legitimate expectation to be considered for the tender under the newly adopted Master Plan.

61. The 11th respondent further relied on the provisions of section 174 of the Act that the right to request a review is in addition to any other legal remedy a person may have, thereby permitting additional causes of action in court, such as the petition. It was submitted that, since the substantive decision has already been issued in this matter, the issue of the appeal on jurisdiction has been rendered moot as far as any interlocutory appeals are concerned.
62. It was further submitted that there was no evidence that the 1st respondent was acting at the behest of the 4th to 9th respondents or other private interests; that the questions raised were of a constitutional nature, and that they directly impugned the conduct of the 2nd respondent as a public entity whose resources are public resources subject to public scrutiny, and which entity is bound by the national values and principles of governance whenever they make or implement public policy decisions; that Article 22 of our Constitution enjoins any person to step up and institute proceedings in public interest where a right has been violated, infringed upon or violated; and that it is inconsequential to the determination of the Court whether the 4th to 9th respondents participated in the proceedings at the superior court, as the claims raised were never against them, and it was not for the court to presume the reason why not.
63. We were therefore urged to uphold the findings of the High Court.
64. This is a first appeal, and our mandate is clear as was held in the authority of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

65. In their memorandum of appeal, the appellants cited a whopping 29 grounds of appeal. We have collapsed them into six grounds, and, in our view, the following are the grounds that fall for determination before us:
 - a. whether the trial court had jurisdiction over the petition under *the constitution* and the provisions of the *Public Procurement and Asset Disposal Act, 2015*;
 - b. whether the petition was being pursued in the public interest, and whether the 1st respondent had locus standi to pursue the petition;
 - c. whether the petitioner pleaded any violation of the bill of rights or proved the violation to the required standard;
 - d. whether the trial court erred in holding that the invocation of the Specially Permitted Procurement Procedure under section 144A of the *Public Procurement and Asset Disposal Act, 2015* violated *the Constitution*;



- e. whether the trial court erred in holding that the 2nd respondent's board of Directors initiated the procurement in flagrant violation of the [Public Procurement and Asset Disposal Act](#), 2015; and
- f. whether the trial court erred in holding that the 2nd respondent's board of Directors acted ultra vires the existing Port Master Plan.
66. Regarding the issue as to whether the trial court had jurisdiction over the petition under [the Constitution](#) and the provisions of the [Public Procurement and Asset Disposal Act](#), 2015, the appellants invoked sections 9 and 167(1) of the Act. Section 167(1) provides that:
- Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
67. It is clear from the said provision that, for one to apply for review under the aforesaid section, the applicant must be a candidate or a tenderer. A "candidate" is defined under section 3 of the Act as meaning:
- "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity".
68. It is not contended that the 1st respondent had obtained tender documents from the 2nd respondent in order for him to qualify as a candidate for the purposes of the Act.
69. Under the same section, a "tenderer" is defined as meaning:
- "a person who submitted a tender pursuant to an invitation by a public entity."
70. Again, it is not contended that the 1st respondent had submitted a tender pursuant to the invitation by the 2nd respondent.
71. It follows that a strict reading of section 167(1) of the Act clearly locks out the 1st respondent from the purview of the review by the board for the simple reason that if he was neither a candidate nor a tenderer, as defined under the Act, which he clearly was not, he could not invoke the jurisdiction of the board under the aforesaid provision. Accordingly, the 1st respondent was within his rights to move the High Court since section 174 of the Act provides that:
- The right to request a review under this Part is in addition to any other legal remedy a person may have.
72. The other provision to which it is contended the 1st respondent ought to have resorted is section 9(1) (h) of the Act, which provides that:
- The functions of the Authority shall be to—
- (h) 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.



73. It is clear that the 1st respondent could have resorted to this provision to ventilate its grievances. However, this Court in *Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others* [2015] eKLR, while expressing itself on the doctrine of exhaustion, expressed itself as hereunder:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

74. The Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) expressed itself as hereunder:

“[106] The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:

‘44. ...we are conscious that the powers conferred upon the High Court under Article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of *the Constitution*. 45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.”

75. However, in order for a legal provision relied upon to support the doctrine of exhaustion and constitutional avoidance to pass muster, it ought to meet certain tests, and these are that the reliefs available in the alternative forums must be available, effective and sufficient and as set out in the decision of the African Commission of Human and People’s Rights in the case of *Dawda K. Jawara vs. Gambia* ACmHPR 147/95-149/96:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of



local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

76. The Supreme Court in *Nicholus v Attorney General & 7 others* (supra) similarly explained that:

“[107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).”

77. Related to these doctrine is the doctrine of judicial restraint.

The Supreme Court in *Nicholus v Attorney General & 7 others* (supra) cited its earlier decision in *Benson Ambuti Atega & 2 others vs. Kibos Distillers Limited & 5 others* SC Petition No. 3 of 2020 [2020] eKLR in which it expressed itself as follows:

“(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.”

78. In the case before us, the 1st respondent not only filed the two petitions but also sought conservatory orders. While we are not prepared to make a broad finding that whenever an application for interim orders are sought, the above doctrines may be sidestepped, in the instant case where declarations of



unconstitutionality of the actions taken by the 2nd and 3rd respondents were sought, it is our view and we find that the remedies available under the *Public Procurement and Asset Disposal Act*, 2015 were not available, effective and sufficient.

79. As regards the 1st respondent's locus standi, Article 22(1) and (2) of *the Constitution* provides that:
1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 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.
80. On the other hand, Article 258 of *the Constitution* provides as follows:
- a. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - b. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - i. a person acting on behalf of another person who cannot act in their own name;
 - ii. a person acting as a member of, or in the interest of, a group or class of persons;
 - iii. a person acting in the public interest; or an association acting in the interest of one or more of its members.
81. Addressing itself to these Articles, this Court in *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* [2013] eKLR at page 16 as follows:

“(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*.

(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010



by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013– which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened 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 contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio- economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.

(30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.” [Emphasis added].

82. It is clear to our mind that the 1st respondent could bring the petition under Articles 22(1) and 258 of *the Constitution*. He could do so on his own behalf, on behalf of identified class of persons, or on behalf of the public. However, it is expected that a petitioner will identify with reasonable precision the right that is alleged to have been violated. In certain circumstances, it may be too broad to simply plead that the public right has been violated, such as where discrimination is alleged. In this case, the 1st respondent pleaded in paragraph 50 of the Petition No. E045 of 2021 as follows:

“That the 2nd to 7th Interested Parties were discriminated and their proposals never considered in light of the adopted use of the Specially Permitted Procurement procedure and thus unfairly locking them out of the procurement process.”

83. Further, at paragraphs 61 and 62 of the said petition, it was pleaded that:

“(61) The Petitioners aver that the respondent (sic) decision is in contravention of Article 27 of *the Constitution* 2010 which guarantees that every person is equal



before the law and has the right to equal protection and equal benefit of the law. Further, that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The respondents' actions of preferring the use of Specially Permitted Procurement Procedure in favour of the 1st Interested Party, without the consideration and/or invitation of the proposals from the 2nd to 7th Interested Parties amounts to discrimination.

(62) That the respondents have employed the discriminatory use of the Specially Permitted Procurement Procedure to favour the 1st Interested Party to the detriment of the other interested parties who may have qualified for the award of the licence.”

84. A holistic consideration of the above paragraphs leads us to the conclusion that, as regards the allegation of discrimination, the 1st respondent specifically had in mind the 4th to the 9th respondents who were the 2nd to 7th interested parties in petition E045 of 2021. Contrary to the submissions made before us by the 1st respondent that the discrimination was against the public, including the 1st respondent, there was no such averment. In our view, in order to justify a finding of an allegation against persons other than the 4th to the 9th respondents, the 1st respondent ought to have expressly and specifically pleaded that fact. Accordingly, we find that, as regards the alleged discrimination against persons other than the 2nd to 9th respondent, the petitions failed to meet the test enunciated by the Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* [2014] eKLR thus:

“ Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of the contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement”

85. With regard to the alleged discrimination against the 4th to the 9th respondents, although the said respondents were joined in the petition, they elected not to participate in the proceedings. It is not contended that they fell within the class of persons contemplated under Article 258(b) of *the Constitution*. In the premises, the 1st respondent could not purport to bring the petition on behalf of the 4th to 9th respondent. In addition, failure by the said respondents to participate in the proceedings denied the court the essential material on the basis of which the trial court could have justifiably found that they were discriminated by the actions of the 2nd and 3rd respondents. It is also not in contention that the 4th respondent did apply for a licence to establish the second bulk grain handling facility which, according to the 2nd respondent, was conditionally granted. We therefore disagree with the learned Judge's holding that:

“ It is therefore clear that the Board acted ultra vires by discriminating against the rest of the Kenyans the petitioner and the 1st – 9th interested parties included thus dashing away their legitimate expectation to not only participate but also benefit from such an opportunity to open a 2nd Bulk Grain Handling facility.”



86. That leads us to the issue as to whether the use of Specially Permitted Procurement Procedure was unconstitutional or illegal. The Specially Permitted Procurement Procedure is the last type of procurement provided for in Part IX of the Act and comes way after direct tendering. Section 114A of the Act provides as follows as regards the use of Specially Permitted Procurement Procedure:
1. A procuring entity may use a procurement procedure specially permitted by the National Treasury.
 2. The National Treasury may allow the use of specially permitted procedure—
 - a. where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations;
 - b. where the market conditions or behaviour do not allow the effective application of the Act and Regulations made under the Act;
 - c. for specialized or particular requirements which are regulated or governed by harmonized international standards or practices;
 - d. where strategic partnership sourcing is applied;
 - e. where credit financing procurement is applied; or
 - f. in such other circumstances as may be prescribed.
 3. The Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurements under this section.

87. The application of this procedure was challenged on two fronts. The first was that there was no public participation in such procurement procedures, and that it was discriminatory. On the aspect of public participation, we associate ourselves with the holding by this Court in Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR:

“Public participation in procurement process is achieved largely through invitation of members of the public to bid and submit tenders for procurement of goods, works or services. The invitation is ordinarily done through competitive and open advertisement to the public. Section 91 (1) of *Public Procurement and Asset Disposal Act*, 2015 echoes this by stipulating that open tendering shall be the preferred procurement method for goods, works and services. Section 91 (2) of the *Public Procurement and Asset Disposal Act*, 2015 permits a procuring entity to use alternative procurement procedure if allowed by law and stipulated conditions are satisfied. A common theme when alternative procurement procedure is adopted is that the scope of public participation through competitive bidding is reduced and progressively eliminated as we approach the direct procurement method.” [Emphasis ours]

88. In that case, this Court cited with approval the decision in Revital Health (Epz) Limited vs. Public Procurement Oversight Authority & 6 Others, Constitutional Petition No. 75 of 2012 in which Muriithi, J. held that:

“Procurement conducted outside the provisions of the *Public Procurement and Asset Disposal Act* was not necessarily unconstitutional. Constitutionality of a procurement process is to be assessed on the basis of Article 227 of *the Constitution*. Article 227 provided



that procurement by a State organ or public entity was to accord to a system that was fair, equitable, transparent, competitive and cost-effective.”

89. In addition, it is notable in this regard that, while the general rule in Article 227(1) of *the Constitution* is that public entities shall contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, Article 227(2) gives various exceptions that may be provided under a legislative framework, which includes categories of preference in the allocation of contracts. The effect of the Specially Permitted Procurement Procedure is to give preference by releasing a procuring entity from the requirements and obligations of open competition. That explains why its use is limited to a few defined cases in which it is considered strictly necessary, and with prior permission of the National Treasury.
90. Two principles in this regard govern the use of this procedure, namely that the provisions should be strictly interpreted, and that the procuring entity has the burden of proving that the circumstances justifying the use of the procedure have been met, and must be backed by evidence to justify its reliance on the derogation. Once this is done, the opposing parties are at liberty to refute the evidence. (See *The Law of Public and Utilities Procurement – Regulation in the UK and UK*, Volume 1 Third Edition by Prof. Sue Arrowsmith at paragraphs 10.02 to 10.04).
91. Applying these principles in the present appeal, and in approving the 1st appellant’s proposal, the 2nd respondent made the following observations:
- a. Recouping of the investment from the total yearly revenue raised will take 7 years before KPA can make a profit on the investment. On the contrary if KPA opts for the private investor it will make Kshs 3.9 Billion in the said years without incurring any investment.
 - b. Revenue payable by the private investor will start flowing by 2022 as opposed to KPA internal funding of which construction may start from 2025 and become operational by 2027. These are the earliest timings possible. The variance of start date between KPA and Portside i.e. 2022 and 2027 implies five (5) years of foregone revenue by KPA amounting to Kshs 2.3 Billion
 - c. A total revenue forgone of shs 3.9 Billion and shs 2. 3 Billion totalling to Kshs 6.2 Billion is more than expenditure incurred on investing Kshs 6 Billion on the project
 - d. KPA will take approximately 11 years to recoup its investment from the incremental savings realised on the investment.
 - e. The current financial position cannot allow for another major investment unless the same takes place after a minimum period of 5 years, that is 2025, depending on the necessary approvals from the National Treasury. The private investor on the other hand intends to complete the project by 2022 implying the earning power of KPA will improve immediately after 2022 as opposed to 2025 and beyond.
 - f. KPA does not have enough landscape for Construction of a GBHF around G –Section and outside the Port to construct the silos and conveyors. It therefore must buy land before the project is conceptualised.
 - g. The private investor is therefore more feasible than KPA utilising its own funds due to the current financial status of the Authority, the lengthy approval even after funds have been sought, the project timings and the recoupment period based on the incremental savings.
92. While appreciating that the 2nd respondent could have opted for external funding, it was noted that the said option would have been expensive with little returns compared to the private investor. The



respondents have not controverted these averments and reasons given by the 2nd respondent, save to state that the location of the stated investment was not included its Master Plan, which issue we shall shortly address. In addition, the 3rd respondent is, in this respect, permitted to allow that mode of procurement where strategic partnership sourcing is applied, and it is not within our competence to decide for the 3rd respondent circumstances that constitute strategic partnership sourcing, save to say that in circumstances where an investor proposes to shoulder 100% financing of a project may well qualify as strategic partnership sourcing. Accordingly, we do not find any evidence that the invocation of the specially permitted procurement procedure under section 144A of the PPAD 2015 violated *the Constitution*.

93. On the second aspect as regards compliance with the provisions of the Act, it was held by the learned Judge that the procedure by which the said permission was sought was ultra vires the powers of the 2nd respondent in that the steps leading to the request for such permission ought to have been commenced by the 2nd respondent's accounting officer, and not by the 2nd respondent. Regulation 107(2) of the Public Procurement and Asset Disposal Regulations provides that:

2. Pursuant to section 114A(3) of the Act and in applying the Specially Permitted Procurement Procedure referred to under paragraph (1), an accounting officer shall—
 - a. approve and issue written justification for use of the procedure upon considering its uniqueness from the other methods of procurement set forth in the Act;
 - b. plan the subject procurement and set it forth in its approved annual procurement plan, where applicable;
 - c. prepare tender documents for the subject procurement which shall at least include specifications, conditions of tendering and contracting; and
 - d. submit the tender documents and the proposed procedure to the Cabinet Secretary for approval detailing the justification for the use of the method.

94. The 2nd respondent explained the manner in which the procurement was undertaken. The evidence placed before the trial court was that, since 2002 when Grain Bulk Handlers Limited was granted wayleave by the 2nd respondent, several requests for review of the said wayleave and licences were made by the said Grain Bulk Handlers Limited, which requests were granted and the wayleave varied. Those requests for variations, it was averred by the 2nd respondent:

“were initially made to the 2nd respondent Board in the first instance because any variation of a licence or a grant of a wayleave primarily affects the 2nd respondent's Port Master Plan and it is the core role of the Board to receive, review, evaluate and thereafter issue recommendations to the management on any and all variations, amendments, or changes that may affect the Master Plan as part of the Board's discharge of its statutory mandate under Sections 8 and 10 of the *Kenya Ports Authority Act*.”

95. It was explained that:

“such significant capital projects that had an overarching impact on Port operations and the logistical network in the country were deemed to be Board specific roles for ensuring the fullest development of the Port and critical to ensuring the efficient, economical and safe operations of Ports under Section 8(1)(a-b) of the KPA Act.”



96. According to the 2nd respondent:

“At all times the Board undertook a merit-based analysis of the proposal and made a determination based on the merit of the proposal. ONLY THEN did management proceed to engage in a procurement process governed by the Board recommendations and informed by any Ministerial authorisation that may have been sought on the most efficacious or appropriate. The technical nature of bulk commodity handling facilities required a technical evaluation by the Board to ensure that international best practices were included in any bulk commodity handling facility to meet various national and international standards that promote human safety and environmental compliance in commodities handling and storage.”

97. According to the 2nd respondent, in order to give informed directions and guidelines, and informed by the fact that the proposal called for an alteration, amendment or variation of the Master Plan, the board set up a technical committee to review and analyse the 1st appellant’s proposal and, upon the said review, a report was placed before the board which report the board acted on. According to the 2nd respondent, there was no discrimination since each proposal was evaluated distinctly and separately, and the 1st appellant’s proposal was specifically distinct and unique in that the 1st appellant intended to utilise its own land, and would fully fund the project. Accordingly, it called for differentiated treatment, and did not give rise to claims of discrimination.

98. It was contended further that the steps taken by the 2nd respondent were informed by the previous precedents that each and every proposal for an infrastructure project within any of its ports would be independently evaluated on a merit- based approach. The 2nd respondent disclosed that the same process was adopted in 2017 when the 2nd respondent received and processed a similar proposal by the 4th respondent

99. We have re-evaluated the evidence placed before the trial court as we are bound to do and, although the 1st respondent contends that the procurement was initiated by the 2nd respondent’s board, we have not been referred to any board paper or resolution made by the board initiating the procurement process. In light of the above explanation, an explanation which the learned Judge seems not to have considered, we find that the 2nd respondent’s board’s move to guide the management in the conduct of the procurement process in this highly technical area did not amount to commencement of the procurement process.

100. With reference to section 114A of the Act, the learned Judge appreciated the role of the 2nd respondent when he held that:

“Under the above provision, the institution or office mandated to apply for the permission/ authority/license is the procuring entity. A procuring entity under section 2 of the PP & AD Act means “a public entity making a procurement or asset disposal to which this Act applies”. For all purposes and intents, the KPA Board was not a procurement entity for purposes of seeking a special permission to use specially permitted process which is the preserve of the accounting officer. The KPA board’s mandate was to evaluate proposals for establishment of a second grain bulk handling facility only to inform and guide on policy direction and implementation but not to engage in procurement process which is the mandate of the accounting officer in this case the KPA MD.”



101. While we have a difficulty in reconciling the first three sentences above, it is clear from the 4th sentence that the learned Judge appreciated that the 2nd respondent's board had the mandate to take pre-procurement steps before the commencement of the procurement process. According to the 2nd respondent, that is precisely the role it played in the matter. After that, the process envisaged under regulation 107(2) kicked off and was taken over by the 2nd respondent's accounting officer. That the 2nd respondent's board has the power to give directions to the Managing Director is appreciated in section 10(g) of the [Kenya Ports Authority Act](#). Section 8 thereof provides that:

1. It shall be the duty of the Board to provide by means of the undertaking of the Authority a co-ordinated system of ports and facilities relating thereto.
2. The performance of the duty referred to in subsection (1) shall include a general duty to secure —
 - a. the fullest development, consistent with economy, of the undertaking of the Authority;
 - b. that the undertaking of the Authority is operated efficiently, economically and with due regard to safety;
 - c. that the financial administration of the Authority is conducted in accordance with Part V;
 - d. that the Authority provides all reasonable facilities for handling and warehousing of cargo and other goods; and
 - e. that no particular person or body is given any undue preference or is subjected to any undue disadvantage.

102. In view of the foregoing, we find no justification to fault the steps taken by the board. It is not contended that the process which took place thereafter was faulty apart from the allegations of the speed with which that process was undertaken. In the learned Judge's own words:

“There is no doubt that the issues of procurement are the preserve of the KPA management and not the board and that is why after the license was issued by the minister, the AG MD KPA proceeded to constitute a tender committee and on 15th July 2021 issued invitation to tender to the 1st interested party who re-submitted its proposal on 26th July 2021. On 27th July 2021 Technical Evaluation Committee was undertaken which found the proposal responsive and on 28th July 2021 invited the tenderer for negotiation which was held on 29th July 2021 and the same accepted and awarded on 2nd August 2021.”

103. From the learned Judge's own findings taken together with the explanation given by the 2nd respondent, we find nothing to warrant the learned Judge's conclusion that:

“From the above chronology of events, it is clear that the whole process was redone at a lightning speed. In fact, within 4 days everything was done and the contract awarded. In a nutshell, it is my holding that the specially permitted procurement method is one of the prescribed methods of procurement to which the KPA Board had no mandate to evaluate any proposal for that purpose other than for policy direction or implementation. To enter into the arena of procurement amounted to exercise of authority in excess of the power donated by the KPA Act hence ultra vires.”



104. In our view, mere suspicions do not warrant interference with the manner in which the procurement process was conducted. We cannot therefore fault the process merely because it was speedily undertaken. To the contrary, such action ought to be lauded, particularly in this case where the 2nd respondent stood to benefit enormously without incurring heavy expenditure.
105. In light of our foregoing findings, we find no reason to fault the discretion exercised by the 3rd respondent in permitting the request for the Specially Permitted Procurement Procedure.
106. On the issue concerning the alleged issuance of the licence during the subsistence of the conservatory orders, the learned Judge did not make any specific finding as to whether that was the case in light of the 2nd respondent's explanation that the said licence was issued in 2017. Instead, the learned Judge made a broad statement to the effect that:
- “...any license that may have been issued under similar circumstances during the pendency of the proceedings under petition No E045 of 2021 and in particular the conservatory orders in place is null and void.”
107. Finally, we turn to the issue as to whether the trial court erred in holding that the 2nd respondent's board of Directors acted ultra vires the current Mombasa Port Master Plan. It is not in doubt that the 2nd respondent launched its Kenya Ports Authority Master Plan 2017-2047 on 7th August 2019. The same was described as a blue print to define the 2nd respondent's development horizon over the next thirty (30) years. The said Master Plan indicated that there was need to develop a second grain bulk handling facility by the year 2023. The Master Plan was to take advantage of the development of Dongo Kundu as a Special Economic Zone, the Lamu Port and the revitalised Kisumu Port.
108. In this appeal, we are not called upon to determine whether or not the Master Plan could be reviewed since the learned Judge had no difficulty in finding that it was reviewable, and that that finding was not challenged before us. According to the learned Judge:
- “A critical look at Sections 8 and 10 of the KPA Act would reveal that the general power to oversee efficient and economical operation and use of the port lies with the Board and those powers extend and include in my view amendment, review or alteration of the master Plan as it may be deemed necessary or relevant from time to time. Indeed, the master plan is not cast in stone hence meant to serve its users effectively depending on changing circumstances. However, such changes must not be done in a board room without engaging other stakeholders. I do agree with the 1st respondent to the extent that the board has powers to amend or review the master plan.”
109. The only point of divergence is the manner in which such review should be undertaken. According to the learned Judge, the Master Plan could only be amended in the same manner that the Plan itself was formulated, namely by going through public participation. In words of the learned Judge:
- “However, the same should not be done unilaterally to suit a specific isolated case or interest just as it happened in this case.”
110. In determining this issue, it is important to consider the legal status of the Master Plan. As rightly described by the 1st respondent, the Master Plan was in the nature of a blue print. A master plan is defined in the Concise Oxford English Dictionary as “a comprehensive or far reaching plan of action”. In our understanding, a master plan is an operational road map for achieving the visions and mission of an entity or organization. It may or may not be achieved depending, for example, on the availability



of funds. According to the Master Plan in this case, there was need to develop a second grain bulk handling facility by the year 2023, which is now past. Taken literally, the 1st respondent's case would imply that the 2nd respondent is now barred from developing the said grain bulk handling facility unless another process of public participation is undertaken to review the said period. To our mind, such a position would militate against the very objectives for which the Master Plan was conceived, since it would lead to stultification of the development envisaged in the Master Plan for no reason other than the undertaking of public participation.

111. To our mind, public participation is meant to inculcate public views in matters affecting the people so that whatever is undertaken is for the benefit and well being of the people. Whereas it is indeed advisable and commendable that a document such as a master plan of a public entity is developed with the participation of stakeholders, subsequent reviews which do not substantially go contrary to the original objective for which the Master Plan was envisaged may be undertaken without the necessity of public participation. In other words, reviews which are intended to effectually realise the objects of the master plan ought not to be objectionable merely on the ground of lack of public participation. The Court will not set aside such reviews merely because public participation was not undertaken. In the course of implementing the master plan, it may be necessary due to unforeseen exigencies, that certain actions be taken to move the plan to the next level without necessarily burdening the entity with a requirement to undertake public participation. In such a case, a decision may well be taken by the entity itself. In this regard, we affirm the decision of the Employment and Labour Relations Court in *Richard Owuor & 2 Others vs. Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives & 7 Others* [2021] eKLR where that court held that:

“Democratic decision making, involving full blown public participation may be suitable in the process of legislation and related political process...Even as we promote democratic (people-centric) decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems.”

112. This is our understanding of the decision of the Supreme Court in *British American Tobacco Kenya, PLC vs. Cabinet Secretary Ministry of Health and 2 Others* [2009] eKLR where the highest Court in the land cited with approval the holding of this Court in *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance(NASA) Kenya & 6 others*, Civil Appeal No. 224 of 2017; [2017] eKLR that:

“Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.”

113. Likewise, it was explained in *William Odhiambo Ramogi & 3 others vs. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR as follows:

“133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the ‘internal operational decisions concept’. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.



134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.”

114. In this case, the choice of Dongo Kundu and Lamu was not arbitrary. The identification and projection of the two as the locations for the second grain handling facility was informed by two factors. According to the learned Judge, the second facility was to be developed either at Dongo Kundu due to its proximity to the EPZ zone so as to leverage on tax collection, or at the port of Lamu due to the availability of land owned by the 2nd respondent, which was cheaper and less capital intensive. Therefore, one of the factors that weighed in the mind of the 2nd respondent in formulating the Master Plan was the cost implication of developing the facility at any particular location. This was explained by the 2nd respondent’s General Manager in his affidavit sworn on 19th July, 2022 in which he deposed at paragraph 17 as follows:

The initial proposal envisaged the construction of a second grain bulk handling facility at Dongo Kundu or the Port of Lamu was primarily informed by economic factors.

- a. The Master Plan primary assumption was that the land for setting up for the bulk grain handling facility would be provided by the KPA. As such, the Port of Mombasa was deemed unsuitable as the KPA lacked adequate land for the construction and possible expansion of the facility within its current land properties;
- b. The Dongo Kundu area was viewed as fiscally attractive due to the progressive tax regime provided under the EPZ gazettelement of the area; and
- c. The Port of Lamu was envisaged as an alternative site due to the availability of ample land owned by the KPA for setting up of the facility that would be cheaper and less capital intensive.

115. In paragraph 18, it was deposed that:

However, I am aware that the KPA in its Master Plan always contemplated that any prospective stakeholder for any project with the KPA would be allowed to table their proposal for review and consideration by the KPA to determine the economic soundness of the Project, the long-term viability of the Project, its ability to interconnect and feed into the prevailing infrastructural mix and the proven ability of the developer to execute the Project.

116. These averments were not challenged, and yet the learned Judge did not appear to have given them serious considerations in his judgement.

117. In this case, the 1st appellant proposed to develop the facility without any financial input on the part of the 2nd respondent. In those circumstances, it cannot be said that review of the provisions of the Master Plan with respect to the location of the facility was contrary to the Master Plan in order to warrant the adoption of the said proposal being subjected to public participation. The learned Judge’s findings regarding the non-compliance with the Master Plan contradicted his very finding regarding



non-compliance with Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities, which he found to be a policy direction, but nonetheless proceeded to hold that:

“Further, the petitioner under petition no. E018 of 2022 alleged that contrary to the Executive Order, the 1st respondent did not publish on the portal a copy of the said license/permit which it granted to the 2nd and 4th respondents. That the said Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities (The Executive Order) requires all procuring entities to publish tender opportunities and contract awards through the Public Procurement Information Portal at www.tenders.go.ke. This court would categorically state that the said Order in my view was a policy direction breach of which does not amount to a constitutional violation to warrant redress in a constitutional court. [Emphasis ours].

118. We find no reason why the Master Plan ought to be treated differently from the said Executive Order when they are both policy and operational directions. Accordingly, we find that the learned Judge erred in his findings on the legal effect and implications of the Master Plan.
119. Having considered the record as put to us, the grounds on which the appeal was anchored, the written and oral submissions of learned counsel for the appellants and for the respondents, the cited authorities and the law, we hereby determine the issues raised in this appeal as follows, namely that:
- a. the trial court had jurisdiction over the petition under *the Constitution* and the provisions of the *Public Procurement and Asset Disposal Act*, 2015;
 - b. the 1st respondent had the locus standi to pursue the petitions;
 - c. there was no evidence to show that the 4th to 9th respondents were discriminated against and, in the absence of specific pleading that the public or the 1st respondent was discriminated against, the learned Judge erred in finding that there was violation of the right against non-discrimination;
 - d. the trial court erred in holding that the invocation of the Specially Permitted Procurement under section 144A of the PPAD, 2015 violated *the Constitution*;
 - e. the trial court erred in holding that the 2nd respondent’s board of Directors initiated the procurement in flagrant violation of the *Public Procurement and Asset Disposal Act*, 2015; and
 - f. that the trial court erred in holding that the 2nd respondent’s board of Directors acted ultra vires the existing Port Master Plan.
120. In view of the foregoing, we find merit in this appeal and hereby set aside the Judgment and Decree of the High Court of Kenya at Mombasa (J.N. Onyiego, J.) delivered on 18th July 2023, and substitute therefore an order dismissing the two consolidated petitions. As the matter was a public interest litigation, we make no order as to costs.
121. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

P. NYAMWEYA

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JUDGE OF APPEAL



DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

